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AND

Parish Officer.

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THE REST OF THE WORK

BY THOMAS CHITTY, ESQ.,

OF THE INNER TEMPLE.

IN SIX VOLUMES.

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BURN'S

JUSTICE OF THE PEACE

AND

Parish Officer.

VOL. I.

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TO

THE TWENTY-NINTH EDITION.

SINCE the year 1837 (the date of the last edition of this work) a great number of Statutes connected more or less with the office of a Justice of the Peace have been passed. Some of these lessen, but the larger portion of them add considerably to, the duties of that office. Many Statutes have also been passed materially affecting Parish Officers. These, with the decisions of the superior Courts, and a variety of new and important matter connected with these offices, have been introduced into this Edition. New practical Forms have also been added, and the former ones amended where necessary. The whole work has undergone a complete revisal, and no pains have been spared to render it as useful as possible, and worthy of the commendation so flatteringly bestowed upon it.

LIST OF EDITIONS

OF

Dr. BURN'S JUSTICE OF THE PEACE.

1st and 2nd, in 2 small octavo vols.	in	1754 and 1756
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7th, ditto	in	1763
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10th, in 4 vols. octavo	in	1766
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13th, ditto	in	1776
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18th, ditto	in	1797
19th, ditto	in	1800
20th, in 4 vols. octavo, by Woodfall	in	1805
21st, in 5 vols. octavo, by Durnford and King	in	1810
22nd, in 5 vols. octavo, by King	in	1814
23rd, in 5 vols. octavo, by Mr now Sir G. Chetwynd	in	1820
24th, in 5 vols octavo, by Sir G. Chetwynd	in	1825
25th, in 5 vols. octavo, by G. W. Marriott, Esq.	in	1830
26th, in 6 vols. octavo, by J. Chitty and Thomas Chitty	in	1831
27th, in 5 vols octavo, by Mr. Serjt. D'Oyly and E. V. Williams	in	1836
28th, in 6 vols. octavo, by J. Chitty and T. Chitty	in	1837
29th, in 6 vols. octavo, by Mr. Commissioner Bere and T. Chitty	in	1844

* Dr. Burn died in 1785.

PREFACE

TO

THE FIRST EDITION, BY DR. BURN.

THE Author proposeth in this Book to render the laws relating to the subjects it treats of, a little more intelligible than hath hitherto been done.

The method he makes use of is various.

The first thing regarded is the order of *time*. Thus, in the poor laws:—first, is set forth the appointment of *overseers;* next, the several branches of their duty, in finding *settlements* for the poor—in removing them to such settlements—in making *rates* for their relief—in *relieving* and otherwise ordering them—and, last of all, in *accounting* at the expiration of their office. Then again, in treating of *settlements*, it occurs, to consider distinctly, and as near to the said order as may be, ten different kinds of settlements,—by *birth*—by the *parents'* settlement—by *apprenticeship*—by *service*—by *marriage*—by *inhabiting forty days after notice*—by paying *parish rates*—by serving a *parish office*—by *renting* 10*l. a year*—and by a person's *own estate*. In like manner in treating of the *rates;* first, is set forth the course of *laying the assessment*—then, the *allowance* thereof by the justices—*publishing* the same in the church—*appeal* against the rates at the sessions—levying the same by *distress*—and, finally, *commitment*, where no distress can be had.

Thus to exhibit another instance. In the article of the *Woollen Manufacture*, which makes up a considerable part of the justice of the peace his duty, and of the officers subordinate to him, there is such a number and variety of statutes, that authors are generally overwhelmed with them. To avoid which perplexity, the laws are here digested in order, according to the natural progress of that business; from the shearing of the sheep, to the exportation of the wool manufactured, under the several heads of *winding of wool* by the shearer—laws to prevent its *exportation*—*working* of cloth—*fulling*—*measuring*—*dyeing*—*stretching*—*dressing*—*exporting*. (*a*)

Where there is no priority in point of time, the next method is that of Lord *Coke*, to frame a definition which takes in the whole subject, and then explain the several parts of such definition in their order. Thus, *grand larceny* is defined to be, *a felonious and fraudulent taking and carrying away by any person of the mere personal goods of another, above the value of* 12*d*. In the handling of which the several branches of the definition are explained in the order as they stand; *viz. a felonious and fraudulent taking—and carrying away—by any person—of the mere personal goods—of another—above the value of* 12*d*. Under which heads the general learning relating to that whole title is comprehended.

(*a*) This arrangement has not in the present edition been closely followed, the laws as to Woollen Manufactures having been in many respects altered since the first edition.

The like method is pursued in treating of the *commission of the peace*, the form of an *indictment*, the form of an *order of removal*, and other articles.

In general it is provided that one thing shall clear the way for another, and the subsequent paragraphs explain the preceding.

Under the influence of which conduct, the author hath attempted to bring together, under one general title, divers articles relating to the same subject, which in the common books are broken and detached under various separate titles; hoping thereby that what hath hitherto been thought introductory of confusion, may tend to render the subject more perspicuous, in exhibiting the whole under one comprehensive view. Thus the laws relating to the *game*, which are above forty in number, and are interspersed in the common books under about thirteen different titles, are here digested under one general title *Game*, to which the reader shall have recourse for the knowledge of whatsoever belongeth to that subject. For example, if any person would be satisfied what penalty the law hath proposed for *tracing hares in the snow*, by recurring to the general title concerning the game, he will find the game distinguished into three kinds, the *four-footed* game, the *winged* game, and the game of *fish*; the *four-footed* game are distributed into the several species of *deer*, *hares*, and *conies*; under which head concerning *hares*, he will readily find what is desired. In like manner, the *winged* game are subdivided into several branches, concerning *hawks and hawking—swans—partridges and pheasants—pigeons—wild ducks, wild geese, and other water-fowl—grouse or moor game—herons*—and *other fowl*; each of which have their peculiar laws.

In these large comprehensive titles, care is likewise taken to be as particular as may be without injuring the connection in the statutes, by inserting the whole law by itself, relating to each separate article. The benefit of which will appear by the following instance: if a person would know what number of horses or beasts in a cart or waggon are allowed by the statutes for the preservation of the road; let him take what treatise at present he pleases concerning the highways, he must read over the whole, before he shall be sure that he hath found all which the law hath enacted concerning the same; and such is often the inaccuracy and confusion, that when he hath perused the whole, perhaps he may be still to seek. For as to this instance before us, there have been regulations made concerning the same, by ten different acts of parliament at very different times. Before he can have any competent knowledge thereof, he must lay all these ten acts together; and when he shall have done this, he will find amongst them so many repeals, and revivals, and explanations, and amendments, that it will even then be no easy matter to conclude with certainty how the law doth stand as to that article. To spare the reader all which trouble, the author hath in this, and all other the like instances, laid the whole law together relating thereunto, or at least all that hath occurred to him, or which he hath thought it material to insert. So that the reader may receive satisfaction in a very small compass, as to what he shall be inquiring about; or at least he may be satisfied in this, that if he doth not find it there, he need not seek for it elsewhere in the book.

And by this method of bringing together into one general title, all those separate distinct titles, which have a mutual relation to and dependance upon each other, the author hath avoided one great inconvenience, of referring the reader from one title to another, and from that other back again to the first, and (which is not unusual in books of the like kind) perhaps losing the thing to be treated of betwixt them.

Upon which account also, where one law occurreth under two different titles, it is usual with him to insert the same under both those titles, that so the reader's attention may not be interrupted by sending him to search other titles, and from those perhaps others again, which have no principal relation to the matter he hath in hand.

Also, upon another account, he hath sometimes made use of more words than otherwise he would have done, namely, to avoid the frequent repetition of the term *&c.* which is a vague expression, and apt to create an uneasiness

in the reader's mind, for that he cannot be satisfied from thence how much, or how little, is intended to be understood.

He hath also been somewhat large in the matter of *precedents* under divers titles; and hath endeavoured to bring them much nearer to the statutes upon which they ought to be formed, than usually hath been done.

For all which enlargements he hath the more space allowed to him, for that he hath not thought it necessary (as others have done) to take up near one-fourth part of the book by inserting *Blackerby's* Justice at the end of it, by way of Index; hoping that the method he hath pursued will render every thing of that kind impertinent and useless.

THE MATERIALS which the author hath made use of are chiefly of four kinds: the *Statutes* at large—the several treatises concerning the *Pleas of the Crown*—the *Reports* of Cases adjudged in the Court of King's Bench—and the books concerning the *Office of a Justice of the Peace*.

As to the *Statutes* at large, or acts of parliament, the author hath not thought himself at liberty, as Mr. *Dalton* and others have done, to deliver the import thereof in his own words; but hath constantly abridged the act in the words of the act itself, leaving out nothing which may seem any way material. And to each distinct clause, he hath annexed the interpretation thereof, where the same hath been determined in the Court of King's Bench, or expounded by other good authority.

The treatises concerning the *Pleas of the Crown*, are those of *Stamford*, *Coke*, *Hale*, and *Hawkins*. Of the first of these the author hath made little use, further than as he is adopted by the other three. As to which three great authorities, the law hath been declared by Lord *Coke*, and not controverted by any other, nor altered since his time by any act of parliament, or judicial determination, the author hath given to him the preference. And where any of these differeth from the other, he hath noted the difference.

In citing of Mr. *Hawkins*, he hath not thought it allowable, as is usual with others, to omit the several degrees of caution and assent, with which he delivereth his opinion; as *it seemeth*, or *it hath been said by some*, or *it seemeth to be the better opinion*, or *it seemeth to be agreed*, and the like; which are by no means arbitrary words without much meaning, but are inserted by him with the utmost deliberation and judgment.

As to the books of *Reports*, where the cases therein have been considered by Mr. *Hawkins*, and the other learned persons before mentioned, the author hath judged it very proper to leave the matter there as settled by them. As to the rest, he hath by no means thought himself of ability to proceed in Mr. *Hawkins's* manner by laying together all the reports on the same subject, and thereupon extracting an opinion out of the whole; but hath inserted the same at large, or what he hath thought most material thereof, and left the determination thereupon to the reader's better judgment

And here it may be requisite, that the reader be admonished, not to expect that the book shall be more perfect than the materials of which it is composed. All the books of reports are not of equal authority. Many of them are only notes that had been taken for gentlemen's own private use. For these, or for any other, the author himself vouched not; and as he doth not add to their credit, so he doth not detract from it; but leaveth every author (as he needs must) to answer for himself. For he hath made it an invariable rule, upon all occasions, to cite his authorities, what such soever they be; and in all material instances, in the very words of the original authors; that so what may be of good authority in itself, shall not be rendered less so by his handling of it. And where no authority is alleged, he desires the reader will look upon it as such, namely, as having no authority; the same being nothing but the author's own private observations, which are submitted to every reader's judgment, to approve or reject as he shall see cause.

The books of authority concerning the *Office of a Justice of the Peace*, are those of *Fitzherbert*, *Crompton*, *Lambard*, and *Dalton*; the last of which was published in the reign of King *James* the First; since which time no book under that title hath been allowed as sufficiently authentic. And even the additions which have been made to *Dalton* since his death, seem to have

no better claim to an uncontroulable authority, than other collections which have not obtained it. And *Dalton* himself is much injured in the modern editions in like manner, as was observed before of Mr. *Hawkins*, by delivering that as absolute, which Mr. *Dalton* published under the several degrees of assent or doubtfulness before mentioned; and which the author, in justice to Mr. *Dalton*, hath restored.

Where *Dalton* hath adopted *Lambard*, *Crompton*, and *Fitzherbert*, (which he doth most frequently in their words,) the author hath thought it sufficient to cite *Dalton's* single authority. And generally, in all other cases, where authors are agreed, he hath judged it unnecessary to allege more than one or two good vouchers.

Concerning the other books of this kind, which have been published since *Dalton's* time, it is unnecessary to enlarge, since of the most of them the author hath made no use, and of the rest very sparingly; and he will not seek to recommend his own book, by finding fault with others before him.

ORTON, WESTMORLAND,
Sept 29, 1751.

THE

JUSTICE OF THE PEACE

AND

PARISH OFFICER.

Abatement of Nuisances. See "*Nuisance*," Vol. V.

Abatement, Pleas in. (a)

A PLEA in abatement consists of matter of defence, which merely defeats the present proceeding, and does not, like a plea in bar, show the defendant to be for ever discharged. What.

In criminal proceedings, such a plea is pleadable only to indictments, informations in the Crown Office, and appeals of felony.

It is founded either on some defect apparent on the proceeding itself, or on some defect in matters of fact not so apparent, such as a misnomer of the defendant, or a mistatement of his addition.

Our present considerations will be confined only to pleas in abatement to indictments and informations in the Crown Office.

Pleas in abatement of misnomer, or of want of addition or wrong addition of the party pleading, are now rendered of no advantage to such party in consequence of the 7 Geo. IV. c. 64, s. 19, allowing an amendment, as will be seen, *post*, p. 3. Inutility of.

We will now consider

I. *What may be Pleaded in Abatement*, 1.

II. *Time and Manner of Pleading it, and Affidavit of Truth*, 2.

III. *Amendment, Replication, Demurrer, and Issue, &c.* 3.

IV. *Evidence*, 4.

V. *Judgment, &c.* 5.

VI. *Forms*, 5.

I. What may be pleaded in Abatement.

The defendant may plead in abatement any defect *apparent* on the face of the indictment. (2 *Hale*, 236, 238.) As if it does not state the defendant's What may be pleaded. For apparent defects.

(a) As to these pleas in general, see 2 *Hale*, 236 to 239, 2 *Hawk.* c. 34; *Bac. Ab. Abatement*; *Com. Dig. Abatement*; 1 *Chit. C. L.* 445.

1. *What may be pleaded.*

addition as required by the 1 Hen. V. c. 5 (*a*); (*Andr.* 145; 1 *Show.* 392;) so if it does not state defendant's Christian name.

The want of certainty seems pleadable in abatement.

For defects not apparent.

The defendant may plead in abatement a defect *not apparent* on the face of the indictment; (*Hawk.* b. 2, c. 25, s. 70;) as if he be misnamed either in his Christian or surname, or his addition be mistated. (*b*) (1 *Leach*, 476; 2 *Hale*, 176, 236.)

So if a peer be indicted as a commoner, he may plead his privilege in abatement. (2 *Hale*, 240; 6 *Rep.* 53; *R.* v. *Knowles*, 2 *Salk.* 509; 3 *Salk.* 242.)

So if the description of an highway, in an indictment for the non-repair of it, be too indefinite, being equally applicable to several highways, defendant may plead in abatement, alleging that all such highways are equally known by the description in the indictment; and if indeed the description be true in fact, that seems the only mode of taking advantage of the objection. (*Rex* v. *Hammersmith*, 1 *Stark. C. N. P.* 357.)

The defendant cannot, as in the case of an information, plead in abatement to an indictment that there is another indictment against him for the same offence; (1 *Jones*, 199; *Sir W. Withipole's case*, *Cro. Car.* 147;) but sometimes in such case the Court will quash the first indictment; (2 *Hawk.* c. 34, s. 1;) and as to where the Court will quash an indictment, see *post*, "*Indictment*," Vol. III.

Where several defendants.

It should seem, in an indictment against several defendants, a misnomer of one cannot be pleaded by the others; (see *Lutwyche*, 36; *Wade* v. *Stiff and others*, 1 *Moore & P.* 26;) but each may plead distinct matters in abatement, or one may plead in abatement and the other in bar. (See *R.* v. *Sherman*, *R. T. Hardw.* 303; 2 *Hale*, 177.)

II. Time and Manner of Pleading, and Affidavit, &c.

Time of pleading.

Time of Pleading.]—The plea in abatement must be pleaded before any plea in bar. (2 *Hale*, 175; *Fost.* 16.) It should be put in upon the arraignment, when the defendant is called upon to answer. (2 *Hale*, 175.)

Manner of pleading.

Manner of Pleading.]—These pleas, like pleas in civil actions, are required to be framed with the greatest accuracy and precision, and should be certain to every intent, and be pleaded without any repugnancy, and must point out the objection, so that it may be readily amended or avoided in another prosecution. The general rules which are to be followed in framing pleas in abatement in civil actions will, for the most part, be here applicable, and will be found collected in 1 *Ch. Pl.* 395 to 401; *Com. Dig. Abatement*, 1, 11.

In a plea of misnomer the defendant must disclose his real name, and by such name he will be concluded. (2 *Hale*, 238.)

Where a peer pleaded in abatement his right to be tried before the House of Lords, it was held the plea should have stated he was a peer of the United Kingdom, and the mode in which he derived his title, because such plea was to be determined by the record. (*Rex* v. *Cooke*, 2 *Barn. & C.* 618; 4 *Dowl. & R.* 592, S. C.; 6 *Co. Rep.* 53 b.; 2 *Hale*, 240.)

In a prosecution for a felony, the defendant may plead over to the offence, together with a plea in abatement; and if he omit to do so, the Court will order it to be done, and insert it at the bottom of the parchment; (*Dean's case*, 1 *Leach*, 478; 2 *Leach*, 712, n. a; 2 *Hale*, 238;) but the omission is no ground of demurrer, as defendant may plead over to the felony after the plea

(*a*) How to state such addition, see title, "*Indictment*," Vol. III. If no addition were given, the Courts would formerly, it seems, have quashed the indictment. (See *Rex* v. *Thomas*, 3 D. & R. 621.

(*b*) As to the mode of stating defendant's name and addition, and what is a misnomer, see title, "*Indictment*," Vol. III.

in abatement has been determined against him, and this is *in favorem vitæ*. (*Id.*; *Carth.* 55) In misdemeanors the defendant is not allowed to plead over together with or after plea in abatement. (See *Rex* v. *Gibson*, 8 *East*, 107) 2. *Manner of pleading.*

The plea may be pleaded by attorney as well as in person. (*Rex* v. *Westby*, 10 *East*, 83, n.; 2 *Hawk.* c. 34, s. 3, § C.)

Great accuracy is required in the commencement and conclusion of the plea. A plea of misnomer commencing thus, "and the *said* C. D who is indicted by the name of E. D. comes, &c." would be bad, for by styling himself the *said* C. D, he concludes himself as the party indicted. (2 *Hale*, 175.) It should conclude, "praying judgment on (or "of") the indictment and that it may be quashed." If the plea conclude in bar instead of in abatement, it will be bad. (See *R.* v. *Shakespeare*, 10 *East*, 83)

It has been decided the plea may be put in *ore tenus*; (2 *Leach*, 535; 1 *Leach*, 476;) the present practice, however, does not warrant this, it being usual and therefore safest to put it in writing engrossed on parchment or paper. It should be signed by counsel. (See *Cro. Car.* C. 21; 1 *Ch. C. L.* 448.)

Affidavit of Truth.]—By the 4 Anne, c. 16, s. 11, it is provided, "That no dilatory plea shall be received in any court of record, unless the party offering such plea do by affidavit prove the truth thereof, or show some probable matter to the Court to induce them to believe that the fact of such dilatory plea is true" Affidavit of truth.

This provision applies to pleas in abatement in criminal proceedings. (*Rex* v. *Grainger*, 3 *Burr.* 1617) It is at all events necessary to add the affidavit to a plea in a prosecution filed in the Crown Office. (*Id.*; *Rex* v. *Jones*, 2 *Stra* 1161.) It has been said, though for what reason it does not appear, that this affidavit is unnecessary on a trial at bar of an indictment for high treason. (*Fost.* 16, *Rex* v. *Grainger*, 3 *Burr.* 1617; 2 *Hawk.* c. 34, s. 7.)

The affidavit may, it seems, be made by the defendant or a third person, (*Lumley* v. *Foster*, *Barnes*, 344) It should be properly entitled in the prosecution. It should state that the plea is true in substance and fact, and not merely that the plea is a true plea. (*Onslow* v. *Booth*, 2 *Stra.* 705.)

III. Amendment of, Replication, Demurrer, and Issue.

Amendment.]—If a plea of misnomer or want of addition be true, the prosecutor may, by the practice at common law, instead of replying, if the grand jury be still sitting, alter the indictment by substituting the name, &c. by which the defendant so pleaded, for the name in the indictment, and have it again preferred and found, and the defendant again arraigned upon it, in which case he will be estopped from again pleading a misnomer or want of addition Amendment.

But a more effectual course in this respect is provided by the 7 Geo IV. c. 64, s. 19, which allows the Court to cause the indictment to be amended, and call on the defendant to plead over thereto, as if the plea in abatement had not been pleaded. The enactment of such provision is as follows — "And for preventing abuses from dilatory pleas, be it enacted, that no indictment or information shall be abated by reason of any dilatory plea of *misnomer*, or *of want of addition*, or of *wrong addition* of the party offering such plea, if the Court shall be satisfied by affidavit or otherwise of the truth of such plea; but in such case the Court shall forthwith cause the indictment or information to be amended according to the truth, and shall call upon such party to plead thereto, and shall proceed as if no such dilatory plea had been pleaded."

It should seem that this statute does not affect the right of a peer, when indicted as a commoner, to plead in abatement of an indictment for felony; for his title is not only part of his name, but gives him a different mode of trial, viz. by his peers. (*Arch. Crim. Law*, 9th ed. by *Jervis*, 83.)

The Court will not allow a *plea* in abatement to be amended.

3. *Replication, &c.*

Demurrer.]—If the plea be insufficient in form, or bad in point of substance, the prosecutor may demur. (*Rex* v. *Gibson*, 8 *East*, 83.)

Demurrer.

The Court will not, in general, on motion, quash a bad plea in abatement. (*Rex* v. *Cooke*, 2 *Barn. & C.* 618; 1 *Dowl. & R.* 43, S. C.) *Abbott*, C. J. intimated in that case that there was a great difference between quashing indictments and quashing pleas, and that it would in general be much too strong a measure to quash the latter, though it were clearly defective.

In cases of felony the demurrer and joinder may be *ore tenus*. (*Fost.* 105; 1 *Leach*, 476.) In indictments for treason the defendant must join in demurrer instanter. (6 *Harg. St. Trials*, 241.)

Unless the plea be clearly defective, it is best not to demur, but to amend as above.

Replication.

Replication.]—If the plea be untrue in fact, the prosecutor may reply denying such fact, or allege matter of estoppel. Thus to a plea of misnomer, he may either deny the plea, or reply that the defendant is known as well by one name as the other. (2 *Leach*, 476; 2 *Hale*, 237.) The replication must not commence as to a plea in bar. (See *Carth.* 187; *Bac. Ab. Abatement*, 8.) The conclusion must be proper, and usually is to the country. On a plea of peerage the conclusion should be by the record, and not to the country; (see *Countess of Rutland's case*, 6 *Rep.* 53; 2 *Hale*, 240;) but an issue whether a woman is a peeress by *marriage*, may conclude to the country. (*Id.* See *Rex* v. *Cooke*, 2 *Barn. & C.* 618; 4 *Dowl. & R.* 592, S. C.)

Unless the plea be clearly untrue, it is best to amend.

Issue, &c.

Issue, &c.]—If the replication be bad in form or substance, the defendant may demur, and if he establish the insufficiency, he will have judgment; as where the defendant pleaded in abatement that he was a peer, and the Attorney-General replied, that he formerly petitioned the Lords to be tried by them and was refused; he obtained judgment on demurrer, inasmuch as the decision of the House of Lords is no judgment, and therefore the replication was invalid. (*Rex* v. ———, 2 *Salk.* 209; *Holt*, 530.)

Where issue is joined on a plea in abatement, the *venire* may be returned and the trial proceeded in instanter by a jury of the same county. (1 *Leach*, 478; 2 *Hale*, 238.) At the sessions, however, where a misdemeanor only is in question, it is the usual practice after plea for the defendant to enter into a recognizance to prosecute the same with effect at the ensuing sessions, and then he must give four days' notice of his intention to try to the prosecutor; and if he does not reply, judgment will be entered for the defendant. (*Cro. Car. C.* 31.)

IV. Evidence.

Evidence in misnomer.

In a plea of misnomer, where defendant alleges that he was "named and called," it is sufficient for him to prove that he was *generally* known by that name. But it is not sufficient in such case to prove that he has been called so once or twice. (*Maester* v. *Hartz*, 3 *Maule & S.* 453.) The usual proof in support of a plea in abatement of misnomer, is an examined copy of the register of his baptism, with evidence of identity by a party present at the ceremony or otherwise. It is said that this proof of baptism is absolutely necessary when the plea alleges that defendant was "*baptized*" by the name; (*Welekier* v. *Peletier*, 1 *Camp.* 479;) but this seems very questionable. (See *Arch. C. L.* 5th ed. 83.) Defendant may prove his name by letters of denization, or a commission in the army by it, and proof that he has been known in other countries by that name is sufficient. (See *id.*)

A plea of peerage must be proved by letters-patent under the great seal. (See *Rex* v. *Knollys*, 2 *Salk.* 509; 1 *Ld. Raym.* 10, S. C.) As to proof of such letters, see title "*Evidence*," Vol. II.

5. *Judgment, &c.*

V. Judgment, &c.

Judgment for defendant.

Before the 7 Geo. IV. c. 64, s. 19, the judgment for the *defendant* on a plea in abatement was, in case of a misdemeanor, that the indictment be quashed, and that he be not compelled to answer, but should depart the court without day; (2 *Hale*, 238; *Rex* v. *Shakespeare*, 10 *East*, 87;) but for felony or treason, though the indictment were quashed, the court would not dismiss the defendant, but would cause him to be indicted *de novo*. (*Sir H. Ferrers's case*, *Cro. Car.* 371; 2 *Hale*, 176, 238; 2 *Hawk.* c. 34, s. 2.) A judgment in abatement for one of several defendants would not affect the others. (*Rex* v. *Sherman*, *R. T. Hardw.* 303; 2 *Hale*, 177.)

But this, as regards pleas in abatement of misnomer, or want of addition or wrong addition, is materially altered by the above statute, which as we have seen, *ante*, 3, allows the court to cause the indictment to be amended on such plea, and to call on the party to plead as if no dilatory plea had been pleaded.

Judgment for the Queen.

The judgment *for the queen* on a plea in abatement to an indictment for a misdemeanor is final; (*Rex* v. *Gibson*, 8 *East*, 107; 2 *Hawk.* c. 31, s. 7; 1 *Leach*, 478;) but in treason or felony the judgment is that the defendant do answer over. (*Rex* v. *Gibson*, 8 *East*, 110; 1 *Leach*, 478; 2 *Hale*, 239.) And in both cases, on a judgment on demurrer, the judgment is that the defendant do answer over; (*Trem. P. C.* 189, 190; *Rex* v. *Hon. R. Johnson*, 6 *East*, 583, 602; *Eichorn* v. *Le Maitre*, 2 *Wils.* 368; 1 *Ch. C. L.* 451;) and the reason for this latter doctrine is, that every man shall not be presumed to know matter of law, which he leaves to the judgment of the court, but he is presumed to know whether his plea be true or false in matter of fact.

VI. Forms.

(1.) Plea in abatement of misnomer of defendant's Christian name(*a*).

The Queen against Sarah Lee indicted by the name of Jane Lee. } *And Sarah Lee* [the real name,] *who is indicted by the name of Jane Lee, in her own proper person* [or, "*by her attorney,*"] *cometh into court here, and prayeth judgment of the said indictment, because she saith that she, the said Sarah Lee, from the time of her baptism to this present time was, and still is, called and known by the name of Sarah, and by the said Christian name is, and during the whole time aforesaid was called, named and known, without this, that she the said Sarah Lee now is, or at any time heretofore to this day, was called, named, or known by the name of Jane, as is supposed by the indictment aforesaid; and this she, the said Sarah Lee, is ready to verify; for which reason, and because she, the said Sarah Lee, is not named in the said indictment by the name of Sarah Lee, she, the said Sarah Lee, prayeth judgment of the said indictment, and that the same may be quashed.* [Engross this plea on parchment or paper, and get it signed by counsel, and annex the following affidavit.]

(2.) Affidavit of truth of plea.

In the Queen's Bench.

The Queen against Sarah Lee indicted by the name of Jane Lee.

Sarah Lee, of , in the county of , maketh oath and saith, that the plea hereunto annexed is true in substance and matter of fact.

Sarah Lee.

(3.) Replication thereto, that defendant is known as well by the one name as the other.

And thereupon J. N. [the clerk of the peace, or clerk of the arraigns, or if the plea be to an information say, "*and J. S. knight, of our said Lady the Queen,*"] *who prosecutes for our said Lady the Queen in this behalf, saith that the said indictment, by reason of any thing by the said Sarah Lee in her said plea above alleged, ought*

(*a*) See other Forms of *Pleas* in Abatement of Misnomer, 4 *Ch. C. L.* 520; 1 *Cro. Car. C.* 46; *Rex* v. *Shakespeare*, 10 *East*, 83; of want of addition, 4 *Ch. C. L.* 524; *Stark.* 705; of wrong addition, 4 *Ch. C. L.* 521; 3 *Burr.* 1517; *Stark.* 704; of peerage, 4 *Ch. C. L.* 523; *Rex* v. *Cooke*, 2 *B. & C.* 618; 4 *D. & R.* 592, S. C.; that there is no such parish as that named, 4 *Ch. C. L.* 525; See forms of entries of such pleas, *id.* 521, 525.

See also forms of demurrer and joinder in demurrer to pleas in abatement, 4 *Ch. C. L.* 525, 526.

6. *Forms.* *not to be quashed; because he saith that the said Sarah Lee, long before, and at the time of the preferring of the said indictment, was and still is known as well by the name of Jane Lee as by the name of Sarah Lee, to wit, at the parish aforesaid, in the county aforesaid, and this he the said J. N. prays may be inquired of by the country, &c.*

Abduction of Women. (a)

THIS offence may be divided into two classes,—*first*, the forcible abduction of a woman on account of her fortune, with intent to marry or defile her; and—*secondly*, the unlawful abduction of a girl under the age of sixteen from her parents or guardians. As to stealing children under the age of ten years, see *post*, "*Children.*"

I. Abduction of Women on Account of their Property.

Abduction of a woman on account of her property against her will.

The 9 Geo. IV. c. 31, s. 19, enacts, "That where any woman shall have any interest, whether legal or equitable, present or future, absolute, conditional or contingent, in any real or personal estate, or shall be an heiress presumptive or next of kin to any one having such interest, if any person shall, from motives of lucre, take away or detain such woman against her will, with intent to marry or defile her, or to cause her to be married or defiled by any other person; every such offender, and every person counselling, aiding or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction for any term not exceeding four years." And the act repeals the 3 Hen VII. c. 2; 39 Eliz. c. 9; and 3 Edw. I. c. 13; 1 Geo. IV. c. 115; as also so much of 6 Rich. st. 1, c. 6, as relates to ravishers and to women ravished.

See the general clauses affecting all the provisions of this act, *post*, "*Malicious Injuries to Persons*," Vol. V.

What an offence within the act.

It is not necessary, as was the case under the prior statutes, that an *actual marriage* or *defilement* should take place. Under the present act the taking or detaining, for the purposes of lucre, coupled with an *intent* to marry or defile, constitutes the offence. The taking must be *against the will* of the woman. It seems, however, that although it be with the will of the woman, yet if that be obtained by *fraud* practised upon her, the case will be within the act. (*Wakefield's case*, Lancaster March Assizes, 1827; *Deac. C. Law*, 4.) It is no excuse, that the woman was at first taken away with her own consent, if she afterwards refuse to continue with the offender, because if she so refuse, she may from that time as properly be said to be taken against her will, as if she had never given any consent at all; for till the force was put upon her, she was in her own power. (1 *Hawk.* c. 41, s. 7; 1 *Russ.* 571.) Moreover the *detaining* against her will is an offence. It seems also it is not material whether a woman so taken contrary to her will at last consent thereto or not, if she were under the force at the time, for the offence is complete at the time of taking. (*Fulwood's Case*, *Cro. Car.* 488; *Swendon's Case*, 5 *St. Tr.* 459; *Hawk.* c. 41, s. 8.)

Accessaries.

It will be observed that the above enactment expressly makes accessaries before the fact liable as principals, which was a doubtful point under the prior statutes.

(a) As to Offences against Women in General, see *post*, "*Women*," "*Wife*," Vol. VI.; as to Child Stealing, see "*Children*," *post*; Ravishing Women, see title "*Rape*," Vol. V.; Carnally Abusing Children, see title "*Children*;" Abortion, see title "*Abortion*," *post*, page 10.

The indictment must set forth that the woman taken away had the property, or that she was heiress presumptive, &c. as required by the act, in order to show defendant's interested motives. (*Moulin* v. *Sir G. Dallison, Cro. Car.* 484.) The place and manner of taking must also be set forth in the proceedings. (*Id. ibid.*) It must also be alleged that the taking was against her will, and that it was for *lucre;* (*Bruton* v. *Morris, Hob.* 182; 1 *Hawk.* c. 41, s. 5;) and with an intent to marry or defile. (See 1 *Hale*, 660.)

1. *On Account of property.*

Indictment.

It may be as well observed, that by 7 Geo. IV. c. 64, s. 12, every felony or misdemeanor begun in one county and completed in another may be dealt with and tried in either county.

Venue.

This offence is not triable at quarter sessions. (5 & 6 Vict. c. 38, s. 1.)

Not triable at sessions.

Evidence.]—To sustain the indictment, the prosecutor should look to the averments in it, and prove them accordingly, and in the order stated in such indictment; as that the woman was possessed of the real or personal estate, or was the heiress presumptive or next of kin to some one having the property required by the act. It should be proved that the defendant, from motives of lucre, took away or detained the person mentioned in the indictment against her will; and the jury ought not to convict the prisoner, unless they are satisfied that the prisoner committed the offence from motives of lucre; but evidence of expressions used by the prisoner respecting the property of the lady, such as his stating that he had seen the will of one of her relatives (naming him), and that she would have 220*l.* a-year, are important for the consideration of the jury, in coming to a conclusion whether the prisoner was actuated by motives of lucre or not. (*Reg.* v. *Barratt*, 9 *Car. & P.* 387.) A prisoner was taken into custody at the house of his brother, on a charge of abduction. When he was taken, a letter was found in a writing-desk in the room where he and his brother were. The letter was directed to a person in the neighbourhood of the prisoner's late residence. The police-officer was going to open it, when the prisoner told him it had nothing to do with the business he had come about: held, that the letter was receivable in evidence on the trial of the prisoner for the abduction. *Ib.*

Evidence.

The party injured, though the force continued till the time of the marriage, will be a good witness for or against the offender, because she is not his wife *de jure*, and may herself swear to the compulsion. (*Swendon's case*, 5 *Harg. St. Tr.* 456; *Brown's case*, 1 *Ventr.* 243; *Fullwood's case, Cro. Car.* 488; *Rex* v. *Parry*, 1 *Hawk.* c. 41, s. 13.) But some writers seem to think that where the actual marriage was good, in consequence of a subsequent consent, the wife cannot be sworn; though the better opinion seems to be that the offender should not be allowed to take advantage of his own wrong, and that the act of marriage, which is the completion of his offence, should not be construed to disqualify the witness on whose testimony he may be convicted. (1 *Hale*, 301; 4 *Bla. Com.* 209; 1 *East, P. C.* 454; *Rex* v. *Wakefield, supra.*) And indeed it would now probably be considered that a wife *de jure* may always be a witness against her husband in case of personal injuries. It seems that her dying declarations may be read against him on a trial for her murder; (1 *Leach*, 500;) and it is certain that her testimony may be received when he is charged with assisting others to ravish her. (1 *Harg. St. Tr.* 387; 3 *Ch. C. L.* 819; and see "*Wife*," Vol. VI.; "*Evidence*," Vol. II.)

Witnesses.

If the jury should not be satisfied that the prisoner used force to the person of the lady in taking her away, and that he took her away against her consent, they may convict him of the assault, under the stat. 1 Vict. c. 85, s. 11. And if they should not be satisfied that the prisoner was actuated by motives of lucre; and they be satisfied that the prisoner used force to the person of the lady in taking her away; and that he took her away against her consent, they may likewise convict of an assault, under the stat. 1 Vict. c. 85, s. 11. (*Reg.* v. *Barratt*, 9 *C. & P.* 387. See *post*, "*Assault.*")

May be convicted of an assault.

Punishment.]—This crime is a felony, and punishable accordingly with transportation for life or for not less than seven years, or with imprisonment with or without hard labour, for not more than four years. (9 Geo. IV. c. 31,

Punishment.

2. *Of Girls under Sixteen.*

s. 19, *ante.*) By sect. 31 of the same act, accessaries *after* the fact are punishable with imprisonment, with or without hard labour, not exceeding two years. (*Post.*)

II. Abduction of Girls under Sixteen.

Abduction of a girl under sixteen years.

The 9 Geo. IV. c. 31, s. 20, enacts, "That if any person shall unlawfully take, or cause to be taken, any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her; every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable to suffer such punishment, by fine or imprisonment, or by both, as the court shall award." And the act repeals 4 & 5 P. & M. c. 8.

This provision was passed in order to meet those cases where the girl is of so tender an age that she might be easily imposed on and her consent obtained. It alters the law as it stood under the 4 & 5 P. & M. c. 8.

What an offence within the act.

An illegitimate child appears to be within the act. (*Rex* v. *Cornforth and others*, 2 *Stra.* 1162; better reported in *Bott*, by *Const.* *Rex* v. *Sweeting*, 1 *East*, *P. C.* 457.) The mother retains her authority though she marry again, and the assent of the second husband is not material. (*Ratcliffes' case*, 3 *Rep.* 39.) But the statute extends only to the custody of the *mother*, where the father has *not disposed* of the custody of the child to others. (*Id.*) It seems that if the taking were with the consent of the parent or person having the charge of the child, no restriction could do away with the effect of such approval. (*Calthorpe* v. *Axtell*, 3 *Mod.* 169; 1 *East*, *P. C.* 457.) Under the prior act it was holden, that if a parent place a daughter under the care of another, who, by collusion, marries her to his own son, the case was not within the act if the marriage were solemnized in a parish church, at a canonical hour, and without any attempt at privacy. (3 *Mod.* 88.) The principle of this case was disputed by Mr. East, who contended, that it would protect a school-mistress in disposing of the female infants under her care in marriage; when it is manifest no power of that kind is ever deputed, but is impliedly reserved by the parent. (1 *East*, *P. C.* 457.) And where a man, by false and fraudulent representations, induced the parents of a girl between ten and eleven years of age to allow him to take her away, such taking away has been considered an abduction within this statute. (*Reg.* v. *Hopkins*, 1 *Car. & M.* 254.)

Offence at common law.

It appears to be an offence at common law to take a child from her parents or guardians, or others entrusted with the care of her, by any sinister means; either by violence, deceit, conspiracy, or any other corrupt or improper practices, as by intoxication, for the purpose of marrying her, although she herself might have consented to the marriage. (1 *East*, *P. C.* 459; *Rex* v. *Twisleton*, 1 *Lev.* 257; *Rex* v. *Lord Ossulton*, 2 *Stra.* 1107; *Rex* v. *Lord Grey*, 3 *St Tr.*; 3 *Chit. C. L.* 713;) and *post*, "*Conspiracy*." But seduction alone is not an indictable offence.

Indictment.

No particular observation as to the framing the indictment is here necessary. The usual allegation of the girl being unmarried is sufficient. (*Rex* v. *Moor*, 2 *Lev.* 179; *Rex* v. *Boyal*, 2 *Burr.* 832.)

Evidence.

The prosecutor should be prepared to prove that the defendant took away the girl out of the custody of the parent or temporary guardian, that she was under sixteen years of age, that the taking was against such parent's or guardian's consent, and for which purpose any of these parties may be called.

This offence is a misdemeanor, and punishable by fine or imprisonment, or by both, as the court think fit. (See the 9 Geo. IV. c. 31, s. 20, *supra.*) Hard labour cannot be imposed.

Not triable at sessions.

This offence is not triable at quarter sessions. (5 & 6 Vict. c. 38, s. 1.)

III. Forms.

(1.) Commitment on 9 Geo. 4, c. 31, s. 19, for abduction of a woman on account of her property.

Kent.—[The county wherein the commitment was made.] *J. P. Esq. one of her Majesty's justices of the peace for the said county, to the constable of in the said county, and to the keeper of the common gaol at in the said county.*

These are to command you the said constable, in her Majesty's name, forthwith to convey and deliver into the custody of the said keeper of the said common gaol the body of C. D., charged this day before me, the said justice, on the oath of A. B. of and others, for that he the said C. D. [state the offence thus:] *on the day of in the year of our Lord at in the said county, feloniously and from motives of lucre, did take away and detain one A. B. against her will, she the said A. B. being then a woman having an interest in certain real* [or "*personal*"] *estate,* [or "*being the heiress presumptive to a person having an interest in certain real estate,*" or "*being the next of kin to a person having an interest in certain personal estate*"], *with intent her the said A. B. to marry* [or "*defile,*" or "*to cause to be married to,*" or "*defiled by*"] *J. F.* [or "*by some person unknown,*" according to the fact,] *against the form of the statute in that case made and provided.* [Conclude as usual, thus:] *And you the said keeper are hereby required to receive the said C. D. into your custody in the same common gaol, and him there safely to keep until he shall be thence delivered by due course of law. Herein fail you not. Given under my hand and seal the day of in the year of our Lord .*

J. P.

(2.) Commitment on 9 Geo. 4, c. 31, s. 20, for abduction of a girl under sixteen.

Commencement as usual, as *supra.*] *for that he the said C. D. on the day of in the year of our Lord at in the said county, unlawfully did take* [or "*cause to be taken*"] *one A. B. out of the possession and against the will of J. B. her father* [or "*mother;*" or "*person having the lawful care and charge of her,*"] *she the said A. B. then and there being an unmarried girl, and under the age of sixteen years, to wit, of the age of years; against the form of the statute in that case made and provided. And you the said keeper, &c.* [conclude as usual, as *supra*].

(3.) Indictment on 9 Geo. 4, c. 31, s. 19, for abduction of a woman having an estate. (a)

—— [venue.] *The Jurors for our Lady the Queen upon their oath present, that C. D. late * of the parish of , in the county of , yeoman, on the day of , in the year of the reign of our Lady the now Queen Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, feloniously and from motives of lucre, did take away and detain one A. B. against her will, she the said A. B. then and there being * a woman having an interest* (b) *in a certain real estate, to wit, in certain lands, tenements, and premises, situate at, &c.* [or "*in a certain personal estate, to wit, in certain goods and chattels, that is to say,*" describe generally the personalty,] *with intent her the said A. B. to marry* [or "*cause to be married by one E. F.*"] *against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.* [Add counts, if the case be in any way doubtful as to the proofs, varying the statements as to the property of the woman, and a count stating the intent to be to "*defile*" her, or that some other person should do so.]

(4.) Indictment on same act, the woman being an heiress presumptive.

Proceed as in above form No. 3, to the asterisk, and then thus,] *the heiress presumptive to one A. C. having an interest in a certain real estate, to wit, in certain lands, tenements, and premises situate at, &c. with intent her the said C. D. to marry* [or "*defile*"]; *against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.*

(5.) Indictment on same act, the woman being next of kin, &c.

Proceed as in above form, No. 3, to the asterisk, and then thus,] *the next of kin to one A. C. having an interest in a certain personal estate, to wit, in certain goods and chattels, that is to say* [describe the personalty generally,] *with intent her the*

(a) See a precedent on 3 Hen. VII. c. 2, being also against accessaries, C. C. C. 629. See post, p. 15, title "*Accessary.*"

(b) The words of the act are "*any* interest, whether legal or equitable, present or future, absolute, conditional, or contingent." Some forms state generally the nature of the interest, as that it is "a legal interest," or "an equitable interest," &c. but this does not seem requisite.

3. *Forms.* *said C. D. to marry* [or "*defile*]; *against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.*

(a.) Indictment on 9 Geo. 4, c 31, s. 20, for abduction of a girl under sixteen. (a)

Commence as in the form *supra*, No. 3] *unlawfully did take one A. B. out of the possession and against the will of J. B. her father* [or "*mother,*"] *she the said A. B. then and there being an unmarried girl, under the age of sixteen years, to wit, of the age of years; against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.* [Add a count stating *J. B.* to be "*a person then and there having the lawful care and charge of the said A. B.;*" also two other counts respectively like the first and second counts, but stating that the defendant "*unlawfully did cause to be taken one A. B. &c.*"]

Abettor. See "*Accessary.*"

Abjuration, Oath of. See "*Oaths,*" Vol. V.

Abortion. (b)

When murder at common law.

If a woman be with child, and any give her a potion to destroy the child within her, and she take it, and it work so strongly that it kills her, this is murder; for it was not given to cure her of a disease, but unlawfully to destroy her child within her, and therefore he that gives her a potion to this end must take the hazard, and if it kill the mother, it is murder. (1 *Hale*, 429, 430.)

And if a woman quick or great with child took, or another gave her, any potion to make an abortion, or if a man struck her, whereby the child within her was killed, though it were a great crime, yet it was not murder nor manslaughter by the law of *England*, because it was not yet *in rerum naturâ*, nor could it legally be known whether it were killed or not. (1 *Hale*, 433.) Though if the child were born alive, and afterwards died of the poison or bruises it received in the womb, it was murder in such as administered or gave them. (1 *Hawk.* c. 31, s. 16; 4 *Bla. Com.* 198.)

By statute 9 Geo. IV. c. 31, s. 13.

But this omission in our criminal code was in a great degree corrected by stat. 43 Geo. III. c. 58: and afterwards by the 9 Geo. IV. c. 31, s. 13, (which wholly repeals the 43 Geo. III.) This act enacts, "That if any person, with intent to procure the miscarriage of any woman then being *quick with child*, unlawfully and maliciously shall administer to her, or cause to be taken by her, any poison or other noxious thing, or shall use any instrument or other means whatever with the like intent; every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof shall suffer death as a felon. And if any person, with intent to procure the miscarriage of any woman *not being, or not being proved to be, then quick with child*, unlawfully and maliciously shall administer to her, or cause to be taken by her, any medicine or other thing, or shall use any instrument or other means whatever, with the like intent; every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned with or without hard labour, in the common gaol or house of correction, for any

(a) See form of indictment for stealing a child under ten years of age, *post*, "*Children.*"

(b) As to concealing the birth of children, see *post*, "*Children.* See also "*Homicide,*" Vol. III.

term not exceeding three years, and if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit,) in addition to such imprisonment."

Where woman quick with child.

And now by 7 Will. IV. & 1 Vict. c. 85, s. 6, "Whosoever, with intent to procure the miscarriage of *any woman*, shall unlawfully administer to her, or cause to be taken by her, any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

And now 7 Will. 4 & 1 Vict. c. 85, s. 6.

In order to constitute an offence under the 9 Geo. IV. c. 31, the woman must be either quick with child, or at least with child. (*Rex* v. *Scudder* 1 *Moody, C. C.* 216.) This is not necessary in order to bring a case within the 1 Vict. and which relates to procuring the miscarriage of "any woman," whether she was pregnant or not at the time. Indictments are now usually framed on the latter statute owing to the greater facility of proof, and we shall confine our observations under this head to the offence as provided for by that statute.

What an offence within the act, and evidence to prove it.

The poison or noxious thing must be administered, or some means used with the intent to procure the *miscarriage*. It must be proved according to the fact stated in the indictment, either that the defendant administered to, or caused to be taken by, the woman, the drug as therein stated; or perhaps proof of any other substance or thing *ejusdem generis* would be sufficient, as in the case of murder. (See *post*, "*Homicide*," Vol. III.; and see *R.* v. *Coe*, 6 *C. & P.* 403.)

Where an indictment, on section 2 of the 43 Geo. III. c. 58, charged the prisoner with having administered to a woman "a decoction of a certain shrub called *savin*," and it appeared upon the evidence that the prisoner prepared the medicine, which he administered, by pouring boiling water on the leaves of a shrub; the medical men who were examined stated that such a preparation is called an infusion, and not a decoction, (which is made by boiling the substance in the water,) upon which the prisoner's counsel insisted that he was entitled to an acquittal, on the ground that the medicine was misdescribed; but *Lawrence, J.* overruled the objection, and said that infusion and decoction are *ejusdem generis*, and that the variance was immaterial: that the question was, whether the prisoner administered any matter or thing to the woman to procure abortion. (*Rex* v. *Phillips*, 3 *Camp.* 74.) (*a*)

(*a*) In addition to the foregoing, it may be of some utility to give the following surgical observations on this offence. They frequently become very material in the evidence. They will be found collected in Mr. Carrington's little work on the Criminal Law, 3d edition, xxx.

Abortion may arise from various causes; external violence, any sudden shock, sudden influence on the passions, rapid and uneasy travelling, dancing, walking, &c. (3 *Par.* p. 95.) Sometimes the causes are constitutional; many women are predisposed to it, and females in a disreputable way of life are more so than others. (*Sm. For. Med.* p. 296; 1 *Par.* p. 271, *acc.*)

What are symptoms of Abortion having taken place. Dr. Gordon Smith states these to be—a bloody and ichorous [thin, watery] discharge from the vagina, the vagina itself dilated and relaxed, the labia enlarged and soft, and the os uteri (mouth of the womb) open; and the further pregnancy has advanced, there will be a stronger resemblance to the process of parturition. (*For. Med.* p. 300.)

Progress of the Fœtus in size, &c. From the 26th to the 28th day from conception, the embryo reaches a size that is perceptible. It is composed of two masses, the larger being the head. About the sixth week it reaches the size of a large bee, and the navel-string is formed, the twisting of which begins after the tenth week. Before the thirteenth week the sex is not readily distinguishable, as the female clitoris is so disproportionate as to resemble the penis of the male. By the end of the third month, the head is covered with down. At four months and a half the embryo is about seven inches long. After the fifth month, the abdomen seems to predominate over the thorax. At the sixth month, the fœtus

Where woman not quick with child.

In *Rex* v. *Harley*, 4 *C. & P.* 369, it was held that if a servant put poison into a coffee-pot which contains coffee, and when her mistress comes down to breakfast, the servant tells the mistress that she has put the coffee-pot there for her (the mistress's) breakfast, and the mistress drink the poisoned coffee, this is a "causing the poison to be taken" within the 11th section of the 9 Geo. IV. c. 31, (*a*) relative to attempts to murder by poison, and the servant is therefore indictable under that act. And from the same case it should also seem that this is also an "administering" within that act; as to constitute an administering it is not necessary that the poison should be delivered by the hand of the party.

It is, it seems, necessary, to constitute an offence within the act, that the thing administered was *swallowed* by the woman to whom it was administered; merely giving it, if no part be swallowed, is not sufficient. In a case where the prisoner was indicted for administering poison to E. D. with intent to murder her, the proof was that the defendant gave her a bit of cake, which contained arsenic and sulphate of copper. She put this into her mouth and spit it out again, but did not swallow any part of it: this was held not a sufficient administering within the 43 Geo. III. c. 58. (*Rex* v. *Cadman*, *Carr. C. L.* 237, 3d ed.) (*b*)

It is not necessary that there should be an actual delivery of the poison, &c. by the hand of the defendant. (*Rex* v. *Harley*, 4 *C. & P.* 369.)

It is immaterial whether in fact the drug or other thing administered was likely or calculated to procure abortion; it is sufficient to prove that the defendant administered the drug, &c. *with intent* to procure miscarriage, and that the drug, &c. was a "poison" or "other noxious thing." (*Rex* v. *Coe*, 6 *C. & P.* 403.) (*c*)

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measures about nine inches, and the testes of the male begin to descend into the scrotum, but are not found there till the eighth. From the fifth to the seventh month, it may be born alive, but can never maintain a separate existence; but beyond the seventh month we cannot carry the consideration of abortion, the child being then on the same footing with one perfectly mature, and only deficient in size and weight; and about this time the membrana pupillaris disappears. (*Sm. For. Med.* p. 292.)

Of Savin and Colocynth. These are things commonly taken by women to procure abortion. They generally do not answer their intended purpose, and always do injury to the health of the woman who takes them. Savine is a shrub, whose leaves have a hot and bitter taste, and a disagreeable smell. It is a powerful stimulant, and it acts on the nerves, the stomach, and rectum, but has no specific effect on the uterus. (2 *Par.* p. 379.) Colocynth (also called Colloquintida, or Bitter Apple) is bitter in taste, and is a powerful drastic purgative. (*Id.* p. 377.) For these there are no chemical tests.

As to symptoms of pregnancy and diseases that have the effects of recent delivery, see *post*, "*Children, Concealing Birth of.*"

(*a*) *Post*, "*Malicious Injuries to Persons*," Vol. V.

(*b*) This same case is also reported in 1 *R. & Moody*, 114, but the two reports differ very materially; for by the latter, it should seem necessary, to constitute the offence, that the poison should be swallowed. According to the report of *Rex* v. *Harley*, 4 *C. & P.* 369, the former report in Mr. Carrington's work on the Criminal Law is the correct one.

(*c*) See *Rex* v. *Phillips*, 3 Camp. 74, which was an indictment under the 43 Geo. 3, c. 58, s. 2. In this case, witnesses having been called on behalf of the prisoner to prove that the shrub he used was not savin, the counsel for the prosecution insisted that he might, notwithstanding, be found guilty upon the last count of the indictment, which charged, that he administered a large quantity "of a certain mixture, to the jurors unknown, *then and there being a noxious and destructive thing*." The prisoner's counsel objected, that unless the shrub was savin, there was no evidence that the mixture was "noxious and destructive." *Lawrence*, J. held, that in an indictment on this clause of the statute it was improper to introduce these words; and that though they had been introduced, it was not necessary to prove them. And he further said, "it is immaterial whether the shrub was savin or not, or whether or not it was capable of procuring abortion, or even whether the woman was actually with child. If the prisoner believed at the time that it would procure abortion, and administered it with that intent, the case is within the statute, and he is guilty of the offence laid to his charge."

Where woman not quick with child.

The defendant, if not convicted of the felony, may be found guilty of an assault, if the evidence shall warrant such a finding. (7 Will. IV. & 1 Vict. c. 85, s. 11.) The enactment is as follows: "That on the trial of any person for any of the offences thereinbefore mentioned, or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding, and when such verdict shall be found, the Court shall have power to imprison the person so found guilty of an assault for any term not exceeding three years."

Defendant may be found guilty of an assault.

This offence is not triable at quarter sessions. (5 & 6 Vict. c. 38, s. 1.)

Offence not triable at sessions.

The punishment is transportation for life, or for any term not less than fifteen years, or imprisonment for any term not exceeding three years, at the discretion of the Court, (*ante*, p. 11,) with or without hard labour, or with or without solitary confinement for any portion of such imprisonment, with hard labour not exceeding one month at one time, nor three months in any one year. (7 Will. IV. & 1 Vict. c. 85, s. 8.)

Punishment.

If found guilty of an assault only, imprisonment for any term not exceeding three years. (*Id.* s. 11.)

Principals in the second degree and accessaries before the fact are punishable in the same manner as principals in the first degree; and accessaries after the fact are liable to be imprisoned for any term not exceeding two years, which imprisonment may be regulated as before. (*Sup.*) (7 Will. IV. & 1 Vict. c. 85, s. 7; and see "*Accessary*," *post*.)

Principals in the second degree and accessaries.

Forms.

(1.) Commitment for administering drugs, &c. to procure the abortion of a woman.

Commencement as usual, as *ante*, p. 9.] *for that he the said C. D. on the day of in the year of our Lord at the parish of in the said county, unlawfully, maliciously and feloniously, did cause to be administered to and taken by S. L. a large quantity of a certain noxious thing, to wit, a noxious thing called savin,* [or, "*a certain poison, to wit, a poison called,*" &c.; or, "*use a certain instrument, &c. to wit, an instrument called, &c.*"] *with intent then and there and thereby to procure the miscarriage of the said S. L., against the form of the statute in that case made and provided. And you the said keeper,* &c. [conclude as usual, as *ante*, p. 9.]

(2.) Indictment for administering poison to procure the miscarriage of a woman, under 1 Vict. c. 85, s. 6, *ante*, 11.

—— [venue.] *The jurors for our Lady the Queen upon their oath present, that C. D. late of the parish of A. in the county of* B. [*yeoman*] *on the day of in the year of the reign of our Lady the now Queen Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, feloniously, wilfully, maliciously and unlawfully did * administer to and cause to be taken by one S. L. a large quantity of a certain noxious thing, to wit, a noxious thing called savin, to wit, four ounces of the said noxious thing, with intent then and there and thereby to procure the miscarriage of the said S. L., against the form of the statute in such case made and provided, and against the peace of our Lady the Queen.* [If the facts justify it, add a count or more, stating the administration of the thing differently; and add a count for administering, &c. "*a certain noxious and destructive thing to the jurors aforesaid unknown,*" with the like intent.]

(3.) Indictment on same act for using an instrument, &c. to procure the miscarriage.

Commence as in preceding form, No. 2, to the asterisk, and then thus] *use a certain instrument called a by then and there* [state concisely the mode of using it, and if any doubt, add other counts to meet it] *with intent, &c.* [conclude as in preceding form, No. 2.]

Acceptance. See "*Bill of Exchange*," Vol. I.; "*Forgery*," Vol. II.

Accessary. (a)

A PARTY guilty of an offence may be either a *principal* in the *first* degree, a principal in the *second* degree, or an *accessary before* or *after* the fact.

I. *Of Principals in General*, 14.
[7 & 8 *Geo. IV. c.* 29, *s.* 31 ; *c.* 30, *s.* 26.]
II. *Of Accessaries in General*, 19.
[7 & 8 *Geo. IV. c.* 29, *s.* 55.
III. *Of Accessaries before the Fact*, 20.
IV. *Of Accessaries after the Fact*, 21.
V. *Of the Proceedings againt Accessaries*, 23.
1. *In General*, 23.
2. *Indictment against*, 25.
3. *Trial of*, 28.
4. *Evidence*, 30.
5. *Punishment of*, 32.
[7 *Geo. IV. c.* 64, *s.* 9, 10, 11 ; 7 & 8 *Geo. IV. c.* 29, *s.* 54, 55, 56, 60, 61, 62 ; *c.* 30, *s.* 26 ; 9 *Geo. IV. c.* 31, *s.* 3, 31 ; 2 *Will. IV. c.* 34, *s.* 18 ; 7 *Will. IV.* & 1 *Vict. c.* 85, *s.* 7 ; *c.* 86, *s.* 6 ; *c.* 87, *s.* 9 ; *c.* 88, *s.* 4 ; *c.* 89, *s.* 11 ; *c.* 36, *s.* 35 ; *c.* 66, *s.* 25 ; *and* 4 & 5 *Vict. c.* 56, *s.* 2.]
VI. *Particular Enactments against Receivers of Stolen Goods*, 33.
[7 & 8 *Geo. IV. c.* 54, 55, 56, 60 ; 2 *Geo. III. c.* 28, *s.* 12, 14, 18, 19 ; 39 & 40 *Geo. III. c.* 87, *s.* 22 ; 1 & 2 *Geo. IV. c.* 75, *s.* 1, 12, 15, 21, 22.]
VII. *Forms*, 39.

I. Of Principals in General.

(1.) Of Principals in general.

In order to ascertain who are accessaries, it will be expedient to inquire in the first place who are principals.

Principals in the first degree.

Principals in First Degree.]—A principal in the *first* degree is he that is the *actor* or *actual perpetrator* of the offence. (1 *Hale*, 233, 615; 4 *Bla. Com.* 34.) It is not necessary that the act should be perpetrated with his *own hands;* for if an offence be committed through the medium of an innocent agent, the employer, though absent when the act is done, is answerable as a principal in the first degree. (*See R.* v. *Giles, R.* & *M.* 166.) Thus, if a child under the age of discretion, or any other instrument excused from the responsibility of his actions by defect of understanding, ignorance of the fact, or other cause, be incited to the commission of murder or any other crime, the incitor, though absent when the fact was committed, is, *ex necessitate*, liable for the act of his agent, and a principal in the first degree. (*Fost.* 340 ; 1 *East, P. C.* 118 ; 1 *Hawk.* c. 31, s. 7 ; *R.* v. *Palmer*, 1 *N. R.* 96.) But if the instrument be aware of the consequences of his act, he is a principal in the

(a) As to Accessaries in general, see *Law*, title Accessary ; 1 *Russ. Crim. Law*, 31, &c. 1 *Chit. C. L.* 256 to 275 ; *Arch. Crim. Law*, 9th ed. by *Jervis ; Deacon's Crim.*

first degree, and the employer, if he be absent when the fact is committed, is an accessary before the fact; (*R.* v. *Stewart, R. & R.* 363;) or, if he be present, a principal in the second degree. (*Fost.* 349; *Arch. C. L.* 9th ed. by Jervis, 4.) Also in other cases a party absent may be liable as principal; as he that puts poison into any thing to poison another and leaves it, though not present when it is taken: and so it seems all that are present when the poison is so infused and consenting thereto are principals. (*Hale's Sum.* 216.) Turning out a wild beast with intent to do mischief, so that thereupon death ensues, the party offending is guilty of murder as a principal. (*Fost.* 349; 1 *Hale*, 514.)

1. *Of Principals.*

But if one came casually, not of the confederacy, though he hindered not the felony, he is neither principal nor accessary, although he apprehend not the felon; but for his negligence he is punishable by fine and imprisonment. (*Hale's Sum.* 216; 2 *Hawk.* c. 29, s. 10.)

Principals in second degree.

Principals in Second Degree.]—A principal in the *second* degree is he who is *present aiding and assisting with a felonious intention to commit the felony*, (1 *Hale*, 233, 615; 4 *Bla. Com.* 34,) at the time the offence was committed.

The *presence* need not be an actual standing within sight or hearing of the act: an *active co-operation* in the crime at the time of its commission completes the felony. As if several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each taketh the part assigned him, some to commit the fact, others to watch at proper distances and stations to prevent a surprise, or to favour, if need be, the escape of those who are more immediately engaged. They are all, provided the fact be committed, in the eye of the law, *present* at it: for it was made a common cause with them, each man operated in his station at one and the same instant towards the same common end; and the part each man took tended to give countenance, encouragement, and protection to the whole gang, and to insure the success of their common enterprise. (*Fost.* 350).

In case of stealing in a shop, if several are acting in concert, some in the shop and some out, and the property is stolen by one of those in the shop, those who are on the outside are equally guilty as principals in the offence of stealing in a shop. (*Rex* v. *Gogerley, Russ. & R. C. C.* 343; and see *Rex* v. *Owen*, 1 *Ry. & M. C. C.* 96; *Rex* v. *Borthwick*, 1 *Dougl.* 207.)

If several act in concert to steal a man's goods, and he is induced by fraud to trust one of them, in the presence of the others, with the possession of such goods, and another of them entices him away, that the man who has the goods may carry them off, all are guilty of felony as principals. (*Rex* v. *Standley, Russ. & R. C. C.* 305.)

All persons aiding and abetting the personating a seaman are principals; the offence is not confined to the person only who personates the seaman. (*Rex* v. *Potts, Russ. & R. C. C.* 353.) So in simony all are principals. (*Baker* v. *Rogers, Cro. Eliz.* 789.)

If one encourage another to commit suicide, and is present abetting him while he does so, such person is guilty of murder as a principal; and if two encourage each other to murder themselves, and one does so, the other being present, but the latter fail in the attempt upon himself, he is a principal in the murder of the first: but if it be uncertain whether the deceased really killed himself, or whether he came to his death by accident before the moment when he meant to destroy himself, it will not be murder in either. (*Rex* v. *Dyson, Russ. & R. C. C.* 523; see *Rex* v. *Russell, Moody, C. C.* 356; *Reg.* v. *Alison*, 9 *C. & P.* 418.)

So if several persons come to a house with intent to commit an affray, and one be killed while the rest are engaged in riotous and illegal proceedings, though they are dispersed in different rooms, all will be principals in the murder. (*Dalt. J.* c. 161; 1 *Hale*, 439; *Hawk.* b. 2, c. 29, s. 8.) All those who assemble themselves together, with an intent even to commit a trespass, the execution whereof causes a felony to be committed; and continue

1. *Of Principals.*

together, abetting one another till they have actually put their design into execution; and also all those who are present when a felony is committed, and abet the doing of it, are principals in felony. And where persons combine to stand by one another in the breach of the peace, with a general resolution to resist all opposers; and, in the execution of their design, a murder is committed, all of the company are equally principals in the murder, though, at the time of the fact, some of them were at such a distance as to be out of view. (*Reg.* v. *Howell*, 9 *C. & P.* 437.)

Presence during the whole offence.

The offender, to constitute him a principal, it is not necessary that he should be *present during the whole of the transaction*: it is sufficient to show that he originally assented to the felony, and was present aiding and abetting when the offence was consummated, although he was not at the inception. As where the servants of *A.* feloniously removed goods in *A.*'s warehouse from one part of it to another, and *B.* several hours afterwards assisted in removing the goods *from* the warehouse, he was held a principal, since it was a continuing transaction. (2 *East, P. C.* 768.) If several combine to forge an instrument, and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are nevertheless all guilty as principals. (*Rex* v. *Bingley, Russ. & R. C. C.* 446; *sed vide Rex* v. *Kelly, Russ. & R. C. C.* 421, and *id.* 332, *infra.*) As, if *A.* counsel *B.* to make the paper, *C.* to engrave the plate, and *D.* to fill up the names of a forged note, and they do so, each without knowing that the others are employed for that purpose, *B.*, *C.* and *D.* may be indicted for the forgery, and *A.* as an accessary; (*Rex* v. *Dale, Moody, C. C.* 307;) for if several make distinct parts of a forged instrument, each is a principal though he do not know by whom the other parts are executed, and though it is finished by one alone in the absence of the others. (*Rex* v. *Kirkwood, Moody, C. C.* 304.)

Not sufficiently near to give assistance.

Persons *not sufficiently near to give assistance*, are not principals. Thus where Brighton uttered a forged note at Portsmouth, the plan was concerted between him and two others, to whom he was to return when he had passed the note and divide the produce. The three had before been concerned in uttering another forged note; but at the time this note was uttering in Portsmouth, the other two stayed at Gosport. The jury found all three guilty; but on a case reserved, the judges were clear, that as the other two were not present, nor sufficiently near to assist, they could not be deemed principals, and, therefore, they were recommended for a pardon. (*Rex* v. *Soares, Atkinson and Brighton*, 2 *East, P. C.* 974; *Russ. & R. C. C.* 25, S. C.; and see *R.* v. *Stewart and others, Russ. & R. C. C.* 363; and *Rex* v. *Badcock and others, Russ. & R. C. C.* 249; *Rex* v. *Manners*, 7 *C. & P.* 801.)

Going towards the place where a felony is to be committed, in order to assist in carrying off the property, and assisting accordingly, will not make a man a principal if he were at such a distance at the time of the felonious taking as not to be able to assist in it. (*Rex* v. *Kelly, Russ. & R. C. C.* 421.)

Where H. and S. broke open a warehouse and stole thereout thirteen firkins of butter, &c. which they carried along the street thirty yards, and then fetched the prisoner, who was apprised of the robbery, and he assisted in carrying the property away; he was held not a principal, the felony being complete before he interfered. (*Rex* v. *King, Russ. & R. C. C.* 332; *Rex* v. *M'Makin, id.* 333, note.)

If a wife, by her husband's order, but in his absence, knowingly uttered a forged order and certificate for prize money, the presumption of coercion at the time of uttering does not arise, as the husband was absent, and the wife may be convicted. (*Rex* v. *Morris, Russ. & R. C. C.* 270.)

It is not sufficient to make a person a principal in uttering a forged note that he came with the utterer to the town where it was uttered, went out with him from the inn at which they had put up a little before he uttered it, joined him again in the street a short time after the uttering, and at some little distance from the place of uttering, and ran away when the utterer was apprehended. (*Rex* v. *Davis, Russ. & R. C. C.* 113; and see *Rex* v. *Else, id.* 142.)

The offender must also be *aiding, assisting and abetting*, to constitute him a principal in the second degree; mere presence is not enough. Thus, if two persons are fighting, and a third comes by and looks on, but assists neither, he is not guilty of homicide in any degree, though he may be fined for a misprision if he neglect to exert himself to apprehend the offenders. (*Hale's Sum.* 216; 2 *Hawk.* c. 29, s. 10; *post*, "*Arrest.*")

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Offender must be aiding and assisting.

But if several come with intent to do mischief, though only one does it, all the rest are principals in the second degree. (1 *Hale*, 442; 2 *Hawk.* c. 29, s. 8) And if one present command another to kill a third, both the agent and the contriver are guilty. (*Id.*) And, as we have already seen, where many are engaged in the perpetration of a criminal act, and one of them is guilty of murder in the pursuit of their common object, all who are engaged in the riot or disorder are principals in the second degree. (1 *Hale*, 442; 2 *Hawk.* c. 29, s. 8.)

Where principal insane.

If the principal were insane when the act was committed, no one could be convicted as an aider or abettor. (*Reg.* v. *Taylor*, 8 *Car. & P.* 616)

Offender must be participating in the felonious design.

The offender must also be *participating in the felonious design*, or at least the offence must be within the compass of the *original* intention. (1 *East, P. C.* 257; *Rex* v. *Plumer, Kel.* 109, 117.) For if a master assaults with malice prepense, and the servant, being ignorant of his master's malignant design, takes part with him, the servant is not an abettor of murder, but of manslaughter only. So if an affray arise between two parties, and constables interfere and are killed, those who kill them, knowing their office, are principals in the first degree; those who abetted them, not knowing or having the means of knowing the constable's office, are guilty in the second degree of manslaughter only; and those who were present and concerned in the original affray, but desisted from interfering on the approach of the officers, are not at all concerned, for this was a new outrage independent of the original quarrel. (1 *Hale*, 446; 1 *Ch. C. L.* 258.)

The act must also be the result of the confederacy; and if several are out for the purpose of committing a felony, and upon an alarm run different ways, and one of them maim a pursuer to avoid being taken, the others are not to be considered principals in such act. (*Rex* v. *White, Russ. & R. C. C.* 99.)

And in order to render persons liable as principals in the second degree, the killing or other act must be in pursuance of some *unlawful* purpose, and not collateral to it. (1 *East, P. C.* 258; *Fost.* 354, 355.)

If A. is charged with the offence, and B. is charged with aiding and abetting him, it is essential to make out the charge as to B., that B. should have been aware of A.'s intention to commit murder. (*Reg.* v. *Cruise*, 8 *C. & P.* 541.)

Duelling.

In the case of murder by duelling, in strictness both the seconds are principals in the second degree; yet Lord Hale considers that, as far as relates to the second of the party killed, the rule of law in this respect has been too far strained; and he seems to doubt whether such second should be deemed a principal in the second degree. (1 *Hale*, 422, 452.) But all persons present at a prize fight, having gone thither for the purpose of seeing the prize fighters strike each other, were principals in the breach of the peace. (*Rex* v. *Perkins*, 4 *C. & P.* 537; *Rex* v. *Murphy*, 6 *C. & P.* 10; *Rex* v. *Young*, 8 *C. & P.* 645.)

Indictment against principals in second degree.

Indictment against Principals in Second Degree.]—The indictment may in general charge all the parties as principals in the first degree, or as being present, aiding and abetting. (*Fost.* 351; 2 *Hawk.* c. 23, s. 76; *Rex* v. *Young*, 3 *T. R.* 105; *Rex* v. *Towle, Russ. & R.* 314; *Reg.* v. *Crisham*, 1 *C. & Mar.* 187.) But there are exceptions to this rule as to the structure of indictments under particular statutes, which make the punishment different; and it is best not to charge all the parties as principals in the first degree, but to charge the principals in the second degree specially as aiders and abettors, when there is any doubt as to the evidence to prove them all equally guilty;

1. *Of Principals.*

for if one were altogether innocent, having repented of his purpose and left the others before the felony, and it is uncertain which is guilty, both must be acquitted. (1 *Leach*, 387.) Where a prisoner was convicted upon an indictment which charged him with a rape as a principal in the first count, and as an aider and abettor in the second, it was holden that the conviction upon the first count was good. (*Rex* v. *Folkes*, *Moody*, *C. C.* 354.) A., B. and C. were indicted for murder, in the first count as principals in the first degree, in the second count A. was indicted as principal, and B. and C. as principals in the second degree; the first count was ignored as to B. and C. and a true bill found on the second count against all, and it was held that B. and C. might be convicted on the second count, though A. was acquitted. (*Reg.* v. *Phelps*, 1 *C. & Mar.* 180.) See further as to the joinder of principals, *post*, "*Indictment*," Vol. III.

Trial.

Trial.]—The former doctrine, that principals in the second degree were only *accessaries* at the fact, is now exploded; (see 1 *Ch. C. L.* 256;) and in confirmation of this, principals in the second degree may be arraigned and tried before the principal in the first degree has been outlawed or found guilty; (1 *Hale*, 437; 2 *Hale*, 223; 9 *Co.* 67 b.;) and he may be convicted though the principal in the first degree has been acquitted. (1 *Leach*, 360; *Reg.* v. *Wallis*, 1 *Salk.* 334; 1 *Hale*, 437, &c.; 1 *Ch. C. L.* 260; *Rex* v. *Towle and others*, *Russ. & R. C. C.* 314; 3 *Price*, 145; 2 *Marsh.* 465, S. C.)

Punishment of principals in second degree.

Punishment of Principals in Second Degree.]—Principals in the second degree are liable to the same punishment as the actual perpetrators of the crime, and this not only in offences at common law, but in cases of felony created by statute, to which the same implication extends. (1 *Leach*, 64; *Rex* v. *Royce*, 4 *Burr.* 2076.) Though when the act is *necessarily* personal there are exceptions; (see 1 *Ch. C. L.* 252;) and some particular statutes impose on the actual perpetrator a different punishment.

By statutes 7 & 8 Geo. IV. c. 29, s. 61, ("*Larceny*," Vol. III.); 7 & 8 Geo. IV. c. 30, s. 26, and 4 & 5 Vict. c. 56, s. 2, ("*Malicious Injuries to Property*," Vol. V.); 2 Will. IV. c. 34, s. 18, ("*Coining*," *post*); 7 Will. IV. & 1 Vict. c. 85, s. 7, ("*Malicious Injuries to the Person*," Vol. V.); 7 Will. IV. & 1 Vict. c. 86, s. 6, ("*Burglary*," *post*, and stealing in the dwelling house, &c. "*Larceny*," Vol. III.); 7 Will. IV. & 1 Vict. c. 87, s. 9, ("*Robbery*," Vol. V. and stealing from the person, "*Larceny*," Vol. III.); 7 Will. IV. & 1 Vict. c. 88, s. 4, ("*Piracy*," Vol. V.); 7 Will. IV. & 1 Vict. c. 89, s. 11, ("*Burning*," *post*); and 7 Will. 4, & 1 Vict. c. 36, s. 35, (offences against the post office, "*Post Office*," Vol. V.): principals in *the second degree* in felonies punishable by these acts respectively, are punishable with death, or otherwise, in the same manner as principals in the first degree. Provisions applicable to principals in the second degree are also contained in most of the sections of the statute 9 Geo. IV. c. 31, relating to offences against the person; and by statutes 11 Geo. IV. & 1 Will. IV. c. 66, s. 25, and 7 Will. IV. & 1 Vict. c. 84, "*Forgery*," Vol. II., principals in the second degree are punishable in the same manner as principals in the first degree.

Where, upon the construction of any particular statute, principals in the second degree are not punishable with death, and no punishment is prescribed by the statute, then principals in the second degree may be transported for seven years, or imprisoned (with or without hard labour, for the whole or any part of the imprisonment, and with or without solitary confinement, such confinement not to exceed one month at any one time, nor three months in any one year, 7 Will. IV. & 1 Vict. c. 90, s. 5, 4 & 5 Vict. c. 56, s. 4, and see 7 & 8 Geo. IV. c. 28, s. 9, *post*, ("*Larceny*," Vol. III.) for any term not exceeding two years; and, if a male, may be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the court shall think fit. (7 & 8 Geo. IV. c. 28, s. 8, *post*, "*Larceny*," Vol. III.)

Let us now consider as to—Accessaries in *General*;—Accessaries *before* the Fact;—and Accessaries *after* the Fact.

II. Of Accessaries in General.

2. *Of Accessaries in general.*

An accessary (*quasi accedens ad culpam*) is he who is not the *chief actor* in the offence, nor *present* at its performance, but is some way concerned therein, either *before* or *after* the fact committed. (4 *Blu. C.* 35.)

(2.) Who are accessaries.

In the highest capital offence, namely, *high treason*, there are no accessaries, either *before* or *after* the fact; for all consenters, aiders, abettors, and knowing receivers and comforters of traitors, are principals. 1 *Hale*, 613; 4 *Bla. C.* 35. *Sed vide Fost.* 342, *contra.*) But yet as to the course of proceeding, it hath been the course, that those who did actually commit the very fact of treason should be first tried, before those that are principals in the second degree; because otherwise this inconvenience might follow, that the principals in the second degree might be convicted, and yet the principals in the first degree may be acquitted, which has been considered absurd. (1 *Hale*, 437, 613; 2 *Hale*, 223; 9 *Co.* 67 b.)

In treason there are no accessaries.

The rule that there are no accessaries in treason does not hold in the case of *inferior treasons*, as those which relate to the coins, &c.; for in these no advice to commit them, unless they are actually performed, can make a man a principal traitor. (*Fost.* 342; 4 *Blu. C.* 35.)

In inferior treasons there are.

In cases that are criminal, but not capital, being below the degree of felony, as in *misdemeanors and trespass* at common law, there are no accessaries; for all the accessaries *before* are in the same degree as principals; and accessaries *after*, by receiving the offenders, cannot be in law under any penalties as accessaries, unless the acts of parliament that inflict those penalties do expressly extend to receivers or comforters, as some do. (1 *Hale*, 613; 12 *Rep.* 81; *Evans's case, Fost.* 73; 4 *Bla. C.* 36.)

In offences below felony no accessaries.

By the stat. 7 & 8 Geo. IV. c. 29, s. 55, it is enacted, that if any person shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, obtaining, or converting whereof is made an *indictable misdemeanor by this act*, (relating to larceny and acts connected therewith,) such person knowing the same to have been unlawfully stolen, taken, obtained or converted, every such receiver shall be guilty of a *misdemeanor*, and may be indicted and convicted thereof. See this provision in full, *post*, with provisions as to the trial and punishment of offenders. See also the provisions of the 7 & 8 Geo. IV. c. 29, s. 61, and 7 & 8 Geo. IV. c. 30, s. 26, *ante*, 18, enacting the liability and punishment of accessaries before and after the fact in felonies and misdemeanors under those acts.

If indeed the act of the receiver amount to a rescue, or to the obstructing an officer of justice in the execution of his duty, or the like, he would undoubtedly be indictable for it as for a misdemeanor. (2 *Hawk.* c. 29, s. 4.)

In this respect the highest and lowest offences are alike; the former, as it should seem, on account of the magnitude and danger of the guilt; the latter, because the crime is so small that the law does not condescend to mark the minor shades of distinction.

Therefore the business of this title of accessary refers only to *capital felonies*, whether by the common law or by act of parliament.

Accessaries only in capital felonies.

Concerning which, Lord *Coke* observes generally, that when an offence is felony, either by the common law or by statute, all accessaries both before and after are incidently included. (3 *Inst.* 59.)

When implied in felony.

But as to felonies by act of parliament, Lord *Hale* distinguishes thereupon as follows; regularly (he says) if an act of parliament enacts an offence to be felony, though it mention nothing of accessaries *before* or *after*, yet virtually and consequently those that counsel or command the offence are accessaries *before*, and those that knowingly receive the offender are accessaries *after*. (1 *Hale*, 613.) But if the act of parliament, that makes the felony, in express terms comprehend accessaries *before*, and make no mention of accessaries *after*, namely, receivers or comforters, there it seems there can be no accessaries *after*; for the expression of procurers, counsellors, abettors, all which import accessaries before, makes it evident that the law-makers did not intend to include accessaries *after*, which is an offence of a lower degree than acces-

In felonies by statute.

2. *Of Accessaries in general.*

saries *before*. (1 *Hale*, 614.) Yet, says Mr. Hawkins, I take it to be settled at this day, that in these and all other cases, where a statute makes any offence treason or felony, it involves the receiver of the offender in the same guilt with himself, in the same manner as in treason or felony at common law, unless there be an express provision to the contrary. (2 *Hawk.* c. 29, s. 14.)

And although it be generally true that an act of parliament, creating a felony, renders, consequentially, accessaries *before* and *after* within the same penalty, yet the special penning of the act sometimes varies the case. (1 *Hale*, 614.) Thus the statute of 27 Eliz. c. 2, made the coming in of a Jesuit treason, the receiving or relieving of him felony, the contributing of money to his relief a *præmunire*. So that acts of parliament may diversify the offences of accessary or principal, according to the various penning thereof, and so have done in many cases. (1 *Hale*, 615.)

A statute which excluded the principals from the benefit of clergy did not thereby exclude the accessaries before or after; neither did a statute excluding the accessaries thereby exclude the principals. (2 *Hawk.* c. 33, s. 26.)

Accessary to an accessary.

There may be an accessary to a person who was accessary before the fact. —As if *A.* advise and procure *B.* to murder *C.*; by this *A.* is accessary *before* the fact; and though but accessary, yet if *D.* receives and conceals him from justice, *D.* hereby becomes an accessary; but there cannot be an accessary to a person who was accessary *after* the fact. (3 *P. Wms.* 475; 2 *Hawk.* c. 29, s. 1.)

III. Of Accessaries before the Fact.

(3.) Accessary before the fact.

An accessary before the fact committed is he that, *being absent at the time of the felony committed, doth yet procure, counsel, command, or abet, another to commit a felony.* (1 *Hale*, 615.)

Must be absent.

Being absent at the time of the Felony committed.]—For if he be *present*, he is not an accessary, but a principal.—As if divers come to commit an unlawful act, and be present at the time of the felony committed, though one of them only doth it, they are *all* principals. (*Hale's Sum.* 215; *ante*, 15.) So if one present move the other to strike; or if one present did nothing, but yet came to assist the party if needful; or if one hold the party while the felon strikes him; or if one present deliver his weapon to the other that strikes: for they are *present* aiding, abetting, or comforting. (*Hale's Sum.* 216.) And we have already seen what is a sufficient presence to constitute a party an offender as a principal. (*ante*, 15, 16.)

Must procure, counsel and abet.

Procure, counsel, command, or abet.] Lord *Coke* and Mr. *J. Foster* considered the word *command* as comprehending all those who *incite, procure, set on*, or *stir up*, any other to do the fact. (2 *East's P. C.* 641.) But here note some diversities: As,—

(1) *When the principal doth not accomplish the fact altogether in the same sort as it was beforehand agreed between him and the accessary;* and therefore if one command another to lay hold upon a third person, and he lays hold upon him and robs him, the person commanding is not accessary to the robbery, for his command might have been performed without any robbery. (*Dalt.* c. 161, p. 369; and see 1 *Ch. C. L.* 262.)

But if the command had been to beat him, and the party commanded doth kill him, or beat him so that he dieth thereof; the person commanding shall be accessary to the murder; for it is a hazard in beating a man that he may die thereof. (*Id.*) *Sed query*, if this does not mean where the command was to beat the other *violently*. (See 1 *Hale*, 442; 1 *East, P. C.* 257.)

(2) *He that commandeth or counselleth any evil or unlawful act to be done, shall be adjudged accessary to all that shall ensue upon the same evil act, but not to any other distinct thing.* As if one command another to steal a horse, and he stealeth an ox; or to rob a man by the highway of his money, and he robs him in his house of his plate; or to burn such a one's house, and he

burneth the house of another: these are other acts and felonies than he commanded to be done, and therefore he shall not be adjudged accessary to them. (*Id.*)

3. *Of Accessaries before the fact.*

(3) *But if a person commit the same felony which another did command or counsel to be done, though he doth it another time, or in another place, or in another sort than was commanded or counselled, yet here such person commanding or counselling shall be accessary.* As if he doth counsel to kill a man by poison, and he kills him with a dagger; or to kill him by the highway, and he kills him in his house; or to kill him one day, and he kills him on another day; in these and the like cases he shall be accessary to the murder (*id.*); for the means used are immaterial so that the criminal object be effected.

(4) *Those offences, which in the construction of law are sudden and unpremeditated, cannot have any accessaries before.* As killing a man by misadventure in his own defence, or manslaughter; for in such case there can be no procuring, counselling, commanding, or abetting. (1 *Hale*, 847. 450. 616.)

(5) It seems to be generally agreed, that *he who barely conceals a felony which he knows to be intended, is guilty only of a misprision of felony, and shall not be adjudged an accessary;* for this is not procuring, counselling, or abetting. (2 *Hawk.* c. 29, s. 23.)

Thus words that seem to imply mere *permission*, as if one informs another that he is about to commit a felony, and the latter replies, "You may do your pleasure for me," this does not implicate him as an accessary, but it only fixes him with the guilt of a misprision. (1 *Hale*, 616; 2 *Hawk.* c. 29, s. 23. 28.)

(6) Also if a man counsel or command another to kill a person, and before he hath killed him, he who counselled or commanded it repents and *countermands* it, charging him not to kill him, and yet after he doth kill him; here such person countermanding shall not be adjudged accessary to the murder; for, generally, the law adjudgeth no man accessary to a felony before the fact, but such as continue in that mind at the time that the felony is done and executed. (*Dalt.* c. 161, p. 369.)

(7) But if a person advise a woman to kill her child as soon as it shall be born, and she kill it in pursuance of such advice; he is an accessary to the murder, though at the time of the advice, the child not being born, no murder could be committed of it; for the influence of the felonious advice continuing till the child was born, makes the adviser as much a felon as if he had given his advice after the birth. (2 *Hawk.* c. 29, s. 18.)

(8) If the crime solicited to be committed be *not perpetrated*, then the adviser may still be indicted for a misdemeanor in having made such solicitation. (*Rex* v. *Higgens*, 2 *East*, 5; see *post*, "*Attempts.*")

IV. Of Accessaries after the Fact.

An accessary after the fact is where a person *knowing the felony to have been committed by another, relieves, comforts, or assists the felon.* (1 *Hale*, 618; 4 *Bla. Com.* 37.)

(4.) Accessaries after.

Knowing the Felony to be committed.]—There can be no doubt but that it is necessary that the receiver have notice of the felony, either express or implied; and it must be laid in the indictment, that the receiver *knew* that the person received by him had committed the principal felony. (2 *Hawk.* c. 29, s. 32.) Some particular evidence appears necessary to raise a presumption of knowledge. (1 *Hale*, 323. 622; 3 *P. Wms.* 496.)

He must have notice.

The Felony.]—This, as hath been said, holds place only in *felonies*, and in those felonies where by the law judgment of death regularly ought to ensue; and therefore ought not in *misdemeanors*. (See 1 *Hale*, 618.)

There must be a felony.

4. *Of Accessaries after the fact.*

And it seems if a person do barely receive, comfort, and conceal an offender guilty of *any common trespass, or inferior crime of the like nature*, though he knew him to have been guilty, and that there is a warrant out against him, (which by reason of such concealment cannot be executed), yet he is not an accessary to the offence; but perhaps in such case he may be indictable for a contempt of the law in hindering the due course of justice. (2 *Hawk.* c. 29, s. 4.)

The felony must be *completed.* If therefore *A.* gives *B.* a mortal stroke, and *C.* receives or relieves *A.*, or helps him to escape before the death of *B.*, and *B.* afterwards dies, *C.* is not an accessary, because at the time when he harboured *A.* no felony had been completely committed. (1 *Hale*, 622; 2 *Hawk.* c. 29, s. 35; 4 *Bla. Com.* 38.)

He must relieve, comfort, or assist the felon.

Relieves, comforts, or assists the Felon.]—In the explication of these words, several things are considerable:—

(1) Generally, any assistance whatsoever given to one known to be a felon, in order to hinder his being apprehended, or tried, or suffering the punishment to which he is condemned, is sufficient to bring a man within this description, and make him accessary to the felony; as where one assists him with a horse to ride away with, or with money or victuals to support him in his escape. (2 *Hawk.* c. 29, s. 26.)

(2) But if a man know that a person hath committed a felony, but doth not discover it, this doth not make him an accessary, but it is a misprision of felony, for which he may be indicted, and upon his conviction fined and imprisoned. (1 *Hale*, 618; *post*, "*Felony*," Vol. III.)

(3) Also if a man see another commit a felony, but consents not, nor yet takes care to apprehend him, or to levy hue and cry after him, or upon hue and cry levied doth not pursue him; this is a neglect punishable by fine and imprisonment, but it doth not make him an accessary. (1 *Hale*, 618.)

(4) In like manner, if one commit a felony, and come to a person's house before he be arrested, and such person suffer him to escape without arrest, knowing him to have committed a felony, this doth not make him an accessary; but if he take money of the felon to suffer him to escape, this makes him accessary: and so it is if he shut the fore-door of his house, whereby the pursuers are deceived, and the felon hath opportunity to escape, this makes him an accessary; for here is not a bare omission, but an act done by him to accommodate the felon's escape. (1 *Hale*, 619.)

(5) Also it seems to be settled at this day, that whosoever rescues a felon from an arrest for the felony, or voluntarily suffers him to escape, is an accessary to the felony. (2 *Hawk.* c 29, s 27.)

(6) But if a felon be in prison, he that relieves him with necessary meat, drink, or clothes, for the sustentation of life, is not accessary. (1 *Hale*, 620.)

(7) So if he be bailed out, it is lawful to relieve and maintain him, for he is *quodammodo* in custody, and is under a certainty of coming to his trial. (1 *Hale*, 620.)

(8) But if a felon be in gaol, for a man to convey instruments to him to break prison to make an escape, or to bribe the gaoler to let him escape, makes the party an accessary; for though common humanity allows every man to afford such persons necessary relief, yet common justice prohibits all unlawful attempts to cause their escapes. (1 *Hale*, 621; *post*, "*Escape*," Vol. II.)

(9) The sending a letter in favour of a felon, or advising to labour witnesses not to appear, makes no accessary; but it is a high contempt. (*Hale's Sum* 219.)

(10) A man may be accessary to an accessary before the fact, by the receiving of him, knowing him to be an accessary to felony. (1 *Hale*, 622; 2 *Hawk.* c. 29, s. 1, 3 *P. Wms.* 475; *ante*, 20.)

(11) If a man have goods stolen, and he receive his goods again, simply, without any contract to favour the felon in his prosecution, this is lawful; but if he receive them upon agreement not to prosecute, or to prosecute faintly, this is theftbote, punishable by imprisonment and ransom, but yet it makes

him not an accessary; but if he takes money of him to favour him, whereby he escapes, this makes him accessary. (1 *Hale*, 619.)

4. *Of Accessaries after the fact.*

(12) It seems agreed, that the law hath such a regard to that duty, love, and tenderness which a wife owes to her husband, as not to make her an accessary to felony by any receipt given to her husband. Yet if she be any way guilty of procuring her husband to commit it, it seems to make her an accessary before the fact, in the same manner as if she had been sole. Also it seems agreed, that no other relation besides that of a wife to her husband will exempt the receiver of a felon from being an accessary to the felony; from whence it follows, that if a master receive a servant, or a servant a master, or a brother a brother, or even a husband a wife, they are accessaries in the same manner as if they had been mere strangers to one another. (2 *Hawk.* c. 29, s. 34; *post*, "*Wife*," Vol. V.)

But if the wife alone, the husband being ignorant of it, do receive any other person, being a felon, the wife is accessary, and not the husband. (1 *Hale*, 621.)

But if the husband and wife both receive a felon knowingly, it shall be adjudged only the act of the husband, and the wife shall be acquitted. (*Id.*)

(13) A person may be indicted for receiving stolen property if it remain the same in substance though the name be changed, and therefore a principal may be indicted for stealing a live sheep and the accessary with receiving twenty pounds of mutton. (*R.* v. *Cowell*, 2 *East*, *P. C.* 781; and see *R.* v. *Puckering*, *R. & M. C. C.* 242.)

V. Of the Proceedings against Accessaries.

And herein—first, of Proceedings in General—secondly, of the Indictment—thirdly, of the Trial—fourthly, of the Evidence—fifthly, of the Punishment.

(5.) Proceedings against accessaries.

(1.) Proceedings in General.

(1.) In general.

Formerly accessaries could not be prosecuted with effect until the principal was convicted and attainted, and such conviction is still necessary before proceedings against accessaries in general *after the fact*, unless they consent to such proceedings, see 1 *Hale*, 623; 2 *Hawk.* c. 29, s. 45; now, however, by the recent statute, 7 & 8 Geo. IV. c. 64, s. 9, accessaries *before the fact* to felonies are to be deemed guilty of a substantive felony, and may be proceeded against as felons whether or not the principal has been convicted. (See the provisions in full, *post*, 30.) But this statute only applies where the accessary might at common law have been indicted with, or after the conviction of, the principal. (*R.* v. *Russell*, *Moody*, *C. C.* 356.) And therefore a person cannot be tried for inciting another to commit suicide, although the other commits suicide. (*Reg.* v. *Leddington*, 9 C. & P. 79.)

Conviction of principal, when necessary.

And *receivers of stolen goods*, if the stealing was a felony, may be tried and convicted, either as accessaries or for a substantive felony, and in the latter case whether or not the principal be convicted or be amenable to justice, or may be indicted and convicted for a misdemeanor if the stealing was a misdemeanor. (7 & 8 Geo IV. c. 29, s. 54, *post*, 34.)

And with respect to attainder, by the stat. 7 Geo. IV. c. 64, s. 11, which recites, that in order that all accessaries may be convicted and punished in cases where the principal felon is not attainted, it is enacted, "That if any principal offender shall be in anywise *convicted* of any felony, it shall be lawful to proceed against any accessary, either before or after the fact, in the same manner as if such principal felon had been attainted thereof, notwithstanding such principal felon shall die or be admitted to the benefit of clergy, or pardoned, or otherwise delivered before attainder; and every such accessary shall suffer the same punishment, if he or she be in anywise convicted, as he or she should have suffered if the principal had been attainted." This provision is substituted for that contained in the stat. 1 Ann. st. 2, c. 9, s. 1, which is repealed.

Attainder of principal, when necessary.

If the principal be erroneously attaint, yet the accessary shall be put to

Where the prin-

5. *Proceedings against.*

cipal is erroneously attainted.

answer, and shall not take advantage of the error in that attainder; but the principal reversing the attainder reverseth the attainder of the accessary. (1 *Hale*, 625.) Where an indictment for receiving stolen goods averred that the principal felon had been *duly convicted*, upon an objection that the record which was produced was not sufficiently formal and correct to support the averment, it was held that the *judgment* was not necessary, and might be rejected; that the *conviction was sufficient;* that in the common case where the receiver is tried with the thief, there is no judgment on the thief before the verdict against the receiver; and that although the record produced was full of errors, yet an erroneous attainder of the principal is sufficient, as against the accessary, until it is reversed. (*Baldwin's case*, Monmouth Summer Assizes, 1812, *cor. Thomson B.*, 3 *Campb.* 265.(*a*)) And it should seem the reversal will not now be of any avail to the accessary if he be not indicted *as an accessary*, but for a substantive felony according to the foregoing recent enactments.

Where a person is charged as accessary to more than one.

Formerly if a man had been indicted as accessary in the same felony to several persons, he could not have been arraigned till all the principals were convicted and attainted: but now, if a man be indicted as accessary to two or more, and the jury find him accessary to one, it is a good verdict, and judgment may pass upon him. (*Lord Sanchar's case*, 9 *Rep.* 119; *Fost.* 361.)

And therefore the Court in their discretion may arraign him as accessary to such of the principals who are convicted; and if he be found guilty as accessary to them or *any* of them, judgment shall pass upon him; but on the other hand, if he be acquitted, that acquittal will not discharge him as accessary to the others.

Accessary when may be tried twice.

By statute 7 Geo. IV. c. 64, s. 9, *post*, 29, it is provided, that no person who shall be once duly tried for any such offence, *viz.* of being accessary before the fact to a felony, whether as an accessary before the fact or as for a substantive felony, shall be liable to be again indicted or tried for the same offence.

Again, the 10th section of the same act (*post*, 31) provides, that no person who shall be once duly tried *for any offence of being accessary*, shall be liable to be again indicted or tried for the same offence.

But if one person be indicted as principal, and another as accessary, and both be acquitted, yet the person indicted as accessary may be indicted as principal, and the former acquittal as accessary is no bar. (1 *Hale*, 626.)

It has been said, if a person be indicted as principal, and acquitted, he shall not be indicted as accessary *before*: and if he be, he may plead his former acquittal in bar, for it is in substance the same offence. (1 *Hale*, 626.) But Mr. Justice *Foster* observes upon this, that in the eye of the law the offences of principal and accessary do specifically differ; and if a person indicted as principal cannot be convicted upon evidence tending barely to prove him to have been accessary before the fact, which must needs be admitted, it doth not appear how an acquittal upon one indictment can be a bar to a second for an offence specifically different from it. (*Fost.* 362.) And the distinction is also taken in *Rex* v. *Winifred Gordon;* (1 *East's P. C.* 352;) and there it was held by all the judges, that *W. G.* having been indicted as accessary before the fact, and acquitted upon that indictment, might be indicted again as principal.

So if a man be indicted as principal, and acquitted, he may be indicted as accessary *after*, for they are offences of several natures. (1 *Hale*, 626.)

And so it is if he be indicted as accessary *before*, and acquitted; yet for the same reason he may be indicted as accessary *after*. (*Id.*)

No particular observations seem necessary as to the proceedings themselves

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(*a*) The judgment upon an indictment must be taken to be good until it is reversed by a writ of error; as in the case of proceedings against the accessary. So if there be a judgment against the husband for treason, not reversed by error, it is sufficient to deprive the wife of her dower. (*Per Lawrence*, J. *Holmes* v. *Walsh*, 7 *T. R.* 465.)

against accessaries, except perhaps as regards—the indictment; the evidence; the trial; and the punishment of them; each of which proceedings we shall consider accordingly.

5. *Proceedings against.*

(2.) The Indictment against Accessaries. (*a*)

(2.) Indictment.

Since the 7 Geo. IV. c. 64, s. 9, and 7 & 8 Geo. IV. c. 29, ss. 54, 55, the points relative to indictments against accessaries, collected in the prior editions of this and other works, are for the most part inapplicable.

Accessaries *before* the fact.

By the former of these enactments accessaries *before the fact* to felonies may be indicted and convicted either as an *accessary together with the principal*, or *after conviction* of the principal, or he may be indicted for a *substantive felony*, whether or not the principal has been convicted or is amenable to justice. (See *ante*, 23, 24, and the words of the act, *post*, 30.)

By the 7 & 8 Geo. IV. c. 29, s. 61, and 7 & 8 Geo. IV. c. 30, s. 26, accessaries *before the fact* to *misdemeanors* punishable under those acts may be indicted as principals. (See these enactments, "*Larceny*," Vol. III; and "*Malicious Injuries to Property*," Vol. V.)

Accessaries *after* the fact.

With respect to accessaries *after the fact*, it has been already observed that at common law an accessary could not be tried without his consent before the conviction of his principal; (*Fost.* 365; 2 *Hawk.* c. 29, s. 45; 1 *Hale*, 623; *ante*, 23); and this is still law in the case of accessaries *after* the fact, except in particular cases of *receivers* of stolen property, provided for by the 7 & 8 Geo. IV. c. 29, s. 54 & 55, (*post*, 34.)

By the first of these sections (54) accessaries after the fact to *receiving* stolen property as therein mentioned, the stealing whereof amounts to a *felony*, may be indicted and convicted *as such accessary* after the fact, or for a *substantive felony*, and in the latter case, whether or not the principal has been convicted or is amenable to justice. (See this enactment in full, *post*, 34.)

Also by the other section (55) the *receiver* of stolen property, the stealing whereof is a *misdemeanor*, by that act may be indicted and convicted of a misdemeanor, whether the principal has been convicted or not, or whether or not he be amenable to justice. (*b*) (See this enactment in full, *post*, 34.)

Venue.

With respect to the *venue* in the indictment, see *post*, 29.

Choice of remedies.

The prosecutor has now the option, in prosecuting an accessary *before the fact*, to indict him either as an accessary in an indictment against him with the principal, or to indict him alone as an accessary after the conviction of the principal, or to indict him alone for a substantive felony. In the choice of these remedies it would be best to adopt the first, as the prosecutor would

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(*a*) As to the framing of indictments in general, see *post*, "*Indictment*," Vol. III.

(*b*) Formerly where the principal was amenable to justice, the receiver ought still to have been prosecuted as an accessary to the felony, and not for a misdemeanor only, under the 3 W. & M. c. 9, s. 4, and 5 Anne, c. 31, s. 6. *By all the judges*, 2 *MS. Sum.* 309; *Fost.* 373. Thus *Jonathan Wild* was indicted for a misdemeanor, in receiving stolen goods, knowing them to have been stolen. Upon the prosecutor's evidence it appeared that the felons had been convicted and executed. Whereupon it was objected that this indictment would not lie, being only given in case where the felon cannot be taken, this being only a jurisdiction given under these particular circumstances. And *Pratt*, C. J., being of that opinion, the defendant was acquitted. *Jonathan Wild's case*, *O. B.* 5 Geo. I. 2 *East's P. C.* 746. *W. Wilkes* was convicted on statute 3 W. & M. c. 9, s. 4, and 5 Anne, c. 31, s. 6, as for a misdemeanor in receiving stolen goods; but it appearing that the prosecutor had had an opportunity of taking the principal, which he had neglected to do, though the latter could not be taken at the time of finding the indictment, judgment was respited until the opinion of the judges could be taken. In Trinity Term, 1774, seven of the judges against four were of opinion that there ought to be judgment on the conviction. The four other judges thought that where a prosecutor had it once in his power to take the principal, and neglected it, it took the case out of the sta-

5. *Proceedings against.*

only have to prove the guilt and not to procure the *conviction* (*a*) of the principal, as he would under the second.

In prosecuting an accessary *after* the fact, unless in the cases provided for by the 7 & 8 Geo. IV. c. 29, ss. 54, 55, (*ante*, 25, *post*, 34,) he must be indicted as such accessary either with the principal, or without him if the principal has been convicted; (1 *Hale*, 623;) the former course being the most usual and best. If he be indicted under the cases provided for by the above provisions, the prosecutor has the same choice of remedies as he has against an accessary *before* the fact.

Joinder of offences.

It is no objection in point of law that an indictment charges prisoners in one count as principals and in another as receivers. (*R.* v. *Galloway*, *R. & M. C. C.* 235.)

Or that the prisoners are tried without having the prosecutor put to his election on which charge to proceed, though the prisoners asked it. (*Id.*)

But *semble*, it is reasonable to put the prosecutor to his election, and the officers ought not to join both charges. (*Id.*)

When the principal does not appear to take his trial, but the accessary does, the latter is not compellable to plead. (*Reg.* v. *Ashmell*, 9 *C. & P.* 236.)

Against principal and accessary jointly.

Indictment against Accessary together with his Principal.]—Where the parties are thus joined in the same proceeding, the proper course is first to state the guilt of the principal according to the facts as if he alone had been concerned, and then in case of accessaries before the fact to aver "that C. D. late of, &c. (*the procurer*) before the committing of the said felony and murder, (*or* burglary, *as the case is*,) in form aforesaid, to wit, on, &c. with force and arms, &c did maliciously and feloniously incite, move, procure, aid, and abet, (*or* counsel, hire and command, *following the words of the statute if the defendant be made an accessary thereby, or else the effect of such words*, see *Rex* v. *Grevil*, 1 *And.* 195,) the said A. B. (*the principal felon*) to do and commit the said felony and murder, and in manner aforesaid against the peace," &c. See form, *post*, 42.

And where a man is indicted as accessary *after* the fact together with his principal, the original felony is to be stated in the same way, and the conclusion must aver that the accessary *did receive, harbour, and maintain, &c.* the principal felon, *well knowing* that he had committed the felony; see form, *post*, 41. The averment of knowledge is indispensably requisite, because without it the guilt does not manifestly appear. (1 *Hale*, 622; *Com. Dig. Justices*, t. 2; 2 *Hawk.* c. 29, s. 33; c. 25, s. 67; *R.* v. *Thompson*, 2 *Lev.* 308.)

Indictment.

A person may be indicted for receiving stolen property, if it remain the same in substance, though the name be changed: and, therefore, a principal may be indicted for the stealing of a live sheep, and the accessary with receiving twenty pounds of mutton. (*Rex* v. *Cowell and Green*, 2 *East's P. C.* 781; *R* v. *Puckering*, *R. & M. C. C.* 242.)

In an indictment against the receiver of stolen property, the property stated to have been received should agree with that averred to be stolen; but in *Morris's case*, *Leach*, 525, where the indictment charged the principal with stealing two bank notes, the property of S. S., and charged the accessary with receiving the said notes, the property and chattels of the said S. S., it was holden that the word "chattels" might be rejected as surplusage.

It is not necessary to use the word "accessary" in the indictment, (*Rex* v. *Burridge*, *Plow.* 477,) or to set forth the means by which the accessary before the fact incited the principal to commit the felony, or the accessary after

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tutes. But the seven held that the word "*cannot*" in the statute, must be applied to the time of the prosecution for the misdemeanor, if the principal be then without collusion out of custody, which was the case here, *Wilkes's case*, *Warwick Lent Ass.* 1774, 2 *East's P. C.* 746. This was remedied by the 22 Geo. III. c. 58, and now by the above act of 7 & 8 Geo. IV. c. 29, s. 55.

(*a*) As to this, see *post*, 27. As to proof of such conviction, see *post*, "*Evidence*," Vol. II.

received, concealed, or comforted him; for it is perfectly immaterial in what way the purpose of the one was effected, or the harbouring of the other secured; and as the means are frequently of a complicated nature, it would lead to great inconvenience and perplexity if they were always to be described upon the record. (*Co. Entr.* 56, 57; *Rast. Entr.* 48; 9 *Co.* 114; 2 *Hawk.* c. 29, s. 17.)

5. Proceedings against.

If two are charged jointly with receiving stolen goods, a joint act of receiving must be proved; proof that one received in the absence of the other and afterwards delivered to him, will not suffice. Successive receivers are all separate receivers, and all punishable. (*R.* v. *Messingham*, *R. & M. C. C.* 257.)

Against accessary alone after conviction of principal.

Indictment against the Accessary alone after the Conviction of the Principal.]—It is not necessary in this case to aver, that the latter committed the felony, or on the trial to enter into a detail of the evidence adduced against him; but it is sufficient to recite with certainty the record of the conviction, because the Court will presume every thing on the former occasion to have been rightly and properly transacted. (*Holmes* v. *Walsh*, 7 *T. R.* 465; *Fost.* 365.)

It is sufficient in an indictment for felony against a receiver of stolen goods, to state, that the principal was "*tried and duly convicted*," without going on to show what *judgment* was passed upon him, or how he was delivered. (*Hyman's case*, 2 *Leach*, 925.)

Against accessary alone for a substantive felony or misdemeanor.

Indictment against Accessary alone for a substantive Felony or Misdemeanor.]—In this case it is not, it seems, necessary to allege the original felony or misdemeanor with that particularity as to time and place as in an indictment against the defendant together with the principal. (See 1 *Stark. C. L.* 168; *R.* v. *Scott*, 2 *East's P. C.* 781.) The indictment against a receiver of stolen goods need not allege time and place to the fact of the stealing the goods; it is sufficient if they be alleged to the fact of the receipt. (2 *East's P. C* 780.) In this indictment it is not necessary to aver that the principal has not been convicted. (*R.* v. *Barter*, 5 *T. R.* 83.) An indictment is properly framed which states that the principal felon cast away and destroyed a vessel, and that the accessary incited, moved, aided, counselled, hired, and commanded him to do it; and the accessary may be convicted on an indictment so framed, although the principal felon has not been tried, and does not appear to be amenable to justice. (*Reg.* v. *Wallace*, 1 *C. & M.* 200.) In other respects the indictment will assimilate that against principal and accessary jointly. (See form, *post*, 43.)

If the principal felon be *unknown*, the indictment may state the offence to have been committed by "some person or persons to the jurors aforesaid unknown." Thus in the case of *John Thomas*, the indictment was for receiving goods stolen by persons unknown, which was objected to be insufficient, in not ascertaining the principal thief, and that it ought to appear to whom in particular the prisoner was accessary. This objection being referred to the judges, they were unanimously of opinion that the indictment was good; that the great view of the statutes was to reach the receivers where the principal thieves could not easily be discovered. (*R.* v. *Thomas*, 2 *East's P. C.* 781.)

Where the principal is *known*, it seems proper to state it according to the truth: and the common form of the indictment is to state the fact of stealing the goods by the principal, and the receipt of them by the receiver, he then and there well knowing the said goods and chattels to have been feloniously stolen, &c. (*R.* v. *Hyman*, 2 *Leach*, 925.) Or, an allegation that the goods were stolen "by a certain evil disposed person," is good, without stating the name of the principal felon or averring that he is unknown. (*R.* v. *Jervis*, 6 *C. & P.* 156.) And this in many cases may be the best mode of stating the offence.

Where in an indictment against an accessary to a felony it was stated, that the felony was committed "by a person to the jurors unknown;" and it appeared that the principal felon was a witness before the grand jury, it was

5. *Proceedings against.*

held, that the indictment could not be supported. (*R.* v. *Walker*, 3 *Camp.* 264; *Reg.* v. *Caspar*, 9 *C. & P.* 289.)

If a charge against an accessary be that the principal felony was committed by persons *unknown*, it is no objection that the same grand jury have found a bill imputing the principal felony to J. S. Thus in *R.* v. *J. Bush*, the prisoner was tried before Mr. Baron *Garrow*, at the Gloucester Summer Assizes, 1818, and was convicted, and received sentence of transportation for fourteen years, but execution was stayed in order that the opinion of the judges might be taken upon the propriety of the conviction. The indictment stated, that "a certain person or persons to the jurors unknown," the dwelling-house of *Hannah Wilmot* burglariously did break and enter, and certain silver plate, commonly called a silver cream jug, her goods, did steal, and that *Bush* feloniously did receive and have the same, he then and there well knowing the same to have been feloniously and burglariously stolen, &c. Upon the trial it appeared, that among the records of indictments returned by the same grand jury, there was one charging one *Henry Moreton* as principal in the burglary, and the prisoner *Bush* as accessary after, in receiving the cream jug. Mrs. *Wilmot* proved that her house had been broken but once, that she had lost only one cream jug, and that she had preferred two indictments to the grand jury. The counsel for the prosecution had declined to proceed on the indictment against *Moreton*. *Ludlow*, for the prisoner, objected, that the allegation in the present indictment, that the person or persons who committed the burglary were unknown to the jurors, is negatived by the other record, and that the prisoner was entitled to be acquitted. This point was reserved for the opinion of the judges, who, in Michaelmas Term, 1818, held the conviction right, being of opinion that the finding by the grand jury of the bill imputing the principal felony to J S. was no objection to the second indictment, although it stated the principal felony to have been committed by certain persons to the jurors aforesaid *unknown*. (*R.* v. *Bush*, *R. & R. C. C.* 372.)

In a late case it was made a question, but not decided, whether upon a charge of receiving from T. S., the receipt from T. S. must be proved, the statute making it criminal without regard to the person from whom the stolen property is received. (*R.* v. *Messingham*, *R. & M. C. C.* 257.)

(3.) Trial of Accessaries.

(3.) Time of trial where accessary indicted as such with principal.

Time of Trial, &c.]—Where the accessary is indicted as such, *together with his principal*, which is in general the best and most usual way, it seemeth the accessary may be put to answer before the principal hath appeared; but his plea cannot be tried before such appearance, unless he desire it himself; but if he will put himself upon the trial before the principal be tried he may, and his acquittal or conviction upon such trial is good. (2 *Hawk.* c. 29, s. 45; 1 *Hale*, 623.) But it seemeth necessary in such case to respite judgment till the principal be convicted and attaint, for if the principal be after acquitted, that conviction of the accessary is annulled, and no judgment ought to be given against him; but if he be acquitted of the accessary, that acquittal is good, and he shall be discharged. (1 *Hale*, 623, 624.)

Trial of.

If the principal and accessary appear together, and the principal plead the general issue, the accessary shall be put to plead also; and that if he likewise plead the general issue, both may be tried by one inquest; but that the principal must be first convicted, and that the jury shall be charged, that if they find the principal not guilty, they shall find the accessary not guilty. But it seems agreed, that if the principal plead a plea in bar or abatement, or a former acquittal, the accessary shall not be forced to answer till that plea be determined; for if it be found for the principal, the accessary is discharged; if against the principal, yet he shall after plead over to the felony, and may be acquitted. (2 *Hawk* c. 29, s. 47; 1 *Hale*, 624.)

Even in a case where the principal was indicted for burglary and larceny

in a dwelling-house, and the accessary charged in the same indictment as accessary before the fact to the said "felony and burglary," and the jury acquitted the principal of the burglary, but found him guilty of the larceny: it seems the judges were of opinion that the accessary should have been acquitted; for the indictment charged him as accessary to the burglary only, and the principal being acquitted of that, the accessary should be acquitted also. (*R.* v. *Dannelly and Vaughan*, 1 *Russell*, 30; 2 *Marsh.* 571; 1 *R. & R. C. C.* 310, S. C.)

5. Proceedings against.

Formerly if a man had been indicted as accessary in the same felony to several persons, he could not have been arraigned till all the principals were convicted and attainted; but as the law now stands, if a man be indicted as accessary to two or more, and the jury find him accessary to one, it is a good verdict, and judgment may pass upon him. (*Lord Sanchor's case*, 9 *Rep.* 119; *Fost.* 361; 1 *Hale*, 624.)

And therefore the Court in their discretion may arraign him as accessary to such of the principals who are convicted; and if he be found guilty as accessary to them or any of them, judgment shall pass upon him. but on the other hand, if he be acquitted, that acquittal would not discharge him as accessary to the others; but by statute 7 & 8 Geo. IV. c. 29, s. 54, and 7 Geo. IV. c. 64, s. 9 and 10 (*a*), it is provided, that no person shall be tried more than once for the same offence of being accessary, if once duly tried.

Where the defendant is *indicted by himself* for a substantive felony, and which he may be under the 7 Geo. IV. c. 64, s. 9, the time of his trial need not be regarded as in the case of other accessaries. By that statute, for the more effectual prosecution of accessaries *before the fact* of *felony*, "if any person shall counsel, procure, or command any other person to commit any felony, whether the same be a *felony* at common law, or by virtue of any statute or statutes made or *to be made*, the person so counselling, procuring, or commanding, shall be deemed guilty of *felony*, and may be indicted and convicted either as an accessary before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, *or* may be indicted and convicted of a *substantive felony*, whether the principal felon shall or shall *not* have been previously *convicted*, or shall or shall *not* be *amenable to justice*, and may be punished in the same manner as any accessary before the fact to the same felony, if convicted as an accessary, may be punished." The section then provides for the place of trial of such accessaries, for which see *infra*, and concludes with enacting, "that no person who shall be once duly tried for any such offence, whether as an accessary before the fact, or as for a substantive felony, shall be liable to be again indicted or tried for the same offence." This statute only applies where the accessary might at common law have been indicted with or after the conviction of the principal. (*R.* v. *Russel, Moody, C. C.* 356.)

Where accessary before the fact is indicted for a substantive felony.

Not to be tried twice.

There is no legislative provision, as to the trial of *accessaries after the fact*, altering the common law principle, that the principal shall be tried and convicted before the accessary unless they consent to it, *ante*, 23. The common law, in this respect, therefore, now prevails; and such accessaries may be tried with their principal, (1 *Hale*, 623,) or separately after the principal has been convicted; and having been once duly tried, they cannot be again indicted or tried for the same offence. (7 Geo. 4, c. 64, s. 10, *post*, 31.)

Accessaries after the fact when triable.

Not to be tried twice.

Place of Trial.]—Formerly when the accessary became guilty in a county different from that in which the principal felony was committed, it was doubted, from the strict locality of offences at common law, whether he could be indicted in either; (2 *Hawk.* c. 29, s. 48;) but this doubt was removed by the statutes 2 & 3 Edw. VI. c. 24, s. 2 and 3, and 43 Geo. III. c. 113, s. 5, since repealed by the 7 Geo. IV. c. 64, and 9 Geo. 4, c. 31.

Place of trial.

And now by 7 Geo. 4, c. 64, s. 9, for the more effectual prosecution of *accessaries before the fact of felony*, "if any person shall counsel, procure,

Accessary before the fact of felony,

(*a*) A re-enactment of the 43 Geo. III. c. 113; now repealed.

5. *Proceedings against.*

7 Geo. 4, c. 64, s. 9,

or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any statute or statutes made or to be made, the person so counselling, procuring, or commanding shall be deemed guilty of felony, and may be indicted and convicted either as an accessary before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may be punished in the same manner as any accessary before the fact to the same felony, if convicted as an accessary, may be punished; and the offence of the preson so counselling, procuring, or commanding, howsoever indicted, may be inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felon, in the same manner as if such offence had been committed at the same place as the principal felony, although such offence may have been committed either on the high seas or at any place on land, whether within his Majesty's dominions or without; and that in case the principal felony shall have been committed within the body of any county, and the offence of counselling, procuring, or commanding shall have been committed within the body of any other county, the last-mentioned offence may be inquired of, tried, determined, and punished in either of such counties. Provided always, that no person who shall be once duly tried for any such offence, whether as an accessary before the fact or as for a substantive felony, shall be liable to be again indicted or tried for the same offence."

may be tried by any court having jurisdiction to try principal felon, although offence committed on seas or abroad.

Offence committed in different counties, accessary may be tried in either.

Accessary *after* the fact of *felony.*

And by sect. 10, for the more effectual prosecution of *accessaries after the fact of felony*, "if any person shall become an accessary after the fact to any felony, whether the same be a felony at common law, or by virtue of any statute or statutes made or to be made, the offence of such person may be inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felon, in the same manner as if the act by reason whereof such person shall have become an accessary had been committed at the same place as the principal felony, although such act may have been committed either on the high seas or at any place on land, whether within his Majesty's dominions or without; and that in case the principal felony shall have been committed within the body of any county, and the act by reason whereof any person shall have become accessary shall have been committed within the body of any other county, the offence of such accessary may be inquired of, tried, determined, and punished in either of such counties. Provided always, that no person who shall be once duly tried for any offence of being an accessary shall be liable to be again indicted or tried for the same offence."

may be tried by any court having jurisdiction to try the principal felon.

Offence committed in different counties, accessary may be tried in either.

Admiralty jurisdiction.

As to the place of trial of accessaries in the Admiralty jurisdiction, see *post*, "*Admiralty Court.*"

(4.) Evidence against Accessaries in General.

(4.) Evidence.

On Indictment against Principal and Accessary before the Fact.]—The evidence in this case must consist of proof of the guilt of the principal, so as to obtain his conviction. (See *ante*, 21.) The accessary may enter into the full defence of the principal, and avail himself of every matter of fact and every point of law tending to the acquittal of the principal; for the accessary in this case is to be considered as *particeps in lite*, and this sort of defence necessarily and directly tendeth to his own acquittal. (*Fost.* 265, *infra.*)

Evidence.

The prosecutor must prove that the accessary had previous to the crime procured, hired, advised, or commanded the principal to commit it, and whether this were done directly, or through the intervention of a third person, is immaterial. (*Fost.* 125.) It must appear the accessary was *absent* when the crime was committed, so that he was not a principal, *ante*, 22; and see *ibid.* as to what is necessary to constitute a party an accessary before the fact.

Against accessary *after* the fact.

On Indictment against an Accessary after the Fact together with the Prin-

cipal.]—The prosecutor should prove the guilt of the principal, as *ante*, 22. He must prove that the defendant received, harboured, or maintained him, as *ante*, 22; and knew he had committed a felony, as *ante*, 22. This knowledge may be proved either from the defendant's admissions, or the like, or by evidence of circumstances, from which the jury may fairly presume it. Buying stolen goods at an under value is a presumptive evidence that the buyer knew they were stolen. (1 *Hale*, 619.) If the prisoner, at different times, receive property stolen from the prosecutor, although the substantive charge must be confined to some one receiving, yet the other receivings may be given in evidence, to show a guilty knowledge that the goods were stolen. (*Rex* v. *Dunn*, *Carr. C. L.* 131; *R. & M. C. C.* 146, S. C.; and see *Rex* v. *Burridge*, 3 *P. Wms.* 439.) He must be proved to have done some act to assist the felon personally, or employed another person to do so. (*Reg.* v. *Chapple*, 9 *C. & P.* 355; *Reg.* v. *Jervis*, 2 *M. & Rob.* 40.)

5. *Proceedings against.*

On Indictment against the Accessary after Conviction of Principal.]—In this case the prosecutor should prove the conviction of the principal. Where the accessary is tried in the same county in which the principal was convicted, this is easily effected by the clerk of nasize or clerk of the peace attending at the trial with the record. But if the accessary be tried in a different county, it is necessary to produce either the record itself, or at least an examined copy of it. (See *post*, "*Evidence*," Vol. II. p. 391.) This is evidence against the accessary sufficient to put him upon his defence, for it is founded upon a legal presumption, that every thing in the former proceeding was rightly and properly transacted. (*Holmes* v. *Walsh*, 7 *T. R.* 465.)

Against accessary after conviction of principal.

But a presumption of this kind must, as it seemeth, give way to facts manifestly and clearly proved. (*Fost.* 365.) As against the accessary, therefore, the conviction of the principal will not be conclusive; it is as to him *res inter alios acta*: for an accessary may controvert the guilt of the principal, notwithstanding the record of his conviction. (*Smith's case*, *O. B. Dec.* 1783, 1 *Leach*, 289.) And therefore if it shall come out in evidence upon the trial of the accessary, as it sometimes hath and frequently may, that the offence of which the principal was convicted did not amount to *felony* in him, or *not to that species of felony with which he was charged*, the accessary may avail himself of this, and ought to be acquitted. (*Fost.* 365; and see *Dannelly's case*, 1 *Russ.* 30; 2 *Marsh.* 371; *Russ. & R. C. C.* 310, S. C.; *ante*, 19.)

And as in point of *law*, so also in point of *fact*, if it shall manifestly appear in the course of the accessary's trial that the principal was innocent, common justice seemeth to require that the accessary should be acquitted. As suppose a man is convicted upon circumstantial evidence, strong as that sort of evidence can be, of murder; another is afterwards indicted as accessary to this murder; and it cometh out upon the trial by incontestable evidence, that the person who was supposed to be murdered is still living: in this case certainly the person indicted as accessary shall be acquitted. Or suppose the person to have been in fact murdered, and that it should come out in evidence, to the satisfaction of the court and jury, that the witnesses against the principal were mistaken in his person (a case of this kind Sir Michael Foster says he has known), that the person convicted as principal was not nor could possibly have been present at the murder. (*Fost.* 367, 368; 1 *Hawk.* 457.)

Whatever is evidence against the principal is primâ facie evidence of the principal felony, as against the accessary. If an indictment against a receiver state the principal felony to have been committed by A. B, whatever would have been evidence of the principal felony to convict A. B. is receivable to prove this allegation on the trial of the receiver, but is not conclusive. Therefore if A. B. confessed the principal felony, that confession is admissible on the trial of the receiver to prove the commission of the principal felony. (*Rex* v. *Blick*, 4 *C. & P.* 377.)

After proof of the conviction then prove the defendant's guilt as accessary; see *ante*, 20, 21, as to what will render him one.

5. *Proceedings against.*

For a substantive felony.

On Indictment against Defendant alone for a substantive Felony.]—In this case the prosecutor should prove the offence stated in the indictment, and that the same was committed by the principal therein stated. As to proof of a commission of the offence by persons unknown, see *ante*, 27. The defendant's guilt as an accessary should be proved as in other cases, see *ante*, 20, 21.

Witnesses.

Competency of Witnesses.]—The principal, though not convicted or pardoned, may be examined as a witness against the accessary or receiver. In two prosecutions for a misdemeanor on statute 22 Geo. III. c. 58, the principal felons, though not convicted, were admitted as witnesses on the part of the crown. (*Rex* v. *Patram, Bridgewater Sum. Ass. cor. Grosse, J.* 1787, 2 *East*, 782; *Rex* v. *Haslam*, 1 *Leach*, 418; 2 *East, P. C.* 728; *sed vide Reg.* v. *Lyons*, 9 *C. & P.* 555, where principal and accessary are charged on the same indictment) So in *Jonathan Wild's case*, on a prosecution on statute 4 Geo. I. c. 11, for taking a reward to help to stolen goods. (2 *East's P. C.* 782, 783.) So an accessary is a competent witness against his principal. See further as to the competency of witnesses, *post*, "*Evidence*," Vol. II. p. 421.

(5.) Punishment of Accessaries.

(5.) Punishment of accessaries.

Accessary *before* the fact.

Accessaries before the Fact.]—Accessaries *before* the fact are in general punishable in the same manner as principals, for they are frequently more deeply criminal than the principal. (See *Dalt.* c. 161.) But there are several legislative provisions pointing out the punishment in different offences. Thus, —Accessaries before the fact to *murder* are punishable with death. (9 Geo. IV. c. 31, s. 3, *post*, "*Homicide*," Vol. III.) So are accessaries to *administering poison*, and *attempts* to *drown*, *suffocate*, or *strangle*, and to maliciously shooting and stabbing, with intent to murder or maim, &c. (9 Geo. IV. c. 31, s. 11, 12, *post*, "*Malicious Injuries to the Person*,") So are accessaries to *administering poison to a woman to procure abortion*, with intent, &c. (9 Geo. IV. c. 31, s. 13, and 7 Will. IV. & 1 Vict. c. 85, s. 6, *ante*, 11, 13.) Accessaries to administering poison to a woman *not quick with* child, with intent, &c., are punishable as principals. (*Id.*) So are accessaries to the forcible *abduction* of women for lucre. (9 Geo. IV. c. 31, s. 19, *ante*, 6.) So are accessaries to *child stealing*. (9 Geo. IV. c. 31, s. 21, *post*, "*Children*.") So are accessaries to bigamy. (9 Geo. IV. c. 31, s. 22; *post*, "*Polygamy*," Vol. V.) And accessaries to any felony, punishable under stat. 9 Geo. IV. c. 31, *for whom no punishment is otherwise provided*, may be transported for not more than fourteen nor less than seven years, or imprisoned with or without hard labour, not exceeding three years. (9 Geo. IV. c. 31, s. 31; *post*, "*Malicious Injuries to Persons*," Vol. V.; see *Arch. C. L. by Jervis*, 9 ed. 689.)

Accessaries before the fact to felonies within the statutes 7 & 8 Geo. IV. c. 29; c. 30; 11 Geo. IV. & 1 Will. IV. c. 66; 2 Will. IV. c. 34; 7 Will. IV. & 1 Vict. c. 85, s. 7; c. 86, s. 6; c. 87, s. 9; c. 88, s. 4; c. 89, s. 11; and also c. 36, s. 35, as to offences against the post-office, and 4 & 5 Vict. c. 56, s. 2, respectively, are punishable with death, or otherwise, in the same manner as principals in the first degree. (For notices of these several statutes, see *ante*, 18.)

In many statutes also specific punishments are provided for accessaries before the fact, in which cases accessaries must be punished under the particular statute; but where no punishment is provided, then accessaries may be transported for seven years, or imprisoned (with or without hard labour, for the whole or any part of the imprisonment, (7 & 8 Geo. IV. c. 28, s. 9, *post*, "*Larceny*," Vol. III.), and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year (7 Will. IV. & 1 Vict. c. 90, s. 5; 4 & 5 Vict. c. 56, s. 4) for any term not exceeding two years; and, if a male, may be once, twice, or thrice

publicly or privately whipped, in addition to the imprisonment, if the court shall think fit. (7 & 8 Geo. IV. c. 28, s. 8; *post*, "*Larceny*," Vol. III. See *Arch. C. L. by Jervis*, 9 ed. 689.)

5. *Proceedings against.*

Accessaries after the Fact.]—The punishment of accessaries *after* the fact is at common law trivial, they being in most cases allowed the benefit of clergy. (See *Fost.* 372; *P. W'ms.* 475.) There are several legislative provisions pointing out the punishment in different offences. Thus, in *abduction, bigamy, assaults, child stealing, rape*, and *unnatural crimes*, the 9 Geo. IV. c. 31, s. 31, provides "that every accessary after the fact to any felony punishable under this act (except murder) shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years; and every person who shall counsel, aid, or abet the commission of any misdemeanor punishable under this act, shall be liable to be indicted and punished as a principal offender." See titles "*Abduction*," "*Assaults*," "*Sodomy*," "*Child*," "*Polygamy*," and "*Rape*."

Accessaries after the fact.

Punishment.

In *murder*, by 9 Geo. IV. c. 31, s. 3, "every accessary after the fact to murder shall be liable, at the discretion of the court, to be transported beyond the seas for life, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding four years." See "*Homicide*" Vol. III.

Accessaries after the fact to offences within the 7 & 8 Geo. IV. c. 29; c. 30; 11 Geo. IV. & 1 Will. IV. c. 66; 2 Will. IV. c. 34; 7 Will. IV. & 1 Vict. c. 36; c. 85; c. 86; c. 87; c. 88; and c. 89; respectively, may be imprisoned not exceeding two years, with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. (For notices of these statutes, *see ante*, 18.) Where accessaries after the fact are punishable as for a felony, but no specific punishment is provided by the particular statute, they may be transported for seven years, or imprisoned, with or without hard labour, for the whole or any part of the imprisonment, and with or without solitary confinement, 7 & 8 Geo. IV. c. 28, s. 9, *post*, "*Larceny*," Vol. III., such confinement not exceeding one month at any one time, nor three months in any one year, 7 Will. IV. & 1 Vict. c. 90, s. 5, and, if a male, may be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the court shall think fit, (7 & 8 Geo. IV. c. 28, s. 8, *post*, "*Larceny*," Vol. III.)

VI. Particular Statutes against Receivers of Stolen Goods.

6. Receivers of stolen goods.

The 7 & 8 Geo. IV. c. 29, is now the only statute in force affecting receivers of stolen goods in general. All the statutes prior to that statute are repealed, (*a*) and the only other acts in force on this offence are the 2 Geo. III. c. 28, relating to receiving stolen goods, &c. on the river Thames,

(*a*) The stat. 7 Geo. IV. c. 64, repeals the stat. 6 Ann. c. 31, *vulgo* 5 Ann. c. 31, "except the special provision affecting the sheriffs and under sheriffs of London and Middlesex." And the stat. 7 & 8 Geo. IV. c. 27, repeals the following statutes on this subject, viz.—3 W. & M. c. 9; 4 Geo. II. c. 32; 25 Geo. II. c. 10; 29 Geo. II. c. 30; 5 Geo. III. c. 14; 6 Geo. III. c. 36; 10 Geo. III. c. 48; 21 Geo. III. c. 68; c. 69; 22 Geo. III. c. 58; 51 Geo. III. c. 41; and 3 Geo. IV. c 24; and it also repeals so much of the stat. 31 Eliz. c. 12, "as enacts that all accessaries to horse-stealing shall be deprived of the benefit of clergy; and the stat. 1 Ann. st. 2, c. 9, except so much thereof "as relates to witnesses on behalf of the prisoner on any trial for treason or felony;" and the stat. 4 Geo. I. c. 11, "except so much thereof as relates to the trial of piracy, felony, or robbery committed within the admiralty jurisdiction;" and sects. 7 & 8 of 44 Geo. III. c. 92; and so much of the stat. 3 Geo. IV. c. 114, (Hard Labour Act,) "as relates to the punishment for receiving stolen goods, and for obtaining any property, as therein mentioned, by false pretences."

C. *Receivers.*

and the 1 & 2 Geo. IV. c. 75, relating to anchors, cables, shipping, &c. which will here be noticed.

Receivers. Where stealing is felony.

In *larceny*, where it is a *felony*, with regard to *receivers of stolen property*, by 7 & 8 Geo. IV. c. 29, s. 54, "if any person shall receive any chattel, money, valuable security, or other property whatsoever, the stealing or taking whereof shall amount to a *felony*, either at common law, or by virtue of this act, such person knowing the same to have been feloniously stolen or taken, every such receiver shall be guilty of felony, and may be indicted and convicted either as an accessary after the fact, or for a substantive felony, and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and every such receiver, howsoever convicted, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned for any term not exceeding three years, (with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement, 7 & 8 Geo. IV. c. 29, s. 4, (*post*, "*Larceny*," Vol. III.) such confinement not exceeding one month at any one time, nor three months in any one year, 7 Will. IV. & 1 Vict. c. 90, s. 5); and, if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit,) in addition to such imprisonment. Provided always, that no person, however tried for receiving as aforesaid, shall be liable to be prosecuted a second time for the same offence."

Punishment.

Receivers, where stealing is a misdemeanor.

In *larceny*, where it is a *misdemeanor*, the same act, sect. 55, enacts, "that if any person shall *receive* any chattel, money, valuable security, or other property whatsoever, the stealing, taking, obtaining, or converting whereof is made an indictable *misdemeanor* by this act, such person knowing the same to have been unlawfully stolen, taken, obtained or converted, every such receiver shall be guilty of a misdemeanor, and may be indicted and convicted thereof, whether the person guilty of the principal misdemeanor shall or shall not have been previously convicted thereof, or shall or shall not be amenable to justice; and every such receiver shall on conviction be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned (with or without hard labour for the whole or any part of the imprisonment, and with or without solitary confinement, 7 & 8 Geo. IV. c. 29, s. 4, (*post*, "*Larceny*," Vol. III.) such confinement not exceeding one month at any one time, nor three months in any one year, 7 Will. IV. & 1 Vict. c. 90, s. 5) for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit,) in addition to such imprisonment."

Punishment.

May be tried where principal is triable, or where property found in their possession, or where receiving takes place.

Sect. 56 enacts that "if any person shall receive any chattel, money, valuable security, or other property whatsoever, knowing the same to have been *feloniously* or *unlawfully* stolen, taken, obtained, or converted, every such person, whether charged as an accessary after the fact to the felony, or with a substantive felony, or with a misdemeanor only, may be dealt with, indicted, tried, and punished in any county or place in which he shall have or shall have had any such property in his possession, or in any county or place in which the party guilty of the principal felony or misdemeanor may by law be tried, in the same manner as such receiver may be dealt with, indicted, tried, and punished in any county where he actually received such property."

Receivers, where taking is punishable on summary conviction

In *larceny*, where the original offence is punishable on *summary conviction* by the 60th sect. of the 7 & 8 Geo. 4, c. 29, it is enacted, "that where the stealing or taking of any property whatsoever is by this act punishable on summary conviction, either for every offence, or for the first and second offence only, or for the first offence only, any person who shall receive any such property, knowing the same to be unlawfully come by, shall, on conviction thereof before a justice of the peace, be liable for every first, second, or subsequent offence of receiving, to the same forfeiture and punishment to which a person guilty of a first, second, or subsequent offence of stealing or taking such property, is by this act made liable."

Punishment.

The provisions of the 7 & 8 Geo. IV. c. 29, as we have seen, *ante*, 34, extend to "receivers of any *chattel, money, valuable security or other property whatsoever.*" So that the doubtful and difficult questions that have arisen as to the nature of the property received being sufficient to create the offence of receiving are now entirely set at rest. (*b*)

G. Receivers.

(*b*) The following are some of the decisions on the now repealed law:—

On the construction of the statutes of 3 W. & M. c. 9, s. 4, and 5 Ann. c. 31, s. 5, it was holden that they included *sheep*; and by the same reasoning, *fowls* and *other animals*. (2 *East's P. C.* 748.) But it was clearly settled that the receivers of *money*, were not within the words "goods and chattels" in those acts, for if every receiver of money which happened to have been stolen were liable to be called to account for it, it might be attended with serious inconvenience to the public in their general dealings; it being always difficult, and sometimes impossible, to account for the possession of each individual coin which passes in circulation. (2 *East's P. C.* 748.) And in analogy to this, it was ruled by a majority of the judges (seven) in 1787, that *bank-notes* were not within the statutes against such receivers. (*Rex* v. *Sadi and Morris*, O. B. July, 1787, 2 *East's P. C.* 748; 2 *Russ.* 1308, 1309.) And this point was considered by the judges in *Rex* v. *Gaze and another*, *Russ. & R. C. C.* 384. *Ann Gaze* was convicted of stealing certain promissory notes for the payment of money, and *William Gaze* (her husband) of receiving the said notes, knowing them to have been stolen; but on case reserved, eleven judges, in Easter Term, 1819, were unanimous that *William Gaze* was not rightly convicted, and they founded their opinion upon the reason assigned by *Ashurst*, J. in *Rex* v. *Sadi and Morris*, which was, that though a statute which creates a new felony will attach to that felony all the common law incidents to felony, so that accessaries thereto will be included, it will go no further, and a receiver of the goods, not being a common law accessary, is not included.

It appears to have been considered at one time, that the statute (29 Geo. II. c. 30), related only to the metals mentioned in it, when in their common or raw state, as contradistinguished from wrought goods. (*Scott's case, cor.* Adair, Serjt. C. J. of Chester, Chester Spring Assizes, 1798, cited in 2 *East's P. C.* 752; 2 *Russ*, 1353.) It seems, however, that metals, though in a manufactured state, were deemed to be within the statute. A case occurred at Staffordshire Michaelmas Sessions, 1816, in which the subject underwent considerable discussion. The prisoner was indicted for unlawfully receiving a quantity of brass and copper, knowing it to have been stolen and unlawfully come by, against the form of the statute, &c. It appeared in evidence, that the articles received by the prisoner were brass and copper sockets, which form part of the moveable machinery used in spinning cotton, and are from time to time detached from the fixed machinery, and carried from place to place, for the purpose of discharging the cotton twist originally wound thereon. At the time of their being stolen, part of them were broken into pieces; the rest were whole, in the state in which they had been manufactured. With respect to the latter, the evidence was rejected, on the ground that the statute had uniformly been construed to extend to articles of the description therein mentioned, in their common or unmanufactured state, as iron and lead in pigs or sheets, bars of brass and copper, &c. and not to wrought or manufactured articles. But the evidence was admitted as to the broken sockets, they being considered as mere pieces of brass and copper, to which no appropriate name could be given; and the prisoner, upon that evidence, was found guilty. It was contended, on behalf of the prisoner, that the statute did not apply to these broken pieces of metal; and it was strongly urged, that it would be an extraordinary construction to suppose that the legislature should have protected, by a statute so highly penal, articles damaged and broken, and consequently of small value. The chairman said, that whatever his own opinion might be, he considered it his duty to reserve the point for the opinion of the judges of assize; and at the succeeding quarter-sessions he stated that several of the judges had very kindly permitted him to confer with them upon the question in this case, whether the broken sockets, by the circumstance of their becoming broken after they had been manufactured, lost the character of manufactured articles, so as to fall within the statute; and that those learned judges clearly thought the conviction right. And he further stated that they were also of opinion, that *manufactured* articles of brass, &c. whether broken or unbroken, were within the statute. (*Dolphin's case*, Staffordshire Michaelmas Quarter Sessions, 1816, and Epiphany Quarter Sessions, 1817, 2 *Russ*,

Questions on 3 W. & M. c. 9, s. 4. 5 Ann. c. 31, s. 5.

6. *Receivers.* It seems from the above sections that receivers may be indicted either as accessaries after the fact, or for a substantive felony; or the principal and receiver may be indicted jointly in the same manner as other accessaries.

As to the evidence in proof of the offence, see *ante*, 30.

Where two receivers are charged in the same indictment with separate and distinct acts of receiving, it is too late after verdict to object that they should have been indicted separately. (*Reg.* v. *Hayes*, 2 *M.* & *Rob.* 156.) Where a person knowing goods to have been stolen, directs his servant to receive them, and the servant also knowing them to be stolen does so, they are jointly indictable. (*Reg.* v. *Parr*, 2 *M.* & *Rob.* 346.) Three persons were charged with a larceny, and two others as accessaries, in separately receiving portions of the stolen goods. The indictment also contained two other counts, one of them charging each of the receivers separately with a substantive felony, in separately receiving a portion of the stolen goods. The principals were acquitted, but the receivers were convicted on the last two counts of the indictment. (*Reg.* v. *Pulham*, 9 *Car.* & *P.* 280.) A lad stole a brass weight from his master, and after it had been taken from him in his master's presence, it was restored to him again with his master's consent, in order that he might sell it to a man, to whom he had been in the habit of selling similar articles, which he had stolen before. The lad did sell it to the man, and the man being indicted for receiving it of an evil disposed person, well knowing it to have been stolen, was convicted, and sentenced to be transported for seven years. (*Reg.* v. *Lyons*, 1 *C.* & *Mar.* 217.) Where six 100*l* notes were stolen, and the party was indicted for receiving them, it appeared that the notes had been changed by the thief for 20*l.* notes, which latter notes had been received by the accused; it was held, that he could not be convicted on the indictment, as he did not receive the notes which were stolen. (*Rex* v. *Walkeley*, 4 *C.* & *P.* 132.)

Where owner of goods entitled to restitution.

The owner of the goods prosecuting the receiver or thief to conviction, is entitled to restitution of his property, except in the case of a negociable security transferred *bonâ fide* and for a valuable consideration. (7 & 8 Geo IV. c. 29, s. 57.)

With respect to the apprehension and discovery of receivers of stolen goods in general, see "*Arrest*," Vol. I.; "*Larceny*," Vol. III.; "*Rewards*," Vol. V.; "*Search Warrant*," Vol. V.

1355; 1 *Burn's J.* 24th edit. p. 23.) And in a subsequent case the same doctrine was acted upon by *Burrough*, J. in respect of articles which had become broken after having been manufactured. (*Rex* v. *Wilson and Wife*, Stafford Lent Assizes, 1817.) On this occasion Mr. *Manley*, *amicus curiæ*, cited from the MS. of Mr. Serjt. *Manley*, a note of a case of *Rex* v. *Metcalfe*, on the Chester circuit, at Mold, September 10, 1808, in which *Dallas*, C. J. said, "a doubt arose on the construction of this act,—whether wrought articles were within it, or whether it was not confined to goods in an unwrought state; but we are clear that the act extends to wrought goods, and to all goods mentioned in it, whether manufactured or not." (2 *Russ.* 1356, n. (*m*); 1 *Burn's J.* 24th edit. p. 23.)

On 10 Geo. 3, c. 48.

A question arose upon the 10 Geo. III. c. 48, in the case of *E. Moses*, who was indicted at the Kent Summer Assizes in 1783, before *Gould*, J. The indictment stated that Mr. *Drummond* had been robbed in the highway of a gold watch, gold watch case, a red cornelian seal set in gold, and a white one also set in gold; and then charged that the prisoner received the same knowingly, against the form of the statute. The prisoner having been convicted, judgment was respited to take the opinion of the judges, whether receiving a gold watch and such seals, knowing them to have been stolen, (being taken by a robbery on the highway,) were a felony within the act? This was first debated by all the judges in Michaelmas Term, 1783, and adjourned for further consideration to the Hilary Term following, when ten judges present (and one absent and concurring) held that the conviction was proper. Some thought that the gold in the watch might be deemed *plate*, (a term used in the act); others thought that was not the meaning of the act; but all held that the *seals* set in gold came under the word *jewels*. (2 *East's P. C.* 754.)

6. *Receivers.*

(1.) Goods, Cargoes, &c. of Vessels on the Thames.

With respect to the receivers of *stolen cargoes and goods, &c. of vessels on the Thames*, by the 2 Geo. III. c. 28, s. 12, "every person who shall buy or receive any part of the cargo or lading, or any goods, stores, or things, of or belonging to any ship or vessel in the said river, knowing the same to be stolen or unlawfully come by, or shall privately buy or receive any such goods, stores, or things, or any part of such cargo or loading, by suffering any door, window, or shutter to be left open or unfastened between sun-setting and sun-rising, for that purpose, or shall buy or receive the same, or any of them, at any time, in any clandestine manner, from any person or persons whomsoever, shall, being thereof convicted by due course of law, (although the principal felon or felons, offender or offenders, has or have not been convicted of stealing or unlawfully procuring the same,) be transported for fourteen years to any of his Majesty's colonies or plantations in America, according to the laws in force for the transportation of felons."

Receivers, &c. of stolen cargoes on the Thames to be transported (a)

By sect. 14, "if any person, being out of prison, shall, after the 24th day of June, 1762, by stealing or unlawfully receiving any part of any cargo or lading of, or any goods, stores or things belonging to, or out of, or from any ship or vessel in the said river, and shall afterwards discover two or more persons who shall have bought or received any stolen or unlawfully procured goods, stores, or things, or any part of any cargo or lading of or belonging to, or by, from, or out of any ship or vessel in the said river, after the 24th day of June, 1762, knowing the same to be stolen, or unlawfully procured, so as two or more of the persons discovered shall be convicted of such buying or receiving, every person so discovering shall have and be entitled to the gracious pardon of his Majesty, his heirs and successors, for all such felonies by him or her committed at any time or times before such discovery made; which pardon shall be likewise a bar to any appeal brought for such felony."

Pardon to offenders discovering, &c. offenders.

By sect. 18, "it shall and may be lawful for any person or persons, by the authority of this act, and without any other warrant, to apprehend any offender or offenders committing any of the offences hereinbefore mentioned, and intended by this act to be redressed, and, with all convenient speed, to convey or deliver every such offender or offenders to a constable or some other peace-officer of the county, city, division, liberty, or place, in or near to which the offence shall be committed, or the offender or offenders shall be apprehended, in order to be conveyed before some justice of the peace for such county, city, liberty, or place, there to be dealt with according to law." (See the 3 W. IV. c. 19, s. 31, *post*, "*Police*," Vol. V.)

Any one may apprehend offender.

By sect. 19, "in case any person or persons, acting in the execution of any of the powers granted by this act, shall be obstructed therein, every person so obstructing, and all such as shall act in their assistance, shall, on being thereof convicted before the justices of the peace, at the general or quarter sessions of the county or city adjoining to the said river, upon the oath of two or more credible persons, be transported to any of his Majesty's plantations in America for the space of seven years, according to the law or laws now in force for the transportation of felons."

Obstructing execution of act transportation.

In the case of *Rex* v. *Wyer*, 2 *T. R.* 77, the Court of King's Bench were of opinion that the prisoner might be prosecuted as for a felony for an offence under this section of the act; and they refused to bail him.

Offence a felony.

But the legislature seems to have considered it only as a *misdemeanor*; for by the statute 39 & 40 Geo. III. c. 87, s. 22, (after reciting that by the last-mentioned act, 2 Geo. III. c. 28, persons guilty of certain offences are punishable by transportation for fourteen years; but the said offences not being by the said act declared to be felony, the trial thereof may in all cases be put off, by means of a traverse, to the next sessions after the finding of the bill of indictment for the same, and the offender be in the mean time liberated, on being admitted to bail, whereby justice has been in many instances eluded),

(a) See *post*, Vol. V. titles "*Police*," "*Ships*."

6. *Receivers.*

No traverse.

for remedy thereof it is enacted, "that from and after the passing of this act, whenever any indictment shall be found against any person or persons for the said offences, or any of them, the person or persons so indicted shall plead to the same indictment, without having time to traverse the same, as is usual in cases of misdemeanors."

(2.) Receivers of Anchors, Cables, &c.

Receivers of anchors, cables, &c.

With respect to the receivers of these articles, by the 1 & 2 Geo. IV. c. 75, after reciting that by the 49 Geo. III. c. 122, for remedying certain defects relative to the adjustment of salvage in England, under an act made in the twelfth year of Queen Anne, which act was to continue in force for seven years, and from thence to the end of the next session of parliament; and also that by an act passed in the fifty-third year of his late Majesty King George the Third, the said above-recited act (except so far as the same was altered and extended), was further continued in force for seven years from the passing of the said act, and from thence to the end of the next session of parliament, and no longer; and that it is fit and expedient that the said above-recited acts should be further continued, except so far as the same are altered by this act: it is enacted, "that all pilots, boatmen, hovellers, or other persons, who shall take up any anchors, cables, tackle, apparel, furniture, stores, or materials, or any goods or merchandize, which may have been parted with, cut from, or left by any ship or vessel within any harbours, rivers, or bays, or on any of the coasts of the kingdom, whether the same ship or vessel shall be or shall have been in distress or otherwise, and which shall have been weighed, swept for, or taken possession of, by any such boatman, pilot, hoveller, or other person, shall send a report in writing of the articles so found, and stating the marks, if any, thereon; and also an accurate and particular description of the bearings, distances, and situations, and time when and where the same were so found, to a deputy vice-admiral or his agent, at or near to the port or place where such boatman, pilot, hoveller, or other person shall first arrive with such articles, within forty-eight hours after his or their arrival at such port or place, or before he or they shall leave the port, if he or they shall quit it before that time shall expire; and shall also, within such period as aforesaid, deliver such articles so found into a proper warehouse, or such other place as the vice-admiral of each county shall appoint for safe custody, until the same shall be claimed by the owner or owners thereof, or his, her, or their agent or agents, and the salvage, together with such other charges and expenses as are hereinafter directed to be paid in respect of such articles, paid by him or them, or security given for the payment thereof, to the satisfaction of the salvor or salvors thereof; and every such pilot, boatman, hoveller, or other person, who shall wilfully and fraudulently keep possession of, or retain, or conceal, or secrete any anchors or cables, tackle, apparel, furniture, stores, or materials, or any goods or merchandize, or deface, take out, or obliterate the marks and numbers thereon, or alter the same in any manner, with intent thereby, directly or indirectly, to prevent the discovery and identification of such articles so found, weighed, swept for, or taken possession of, as aforesaid, and shall not report and deliver the same at some proper warehouse or other place, in the manner aforesaid, and within the time hereinbefore limited, shall forfeit all claim to salvage, and shall, on conviction, be adjudged and deemed guilty of receiving goods knowing them to have been stolen, and shall suffer the like punishment as if the same had been stolen on shore."

Pilots, &c. to deposit anchors, &c. taken by them, in certain places.

Forfeiture of salvage, and punishment for concealing them.

Persons purchasing anchors, &c. considered receivers.

Sect. 12. "If any person shall knowingly and wilfully, and with intent to defraud and injure the true owner or owners thereof, or any person interested therein as aforesaid, purchase or receive any anchors, cables, or goods or merchandize, which may have been taken up, weighed, swept for, or taken possession of, whether the same shall have belonged to any ship or vessel in distress or otherwise, or whether the same shall have been preserved from any wreck, if the directions hereinbefore contained with regard to such articles shall not have been previously complied with, such person or persons shall,

on conviction thereof, be deemed guilty of receiving stolen goods, knowing the same to be stolen, as if the same had been stolen on shore, and suffer the like punishment as for a misdemeanor at the common law, or be liable to be transported for seven years, at the discretion of the court, before which he, she, or they shall be tried." 6. *Receivers.*

Sect. 15, after reciting that pilots, hovellers, boatmen, and other persons in small vessels have for many years conveyed anchors and cables, which may have been weighed, swept for, or taken possession of by them, as aforesaid, or which they may have purchased of other persons, knowing them to have been weighed, swept for, or taken possession of, without being reported as aforesaid to foreign countries, and there sold and disposed of, to the manifest injury and loss of the owners thereof: for remedying whereof it is enacted, "that every pilot, hoveller, boatman, or the master of any such vessel, who shall convey any such anchor or cable to any foreign port, harbour, creek, or bay, and there sell and dispose of the same, shall be deemed and adjudged guilty of felony, and shall be transported for any term not exceeding seven years." Punishing pilots, &c. selling, &c. anchors, &c. in foreign countries.

Sect. 21. "The inhabitants of any parish, township, or place, shall be deemed and taken to be competent witnesses for the purpose of proving the commission of any offence against this act, within the limits of such parish, township, or place, notwithstanding the penalty incurred by such offence, or any part thereof, is or may be given or applicable to the poor of such parish, township, or place, or otherwise, for the benefit or use, or in aid, or in exoneration of such parish, township, or place." Inhabitants competent witnesses.

By sect. 28, "all felonies, misdemeanors, and other offences under this act, shall and may be laid to be committed, and shall be tried in any city or county (being a county) where any such article, matter, or thing in relation to which such offence shall have been committed, shall have been found in the possession of the person committing the offence; or if the same shall have been sold in foreign parts, then in the county or place in which the person selling the same shall reside." Trial in county where articles found, &c.

[As to *Receivers of Public Stores, &c.* see "*Stores,*" Vol. V.; *Receivers of Stolen Letters,* see "*Post Office,*" Vol. V.]

VII. Forms.

(1.) Information to ground a warrant to apprehend a *principal* in the *second* degree.

—— } *A. B. of I. in the county of M. yeoman, maketh oath and saith, that on, &c.*
to wit. } [Principals in the second degree may be described like principals in the first degree, as having actually committed the offence; or, in felony, where the principals in the first and second degrees are committed at the same time, after stating the offence of the principal in the first degree, the offence of the principal in the second degree may be described thus]:—*And that the said C. D.* [the principal in second degree] *feloniously was then and there present, aiding, abetting, and assisting the said C. F, to do and commit the said felony. And thereupon he the said A. B. prayed that justice may be done in the premises.* *A. B.*

Sworn before me,
J. P.

(2.) The like against an accessary *before* the fact.

—— } *The information and complaint of A. B. of the parish of in the said*
to wit. } *county, gentleman, taken upon oath before me J. P. Esq. one of her Majesty's justices of the peace in and for the said county, this day of , in the year of our Lord one thousand eight hundred and ; who saith that* [the offence should be described according to the fact: in burglary it may be thus] *on the day of last, his dwelling-house, situate in the parish of in the said county, was, about the hour of in the night of the same day, broken and entered by some person or persons,* [or as the case may be,] *and that* [describe the property stolen] *the property of him the said A. B.* [or "*of C. D.*" as the case may be] *was* [or "*were*"] *then and there feloniously stolen, and that he hath*

7. Forms.

just cause to suspect and doth suspect that E. F. late of aforesaid, (labourer,) did commit the said felony, [or as the case may be,] *and that G. H. late of aforesaid, (labourer,) did counsel, hire, procure, or command the said E. F. to commit the said felony,* [or as the case may be.] *And thereupon he the said A. B. prayeth that justice may be done in the premises.* A. B.

Sworn before me,
J. P.

(3.) The like against accessary *after* the fact.

[If an accessary after the fact, then the form may be thus, after the usual commencement and stating the offence of the principal as in form (No. 2.) *supra* :]—*And also that the said A. J. hath cause to suspect and doth suspect that C. D. late of in the county of , (yeoman,) well knowing the said E. F.* [the principal] *to have done and committed the said felony as aforesaid, afterwards him the said E. F. did feloniously and of his malice forethought, receive, aid, and comfort. And thereupon the said A. J. prayeth that justice may be done in the premises.*

Sworn before me. A. J.
J. P.

(4.) Warrant to apprehend an accessary before the fact.

—— } *To the Constable of in the County of and to all other Constables*
to wit. } *and Peace Officers in the said County.*

Whereas A. J. of the parish of in the said county of (gentleman,) hath this day made oath before me, J. P. Esq. one of her Majesty's justices of the peace in and for the said county, that one E. F. [or if the principal be unknown, "*a certain person or persons unknown,*"] *on, &c. at, &c. did feloniously, &c.* [state the felony as usual] *and that he hath just cause to suspect, and doth suspect, that C. D. late of aforesaid, (labourer,) did counsel, hire, procure, or command the said E. F.* [or "*person or persons unknown*"] *to commit the said felony. These are therefore in her Majesty's name to charge and command you forthwith to apprehend and bring before me the said E. F. and C. D. to answer the said complaint, and to be further dealt with according to law. Given under my hand and seal this day of one thousand eight hundred and* J. P. (L. S.)

(5.) The like to apprehend accessary after the fact, for harbouring principal.

—— } *To the Constable of, &c.* [as in form (No. 4.) *supra.*]
to wit.

Whereas E. F. of , stands charged before me J. P. Esq. one of her Majesty's justices of the peace in and for the said county, on the oath of A. J. with having [state the offence as in the information.] *And whereas G. H. hath this day also made oath before me, that C. D. of, &c. aforesaid, (labourer,) since the said felony was committed, hath received, harboured, and maintained the said E. F. in the dwelling house of the said C. D. at aforesaid; he the said C. D. well knowing the said E. F. to have committed the said felony. These are therefore, &c.* [as in preceding form.

(6.) The like to apprehend accessary *after* the fact for receiving stolen goods.

Commencement as *supra*, and then state the offence as in the information.] *And also that the said A. J. hath cause to suspect and doth suspect that C. D. of in the said county, (labourer,) hath feloniously received the said* [*silver tea-pot,*] *knowing the same to have been feloniously stolen. These are therefore, &c.* [conclusion as in form (No. 4.) *supra.*

(7.) Commitment of principal in *second* degree.

The form as to this in stating the offence may be collected from the form of an information against a principal in the second degree. The form of the commitment in other respects may be as in the following precedent.

(8.) The like, of an accessary *before* the fact with the principal.

—— } *To the keeper of her Majesty's Gaol at for the County of or his*
to wit. } *Deputy.*

Receive [or the commencement may be as *supra*] *into your custody the bodies of E. F. and G. H. herewith sent you, brought before me J. P. Esq. one of her Majesty's justices of the peace in and for the said county, by A. C. constable of the*

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parish of in the said county, the said E. F. being charged upon the oath of A. B. with having [describe the offence as in warrant, and which may be thus in burglary,] *on the day of at the parish of in the said county, feloniously and burglariously broken and entered his dwelling-house, situate in the parish of in the said county,* [or as the case may be,] *and feloniously stolen, taken, and carried away* [describe the property stolen] *the property of the said A. B.* [or *C. D.* as the case may be,] *and the said G. H. being also charged upon the oath of the said A. B. with having counselled, hired, procured and commanded the said E. F. to commit the said felony and burglary,* [or as the case may be,] *and them safely keep* [or the conclusion may be as in form, *ante*, p. ,] *in your custody until they shall be discharged by due course of law. Given under my hand and seal at in the said county, this day of one thousand eight hundred and* J. P. (L. S.)

(9.) The like, without the principal.

Commencement as usual, as *ante* p. 40,] *for that one E. F.* [or, if the fact, "*some person unknown,*"] *on the day of* A.D. *at the parish of in the said county, did feloniously, &c.* [describing the offence as in a commitment of the principal,] *and that the said A. B. before the said felony was so committed, did feloniously and maliciously incite, move, procure, counsel and command the said E. F.* [or "*person unknown*"] *to do and commit the said felony,* [following the form of the warrant.] *And you the said keeper, &c.* [Conclude as usual, as *ante*, p. 40.]

(10.) The like, of accessary *after* the fact, with the principal.

Commencement as usual, as *ante*, p. 40,] and after describing the offence of the principal, proceed thus:]—*And that the said E. F. well knowing the said A. B. to have committed the felony aforesaid, did afterwards feloniously receive, harbour, and maintain the said A. B. And you the said keeper, &c.* [Conclude as usual, as *ante*, p. 40.]

(11.) The like, without the principal.

Commencement as usual, as *ante*, p. 40,] *for that one E. F.* [or, if the fact, *some person unknown,*] *on the day of* A.D. *at the parish of in the said county, did feloniously, &c.* [describing the offence as in a commitment of the principal] *and that the said A. B. afterwards, well knowing the said E. F. to have committed the felony aforesaid, did feloniously receive, harbour, and maintain the said E. F. And you the said keeper, &c.* [as usual, as *ante*, p. 40.]

(12.) The like, without the principal, in another form, in case of a highway robbery.

Commencement as usual, as *ante*, p. 40,] *for being an accessary after the fact, that is to say, by harbouring, relieving, comforting, and assisting one R. D. after he the said R. D. had feloniously assaulted the said A. B. on the said Queen's highway, put him in fear and feloniously taken from his person* [*a silver watch and seals*] *his property, he the said C. D. well knowing the said R. D. to have done and committed the said felony. And you the said keeper, &c.* [Conclude as usual, as *ante*, p. 40.]

(13.) Conviction for receiving stolen property, where offence of principal is punishable by conviction only, on 7 & 8 Geo. 4, c. 29, s. 60.

—— } *Be it remembered, that on, &c. at, &c. C. D. is convicted before me J. P.* to wit. } *one of her Majesty's justices of the peace in and for the said county, for that he the said C. D. on, &c. at, &c.* [*one birch tree of the value of two shillings*] *the property of A. B. by one E. F.* (or "*by a certain ill-disposed person unknown,*") *then lately before unlawfully stolen, taken, and carried away from a certain close of the said A. B. in which the same was then and there growing, did unlawfully receive from the said E. F.* (or "*ill disposed person,*") *he the said C. D. then and there well knowing the said* [*tree*] *to have been unlawfully come by as aforesaid, against the form of the statute in that case made and provided;* I the said J. P. do therefore adjudge, &c.* [Conclude as in the form given by the 71st sect. of the 7 & 8 Geo. IV. c. 29, *post*, "*Larceny,*" Vol. III.]

(14.) Conviction for a second offence of like nature.

Same as in form (13) to the *] *and it is now proved before me the said J. P. that the said C. D. was on, &c. at, &c. convicted before one of her Majesty's justices of*

7. *Forms.* *the peace in and for the said county of for that he the said C. D. on, &c. at the parish of in the county aforesaid, one other birch tree, &c.* [as in the former conviction, *mutatis mutandis*, to the *] *and the said C. D. was thereupon adjudged, &c.* [as in the former conviction to the end of the adjudication,] *I the said J. P. do therefore adjudge the said C. D. for such his said second offence, of which he is now convicted, to, &c.* [Conclude as in a conviction of the principal for a second offence, *post*, "*Larceny*," Vol. III.]

(15.) Conviction of abettor or procurer in an offence punishable by 7 & 8 Geo. 4, c. 29, on summary conviction.

For aiding or abetting, the offender may be convicted in the same form as if he had actually committed the offence. For counselling or procuring another to commit the offence, the party may be convicted with the principal; stating that] *C. D. and E. F. are convicted before me J. P. one, &c. for that the said C. D. on, &c. at, &c.* [stating the offence of the principal in the ordinary way, and then stating the offence of procurer, thus,] *and for that the said E. F. before the said offence was so committed as aforesaid, to wit, on, &c. at, &c. aforesaid, did unlawfully counsel and procure the said C. D. the said offence in manner and form aforesaid to do and commit, against the form of the statute in that case made and provided; I the said J. P. do therefore adjudge, &c.* [See Arch. Peel's Acts, 169.]

(16.) Indictment against principal in second degree.

—— (venue) *The jurors for our Lady the Queen, upon their oath present, that C. D. late of the parish of in the county of labourer, on the day of in the year of the reign of our Lady the now Queen Victoria* [stating the offence of the principal in the first degree, as in other indictments, omitting the conclusion, and immediately before the conclusion of the indictment proceed thus:] *And the jurors aforesaid, upon their oath aforesaid, do further present, that E. F. late of the parish of in the county aforesaid, labourer, on the day of in the year of the reign of our Lady the now Queen Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, feloniously was present, aiding, abetting, and assisting the said C. D. the felony and burglary* [according to the fact] *aforesaid to do and commit, against the peace, &c.* [In an indictment for murder, this is inserted immediately before the concluding clause, *and so the jurors, &c.*; and this clause then charges both the principals in the first and second degree with the murder, thus:] *And so the jurors aforesaid, upon their oath aforesaid, do say, that the said C. D. and E. F. the said A. B. in manner and form aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder, against the peace of our Lady the Queen, her crown and dignity.*

(17.) Indictment against accessary before the fact, together with principal in murder, burglary, or felony.

—— (venue) *The jurors, &c.* [after framing the indictment against the principal in the usual form until the usual conclusion, omitting such conclusion, proceed thus:] *And the jurors aforesaid, upon their oath aforesaid, do further present, that E. F. late of the parish of in the county of labourer, before the said felony* [or "*felony and murder*," or "*burglary*," or "*larceny*," as the case may be,] *was committed in form aforesaid, to wit, on the day of in the year of the reign aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, did feloniously and maliciously aid, abet, and procure* [or if for murder, "*did feloniously and maliciously incite, move, procure, aid, counsel, hire, and command*"] *the said C. D. the said felony* [or "*felony and murder*," or "*burglary*," or "*larceny*," as the case may be,] *in manner and form aforesaid, to do and commit, against the peace, &c.* [and if against a statute, add, "*and against the form of the statute in such case made and provided.*"]

(18.) Indictment against Lord Sanchar as an accessary before the fact for murder. (a)

Middlesex. The jurors present for our Lord the King upon their oath, That whereas Robert Carliel, late of London, yeoman, and James Irweng, late of London, yeoman, not having God before their eyes, but being seduced by the instigation of the devil, on the 11th day of May, in the tenth year of the reign of our lord James, by the grace of God of England, France, and Ireland, King, defender of the faith, and so forth,

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(a) This was the indictment (taken from the report in 9 Coke, 116) on which Robert Creighton, Esquire, Lord Sanchar, of Scotland, was convicted and hanged.

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and of Scotland the 45th, at London, that is to say, in the parish of St. Dunstan in the West, in the ward of Farringdon Without, London, aforesaid, &c. with force and arms, &c. feloniously, and of their aforethought malice, in and upon one John Turner, then and there in the peace of God and of the said Lord the King being, made an assault and affray; and the aforesaid R. C. with a certain gun [tormentum] *called a pistol, of the value of 5s. then and there charged with gunpowder and one leaden bullet, which gun the said R. C. in his right hand then and there had and held, in and upon the aforesaid J. T. then and there feloniously, voluntarily, and of his malice forethought, did shoot off and discharge; and the aforesaid R. C. with the leaden bullet aforesaid, from the gun aforesaid then and there sent out, the aforesaid J. T. in and upon the left part of the breast of him the said J. T. then and there feloniously struck, giving to the said J. T. then and there with the leaden bullet as aforesaid, near the left pap of him the said J. T. one mortal wound of the breadth of half an inch, and depth of five inches, of which mortal wound the aforesaid J. T. at London aforesaid, in the parish and ward aforesaid, instantly died: And that J. I. feloniously and of his forethought malice then and there was present, aiding, assisting, abetting, comforting, and maintaining the aforesaid R. C. to do and commit the felony and murder aforesaid, in form aforesaid, and so the aforesaid R. C. and J. I. the aforesaid J. T. at London aforesaid, in the parish and ward aforesaid, in manner and form aforesaid, feloniously, voluntarily, and of their forethought malice killed and murdered, against the peace of the Lord the now King, his crown and dignity; and that one R. Creighton, late of the parish of St. Margaret, in the county of Westminster, esquire, not having God before his eyes, but being seduced by the instigation of the devil, before the felony and murder aforesaid, by the aforesaid R. C. and J. I. in manner and form aforesaid done and committed, that is to say, on the 10th day of May, in the 10th year of the reign of our Lord James, by the grace of God of England, France, and Ireland, King, defender of the faith, and of Scotland the 45th, the aforesaid R. C. at the aforesaid parish of St. Margaret, in Westminster aforesaid, in the county of Middlesex aforesaid, to do and commit the felony and murder aforesaid, in manner and form aforesaid, maliciously, feloniously, voluntarily, and of his forethought malice did stir up, move, abet, counsel, and procure, against the peace of the said Lord the King that now is, his crown and dignity.*

(19.) Indictment against accessary before the fact, the principal being convicted.

—— (venue) *The jurors for our Lady the Queen upon their oath present, that heretofore, to wit, at the general sessions of the delivery of the gaol of, &c. &c.* [so continuing the caption of the indictment against the principal,] *it was presented that one A. B. late of the parish of in the county of labourer, on the day of in the year of the reign of our Lady the now Queen Victoria* [continuing the indictment to the end, reciting it however in the past tense, as in the form (23) *infra*,] *upon which said indictment the said A. B. at the session of the gaol delivery aforesaid, was duly convicted of the felony and burglary* [according to the fact] *aforesaid; as by the record thereof more fully and at large appears.* And the jurors aforesaid, upon their oath aforesaid, do further present, that C. D. late of the parish aforesaid, in the county aforesaid, labourer, before the said felony and burglary* [according to the fact] *was committed in form aforesaid, to wit, on, &c. with force and arms, at the parish aforesaid, in the county aforesaid, did feloniously and maliciously incite, move, procure, and counsel, hire, and command the said A. B. the said felony and burglary* [according to the fact] *in manner and form aforesaid to do and commit, against the peace of our Lady the Queen, her crown and dignity.*

(20.) Indictment against accessary before the fact as for a substantive felony.

—— (venue) *The jurors for our Lady the Queen upon their oath present, that one C. D. late of the parish of in the county of labourer* [or "*that some person or persons to the jurors aforesaid unknown,*" ante, 27,] *on the day of in the year of the reign of our Lady the now Queen Victoria,* [stating a burglary, robbery, or larceny whatsoever, of the degree of grand larceny, or other felony, as usual, omitting the usual conclusion "*against the peace,*" &c.] *And the jurors aforesaid, upon their oath aforesaid, do further present, that E. F. late of the parish and county aforesaid, labourer, before the said felony and burglary* [according to the fact] *was committed in form aforesaid, to wit, on the day of in the year of the reign of our Lady the now Queen Victoria, at the parish aforesaid, in the county aforesaid, did unlawfully and maliciously counsel, hire, procure, and command the said C. D.* [or "*the said person or persons to the jurors aforesaid unknown, as*

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aforesaid,"] the said felony and burglary [according to the fact,] *in manner and form aforesaid to do and commit, [against the form of the statute in such case made and provided, and] against the peace of our Lady the Queen, her crown and dignity.*

(21.) Indictment against accessary after the fact, with the principal.

—— (venue) *The jurors, &c.* [after framing the indictment against the principal in the usual terms until the usual conclusion, omitting such conclusion, proceed thus.] *And the jurors aforesaid, upon their oath aforesaid, do further present, that E. F. late of the parish of in the county of labourer, on the day of in the year of the reign of our Lady the now Queen Victoria, well knowing the said C. D. to have done and committed the said felony and burglary* [according to the fact] *in form aforesaid, afterwards, to wit, on the day and year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, him the said C. D. did feloniously receive, harbour, and maintain, against the peace of our Lady the Queen, her crown and dignity.*

(22.) Indictment against accessary after the fact, the principal being convicted.

As in the form (19), *supra*, against an accessary before the fact, the principal being convicted, to the *, and then thus:] *And the jurors aforesaid, upon their oath aforesaid, do further present, that E. F. late of the parish of in the county of labourer, on the day of in the year of the reign of our Lady the now Queen Victoria, well knowing the said C. D. to have done and committed the said felony and burglary* [according to the fact] *aforesaid, after the same was so committed as aforesaid, to wit, on the day and year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, him the said C. D. did feloniously receive, harbour, and maintain, against the peace of our Lady the Queen, her crown and dignity.*

(23.) Indictment against accessary for receiving goods, knowing them to have been stolen, in one county, the principal having been indicted and convicted in another.

—— (venue) *The jurors for our Lady the Queen upon their oath present, that at the delivery of the gaol of our Lady the Queen of her county of Dorset, holden at Dorchester, in and for the said county of Dorset, on before the Right Hon. Thomas Lord Denman, Lord Chief Justice of our Lady the Queen, assigned to hold pleas in the Court of our Lady the Queen, before the Queen herself, and Sir knight, one other of the Justices of our said Lady the Queen, assigned to hold pleas in the Court of our said Lady the Queen, before the Queen herself, then justices of our said Lady the Queen, assigned to deliver the said gaol of the prisoners therein being, X. Y. late of the parish of in the county of labourer, was convicted in due form of law, for that the said X. Y. on the day of in the year of the reign of our Lady the now Queen Victoria, with force and arms, at the parish of in the county aforesaid (ten yards of broad cloth) of the value of thirty shillings, of the goods and chattels of one M. N. then and there being found, feloniously did steal, take and carry away, against the peace of our said Lady the Queen, her crown and dignity, as by the record thereof remaining filed in the said court of gaol delivery may more fully and at large appear. And the jurors aforesaid, upon their oath aforesaid, do further present, that A. O. late of in the parish aforesaid, in the county aforesaid, labourer, afterwards, to wit, on the said day of in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, the goods and chattels aforesaid, so as aforesaid feloniously stolen, taken and carried away, feloniously did receive and have (he the said A. O. then and there well knowing the aforesaid goods and chattels to have been feloniously stolen, taken and carried away,) against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.*

(24.) Indictment against receiver of stolen goods, as for a substantive felony.

—— (venue) *The jurors for our Lady the Queen upon their oath present, that C. D. late of the parish of in the county of labourer, on the day of in the year of the reign of our Lady the now Queen Victoria, with force and arms, at the parish aforesaid, in the county aforesaid (one silver tea-pot) of the value of ten pounds, of the goods and chattels of A. B. by one F. F.* [or "*by a certain ill-disposed person to the jurors aforesaid unknown,*"] *then lately before feloniously stolen, taken, and carried away by the said E. F.* [or "*by the same ill-disposed person*"] *feloniously did receive, he the said C. D. then and there well knowing the said goods and chattels to have been feloniously stolen, taken, and carried away as aforesaid, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.*

If the offence of the principal were a larceny not amounting to felony, the indictment will be in the same form as the last, merely substituting the word *unlawfully* for the word *feloniously*. But if the offence of the principal be not a larceny, then, besides substituting *unlawfully* for *feloniously*, make the necessary alteration in the above form, as to the description of the original offence; as for instance, where the offence of the principal was the obtaining goods under false pretences, instead of saying, *then lately before feloniously stolen, taken, and carried away*, you say, *then lately before unlawfully obtained from the said A. B. by false pretences.*

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(25.) Indictment against receiver, where offence of the principal is a misdemeanor.

Accomplice—(Is a person concerned with others in the commission of a felony or misdemeanor.)—See "*Accessary*" and "*Approver*." *As to the Evidence of*, see "*Evidence*," Vol. II.

Accusations. See "*Robbery*," "*Threats*," Vol. V.

Acquittal.

ACQUITTAL, in its most general sense, is a deliverance and setting free of a person from the suspicion of guilt; as he that on trial is discharged of a felony is said to be *acquietatus de feloniâ*; and if he be drawn in question again for the same crime he may plead *autre fois acquit*, as his life shall not be twice put in danger for the same offence. (2 *Inst.* 385.)

Quashing a conviction on a penal statute for a mere matter of form at sessions is not an *acquittal* of the defendant, concluding the case against any further inquiry in the Court of Queen's Bench. (*R.* v. *Ridgway*, 1 *D.* & *R. Mag. Cas.* 38; *R.* v. *Reason*, 6 *T. R.* 375.)

It is questionable whether a new trial is grantable after acquittal in any criminal case except a penal action, but the Court may suspend the judgment in order that a new indictment may be preferred. (See *R.* v. *Sutton*, 5 *Ad.* & *Ell.* 52.)

If a defendant, against whom an information has been laid for a penalty, be acquitted by the justices, the Court of Queen's Bench cannot reverse the judgment. (*R.* v. *Reason*, 6 *T. R.* 575; *post*, "*Conviction*." See further, as to its effect in summary proceedings before justices, &c., *post*, "*Conviction*.")

As to the effect of an acquittal in general on indictments, see *post*, "*Autre fois Acquit*," and "*Evidence*," Vol. II.

As to the acquittal of one defendant to enable him to be evidence for the defendant, see "*Evidence*," Vol. II.

As to costs on, see "*Costs*," *post*, Vol. II.

As to the right to copy of record of acquittal, see *Browne* v. *Cunning*, 10 *B.* & *Cres* 70; *post*, "*Indictment*," Vol. III. and *post*, "*Autre fois Acquit*."

Forms.

After the usual other entries, for which see *post*, "*Judgment*," Vol. III. proceed thus] *Upon their oath say, that the said A. O. is not guilty of the premises aforesaid, in the indictment aforesaid above specified, in manner and form as the said D. O. for himself above by his plea hath alleged, nor did he withdraw himself on that occasion. Upon which it is considered by the Court here, that the said A. O. of the premises aforesaid, in the indictment aforesaid above specified, be discharged and do go thereof without day.*

(1.) Judgment of acquittal on verdict for defendant.

Forms.

(2.) Judgment of acquittal in Q. B.

Whereupon all and singular the premises being seen and fully understood by the Court of our said Lady the Queen now here, it is considered and adjudged by the said Court now here, that the said A. O. do depart hence without day in this behalf.

(3.) Record of acquittal on information on penal statute before a justice out of sessions. (a)

Staffordshire, } Be it remembered, that on the day of in the year of our Lord
to wit. } one thousand eight hundred and , at the town of Stone, in the parish of Stone, in the said county of Stafford, A. I. of the said town of Stone, labourer, in his proper person, came before me J. P. esquire, one of her Majesty's justices of the peace in and for the said county, and gave me, the said justice, to understand and be informed, that on the day of in the year of our Lord one thousand eight hundred and at the parish of Stone, in the said county, one A. O. of in the county aforesaid, labourer, [here state the offence verbatim as charged in the information,] *whereupon it was by the said A. I. alleged, that the said A. O. had for his said offence forfeited the sum of pounds, one moiety thereof to the said A. I.* [as the case may be.] *And therefore the said A. I. prayed the judgment of me, the said justice, in the premises; whereupon afterwards, to wit, on this day of in the said year of our Lord one thousand eight hundred and at Stone aforesaid, in the said county, personally appeared before me, the said justice, as well the said A. I. to prosecute his said information in this behalf, as the said A. O.* [having been first duly summoned,] *to make defence thereto. And the said A. O. having heard the said information read, is asked by me, the said justice, if he can say any thing for himself why he should not be convicted of the offence therein charged against him; whereupon the said A. O. pleadeth and saith, that he is not guilty of the said offence* [or if he pleads any special matter, it must be correctly stated]. *Therefore I, the said justice, did proceed to examine into the truth of the said information and complaint, and upon due consideration had of the premises, and upon hearing the proofs and allegations as well of the said A. O. as of the said A. I., it is hereby considered and adjudged by me, the said justice, that the said A. O. be acquitted of the said charge and offence in the said information above contained, and that he do go therefore quit without day. And it is hereby also further ordered and adjudged by me, the said justice, that the said A. I. the informant, do forthwith pay to the said A. O. the defendant, the sum of* (b) *, which I do hereby settle and ascertain as and for the reasonable costs and charges which the said A. O. hath been put to in making defence to the said information. In witness whereof I have to this record of acquittal set my hand and seal, at Stone, in the said county, this day of in the said year of our Lord one thousand eight hundred and .*

18 Geo. 3, c. 19.

J. P. (L.S.)

Act of State. See "*Evidence,*" Vol. II.

Acts of Parliament.—*As to the Statement of and Offences against,* see "*Indictment,*" Vol. III. *As to the proof of,* see "*Evidence,*" Vol. II. *As to the Construction of, &c.* see "*Statutes,*" Vol. V.

Actions against Magistrates, &c. See "*Justices of the Peace,*" Vol. III.; "*Constables,*" Vol. I.

Action, Popular. See "*Information,*" Vol. III.

Actors. See "*Players,*" Vol. V.

(a) See post, "*Costs.*" (b) From Wms. Prec. 7, & J. C. P. 53.

Addition. (The legal meaning of this word is the title or estate and place of abode of a person besides his name.) *As to the Statement of, in an Indictment*, see "*Indictment*," Vol. III.; "*Abatement*," *ante*. *As to the Statement of, in Convictions*, see "*Conviction*," Vol. I.

Adhering to Queen's Enemies. See "*Treason*," Vol. VI.

Adjournment *of Examination*, see "*Examination*," Vol. II.; *of Hearing of Information*, see "*Conviction*," Vol. I.; *of Hearing of Appeal*, see "*Appeal*," Vol. I.; *of Giving Judgment*, see "*Judgment*," Vol. III.; *of Sessions*, see "*Sessions*," Vol. V.; *of Trials in General*, see "*Trial*," Vol. VI.

Adjudication. See "*Judgment*," Vol. III.; "*Order*," Vol. V.; *Statement of, in Conviction*, see "*Conviction*," Vol. I.; "*Homicide*," Vol. III.

Administering Poison, &c. *to procure Abortion*, see "*Abortion*," *ante*, 10; *Administering Poison &c. to Murder*, see "*Homicide*," Vol. III.

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Administration, Letters of, *Proof of*. See "*Evidence*," Vol. II.

Admiralty Court. (a)

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VI. *Forms as to*, 53.

I Its Jurisdiction.

JURISDICTION of, at Common Law.]—The jurisdiction of the Admiralty Court is at common law confined to offences and other matters com- (1.) Jurisdiction of. At common law.

(a) As to the Criminal Jurisdiction of this Court in general, see 2 *Hale*, 11 to 20, *Com. Dig. Admiralty*, E. 1., *Bac. Abr. Admiralty*, D., 1 *Ch. C. L.* 151. As to forging hand of registrar in, see "*Forgery*," Vol. II. As to the evidence of the proceedings of the Admiralty Court, see *post*, "*Evidence*," Vol. II.

1. *Its Jurisdiction.*

mitted on the main sea or coasts of the sea not being in any county, cinque port, haven, or pier. (See 3 *Rep.* 107; 4 *Inst.* 134.) Therefore if a murder be upon the main sea it may be tried before the admiral. (1 *Hale, P. C.* 54.)

It is plain that the admiral can have no jurisdiction in any rivers, or arms or creeks of the sea, within the bodies of counties, though within the flux and reflux of the tide; except in the particular instances of mayhem and homicide, done in great rivers, beneath the bridges near the sea, which depend on stat. 15 Rich. II. c. 3 (*infra.*) In general, it is said, that such parts of the rivers, arms or creeks, are deemed to be within the bodies of counties, *where persons can see from one side to the other.* Lord *Hale*, in his treatise (*De Jure Maris*), says, that arm or branch of the sea which lies within the *fauces terræ*, where a man may *reasonably discern* between shore and shore, is, or at least may be, within the body of a county. *Hawkins*, however, considers the line more accurately confined by other authorities to such parts of the sea, where a man standing on one side of the land *may see what is done on the other;* and the reason assigned by Lord *Coke* in the Admiralty case, 13 *Rep.* 52, in support of the county coroner's jurisdiction, where a man is killed in such places, *because that the county may well know it*, seems rather to support the more limited construction. But at least, where there is any doubt, the jurisdiction of the common law ought to have the preference. (2 *East's P. C.* c. 17, s. 10.)

In a case at the Admiralty Sessions, of a murder committed in a ship in a part of Milford Haven, never known to be dry except at the very lowest tide, and which was about three miles over, about seven or eight miles from the mouth of the river or open sea, and about sixteen miles below any bridges over the river, a question was made whether the place where the murder was committed was to be considered as within the limits to which commissions granted under stat. 28 Hen. VIII. c. 15, do by law extend. Upon reference to the judges, they were unanimously of opinion that the trial was properly had; and it is said that during the discussion of the point, Lord *Hale's* construction of this act (in 2 *Hale, P. C.* 16, 17, 18,) was much preferred to the doctrine of Lord *Coke*, (in 3 *Inst.* 111; 4 *Inst.* 134); and that most, if not all, of the judges seem to think that the common law has a concurrent jurisdiction with the admiralty in this haven and in all other havens, creeks, and rivers in this realm of this nature, although in the body of a county. (*a*) (*Bruce's case*, 2 *Leach, C. C.* 1093; 1 *East's P. C.* 368; *Russ. & R. C. C.* 243, S. C.)

Between high and low water mark.

An alternate jurisdiction

Upon the open sea shore the common law and admiralty have alternate jurisdiction over the space between *high* and *low water mark*, (3 *Inst.* 113; 2 *Hale's P. C.* 17,) so that if a man stricken on the high sea die on the shore on the reflux of the tide, the case is out of the admiral's jurisdiction. *R.* v. *Lucie*, 2 *Hale's P. C.* 17, 20; 1 *East's P. C.* c. 5, s. 131.) On the other hand, where A. standing on the shore of a harbour, fired a loaded musket at a revenue cutter, which had struck on a sand-bank in the sea, about 100 yards from the shore, by which firing a person was maliciously killed on board the vessel; this was held to be piracy, for the offence was committed where the death happened, and not at the place from whence the cause of death proceeded. (1 *Hawk.* c. 37, s. 17; *R.* v. *Combe*, 1 *Leach*, 388; 1 *East's P. C.* 367.) If it appears that the goods were taken at sea and afterwards brought on shore, the offender cannot be indicted as for a larceny in that county into which they were carried; because the original felony was not a taking of which the common law takes cognizance. (2 *East's P. C.* c. 17, s. 12, p. 805; 3 *Inst.* 117. (*b*)

(*a*) The words "although in the body of a county," are to be found only in the latter report of *Russ. & R. C. C.* 243.

(*b*) It may be questionable however, whether such a case would not now be triable in the county into which the goods were carried, on account of the provisions of the 7 Geo. IV. c. 64, s. 12, which enacts that offences begun in one county and completed in another may be tried in either.

Jurisdiction by Statute.]—The statute 15 Rich. II. c. 3, authorises the admiral "to inquire of *deaths* and *mayhems* done in ships being and hovering in the main streams of great rivers, only beneath the bridges of the same rivers nigh the sea." This jurisdiction is, however, concurrent with and does not supersede the common law jurisdiction. (2 *Hale*, 16, 54; 1 *East's P. C.* 168.)

1. *Its Jurisdiction.*

Jurisdiction by statute.

The 7 & 8 Geo. IV. c. 65, extends the powers and jurisdiction of admiralty commissioners to the Lord High Admiral.

Lord High Admiral.

The 5 & 6 Will. IV. c. 76, s. 108, abolishes the chartered admiralty jurisdictions. (See *post*, "*Corporations*," Vol. II.)

Corporations.

But the practice and proceedings of the Court of Admiralty are now chiefly regulated by the 3 & 4 Vict. c. 65 and 66; which statutes are, however, too extensive for insertion in a work of this description.

II. Trial in.

Trial by jury of offences at sea.

By stat. 28 Hen. VIII. c. 15, A. D. 1536, *treasons, felonies, robberies, murders, and confederacies* committed in or *upon the sea*, or in any haven, river, creek, or place where *the admiral* has or *pretends to have jurisdiction*, shall be tried according to the course of common law, and in such places and counties as shall be appointed by the king's commission, (*c*) in like manner and form as if the same had been committed upon land.

Previous to this act a person who had committed an offence on the high seas or in the admiralty jurisdiction, could only be prosecuted in the High Court of Admiralty, held before the lord high admiral or his deputy, according to the course of the civil law and not by a jury, and therefore, according to the maxims of Roman jurisprudence, he could not be convicted or sentence of death given without proof by two witnesses or his confession. (See 4 *Bla. C.* 268; *Com. Dig. Admiralty*, E. 5.) This statute, it will be observed, obviates this evil.

This statute merely alters the *mode of trial* in the Admiralty Court, and it does not enlarge or narrow its jurisdiction as it stood before the passing of it; (*Com. Dig. Admiralty*, E. 5;) and it does not, neither does the 39 Geo. III. c. 37, *infra*, take away any jurisdiction as to the trial of offences which might before have been tried in a court of common law; and therefore an indictment for a conspiracy on the high seas is triable at common law, on proof of an overt act on shore, in the county where the venue is laid. (4 *East*, 164.) And as to shooting from the land and killing at sea, and stealing goods at sea and bringing them on the land, see *ante*, 48; and see *ante*, 47, 48, as to the concurrent jurisdiction with the common law.

The statute does not give the admiral jurisdiction in any river, creek or port within the body of a county; and the main question of jurisdiction arising on the statute is, whether the fact happened at any place within the body of a county? If it did, the trial must be had before the ordinary jurisdiction; for the admiral can have no jurisdiction there, unless by positive statute. (1 *Russ.* 144; 4 *Inst.* 137; 15 Rich. II. c. 3, *ante*, 48.)

With respect to the words in the act, "*where the admiral* pretends *to have power*," they are not to be extended to such a pretence as is without any right at all. (2 *Hale's P. C.* 17; 1 *Hawk. P. C.* c. 37, s. 11; 4 *Inst.* 137; 2 *East's P. C.* c. 17, s. 10.) Thus a felony committed between high and low water mark, after the water is reflowed, is not within the admiral's jurisdiction by these words; (2 *Hale's P. C.* 17;) but these words are to be understood between the high and low water marks; (3 *Inst supra*;) and in great rivers, where the sea flows and reflows below the first bridges, and also in creeks of the sea, at full water, where the sea flows and reflows, and upon high water upon the shore, though these are possibly within the body of the county; for there at least, by stat. 15 Rich. II. they have a jurisdiction, and thus, accordingly, it has been constantly used in all times, even when common law judges

(*c*) See the form of the commission, 2 *East's P. C.* 795; 4 *Chit. C. L.* 160.

2. *Trial in.*

have been named and sat in their commission; but the words *pretend to have* must not be extended to such a pretence as is without any right at all, as if the admiral pretend jurisdiction on the shore when the water is reflowed, yet he hath no cognizance of a felony committed there. (*Lacie's case*, 2 *Hale's* P. C. 17; *ante*, 49.)

The jurisdiction for the trial of offences under the statute of 28 Hen. VIII. c. 15, only extended to the offences therein named, viz. *treasons, felonies, robberies, murders, and confederacies*, and did not give conusance of any felony not a felony at land, nor to any new created felony created by statute since the passing of that act. (See *Rex* v. *Snape*, 2 *East's P. C.* 807; 2 *Hawk.* c. 25, s. 45.)

To remedy this the stat. 39 Geo. III. c. 37, enacts, "that *all* offences committed on the high seas, out of the body of any county, *shall be offences of the same nature*, and liable to the same punishments, as if they had been committed on shore, and shall be inquired of, heard, tried and adjudged as offences under stat. 28 Hen. VIII. c. 15."

And by 7 & 8 Geo. IV. c. 30, s. 43, relating to malicious injuries to property, "where any felony or misdemeanor punishable under this act, shall be committed within the jurisdiction of the admiralty of England, the same shall be dealt with, inquired of, tried, and determined in the same manner as any other felony or misdemeanor committed within that jurisdiction."

And by 7 & 8 Geo. IV. c. 27, s. 77, relating to larceny and other offences connected therewith, "where any felony or misdemeanor, punishable under this act, shall be committed within the jurisdiction of the admiralty of England, the same shall be dealt with, inquired of, tried, and determined, in the same manner as any other felony or misdemeanor committed within that jurisdiction."

And by 9 Geo. IV. c. 31, s. 32, relating to injuries to the person, "all indictable offences mentioned in this act, which shall be committed within the jurisdiction of the admiralty of England, shall be deemed to be offences of the same nature, and liable to the same punishments, as if they had been committed upon the land in England, and may be dealt with, inquired of, tried, and determined in the same manner as any other offences committed within the jurisdiction of the admiralty of England." This provision is substituted for those contained in sect. 2 of the stat. 1 Geo. IV. c. 90, which made offences under Lord *Ellenborough's* act, if committed at sea, triable at the admiralty sessions; and that section is now repealed.

Also, by 11 Geo. IV. & 1 Will. 4, c. 66, s. 27, relating to forgery, "where any offence punishable under this act shall be committed within the jurisdiction of the Admiralty, the same shall be dealt with, inquired of, tried, and determined in the same manner as any other offence committed within that jurisdiction;" and the 7 Will. IV. & 1 Vict. c. 85, s. 10, relating to offences against the person; the 7 Will. IV. & 1 Vict. c. 86, s. 10, relating to burglary and stealing in a dwelling house; the 7 Will. IV. & 1 Vict. c. 87, s. 13, relating to robbery and stealing from the person; and the 7 Will. IV. & 1 Vict. c. 89, s. 14, relating to burning or destroying buildings or ships; all contain similar enactments with respect to the offences punishable under these acts respectively.

By the 11 & 12 Will. III. c. 7, made perpetual by 6 Geo. I. c. 19, piracies and felonies upon the sea, &c. may be inquired of in any place at sea or upon land in his Majesty's dominions, appointed by the king's commission. Also by the stats. 4 Geo. I. c. 11; 8 Geo. I. c. 24, and 2 Geo. II. c. 28, several piratical offences therein mentioned, and by stat. 18 Geo. II. c. 30, certain acts of hostility committed at sea in time of war, may be inquired of and tried in the admiral's court; and see 2 & 3 Anne, c. 20, s. 35.

For the acts against the wilful destruction of ships, see "*Ships*," Vol. V.

The piratically stealing a ship's anchor is a capital offence by the marine laws, triable under the stat. 28 Hen. VIII. and the stat. 39 Geo. III. c. 37, does not extend to that case; and the stealing is equally an offence whether the master concur in it or not, and whether to defraud the underwriters or the owners. (*Rex* v. *Aveling*, *Russ. & R. C. C.* 123.)

2. *Trial in.*

Accessaries.

Upon the statute 28 Hen. VIII. c. 15, a doubt arose whether one who was accessary at land to a felony committed at sea, was triable by the admiral within the purview of it; (*Yelv.* 134; 13 *Co.* 51;) but by the stat. 11 & 12 Will. III. c. 7, made perpetual by 6 Geo I. c. 19, accessaries to piracy may be inquired of according to the stat. 28 Hen. VIII. c. 15. And by the stat. 7 Geo. IV. c. 64, s. 9 & 10, *ante*, 29, 30, all accessaries to felonies committed upon the high seas, whether the offence of becoming accessary shall have been committed within the body of a county of the realm or upon the high seas, may be tried by any court that may try the principal felon.

Mode of trial.

Judges.

With respect to the *mode of trial* in this court, all offences committed on the seas are tried before commissioners nominated by the Lord Chancellor, the indictment being first found by a grand jury of twelve men, and afterwards tried by another jury, as at common law; the course of proceedings being according to the law of the land. Among the commissioners are always the deputy of the admiral, or the judge of the admiralty, and two or more of the common law judges; see stat. 28 Hen. VIII. c. 15, s. 1, 2. (4 *Bla. C.* 269.)

The mode of trial in the admiralty court is regulated by the civil law *et per consuetudines marinas*, grounded on the law of nations, which may possibly give to that court a jurisdiction which our common law is not able to invest. (Per *Mansfield*, C. J.; *Rex* v. *Depardo*, 1 *Taunt. R.* 29.)

Times for holding the court.

The stat. 32 Geo. II. c. 25, s. 20, for the more speedy bringing of offenders to justice, &c. enacts, "that a session of oyer and terminer and gaol delivery for the trial of offences committed on the high seas within the jurisdiction of the admiralty of England, shall be holden twice at least in every year, viz. in March and October, at the Old Bailey, (except when the sessions of oyer and terminer and gaol delivery for London and Middlesex shall be there holden,) or in such other places in England as the Lord High Admiral, &c. shall in writing under his hand, directed to the judge of the court of admiralty, appoint. (*Sed query if this provision be not expired.*)

Central Criminal Court.

When offenders are first committed to Newgate for the offences above-mentioned, the Central Criminal Court act, 4 & 5 Will. IV. c. 36, s. 22, enacts, "that it shall and may be lawful for the justices and judges of oyer and terminer and gaol delivery, to be named in and appointed by the commissions to be issued under the authority of the act, or any two or more of them, to inquire of, hear, and determine any offence or offences committed or alleged to have been committed on the high seas, or other places within the jurisdiction of the admiralty of England; and to deliver the gaol of Newgate of any person or persons committed to or detained therein, for any offence or offences alleged to have been done or committed upon the high seas, within the jurisdiction of the admiralty of England; and all indictments found, and trials and other proceedings had and taken by and before the said justices and judges, shall be valid and effectual to all intents and purposes whatsoever. The same section enables the justices and judges to order the payment of costs in the manner prescribed by the stat. 7 Geo. IV. c. 64, s. 27, *infra*.

An accessary before the fact to a felony committed on the high seas within the jurisdiction of the Admiralty of England may be indicted and tried at the Central Criminal Court, by virtue of the stats. 7 Geo. 4, c. 64, s. 9, and 4 & 5 Will. IV. c. 36, although the person charged as the principal offender has not been committed to or detained in the gaol of Newgate for his offence. (*Rex* v. *Wallace*, 1 *C. & Mar.* 200.)

III. Expenses of Prosecutions, &c.

Expenses of prosecutions in.

By the stat. 7 Geo. IV. c. 64, s. 27, for enabling the high court of admiralty to order the payment of the costs and expenses of prosecutors and witnesses, and compensation for their trouble and loss of time, in cases in which other courts have a like power under this act, it is enacted, "That it shall be

3. *Expenses of Prosecutions, &c.*

lawful for the judge of the said court of admiralty, in every case of felony, and in every case of misdemeanor of the denominations hereinbefore enumerated, committed upon the high seas, to order the assistant to the counsel for the affairs of the admiralty and navy to pay such costs, expenses and compensation to prosecutors and witnesses, in like manner as other courts may order the treasurer of the county to pay the same; and such assistant is hereby authorised and required, upon sight of every such order, forthwith to pay to the person named therein, or to any one duly authorised to receive the same on his or her behalf, the money in such order mentioned, and shall be allowed the same in his accounts."

This enactment puts prosecutions in the High Court of Admiralty on the same footing as those in other criminal courts, in regard to the allowance of prosecutors' expenses. See further *post*, "*Costs.*"

The 4 & 5 Will. IV. c. 36, s. 22, the Central Criminal Court Act, enables the judges and justices to order the payment of costs in the manner prescribed by the above act of 7 Geo. 4, c. 64.

IV. Punishment of Offences in Jurisdiction of.

Punishment of offences in jurisdiction of.

With respect to the punishment of offences committed in the jurisdiction of the Admiralty, it is by the stat. 7 & 8 Geo. IV. c. 28, s. 12, enacted, "That all offences prosecuted in the High Court of Admiralty of England, shall, upon every first and subsequent conviction, *be subject to the same punishments*, whether of death or otherwise, as if such offences had been committed upon the land."

As to the punishment of offences against the person, &c. see the 9 Geo. IV. c. 31, s. 32, *ante*, 50.

V. Summary Jurisdiction of Justices, &c. other Offences in Jurisdiction of.

Commissioners or justices to have jurisdiction, &c.

By the 7 Geo. IV. c. 38, "it shall and may be lawful to and for any one or more of the commissioners for the time being, named or to be named in the commission of oyer and terminer, for the trying of offences committed within the jurisdiction of the admiralty of England; and also to and for any one or more of the commissioners for the time being, named or to be named in any commission made or granted under or by virtue of the act of the 46 Geo. III. c. 54; and also to and for any one or more of his Majesty's justices of the peace for the time being for any county, riding, division, or place in the United Kingdom, and they are hereby respectively authorised, empowered, and required, from time to time, to take any information or informations of any witness or witnesses upon oath, which oath they and each of them are hereby respectively authorised to administer, touching any treason, piracy, felony, robbery, murder, conspiracy, or other offence, of what nature or kind soever, committed upon the sea, or in any haven, river, creek, or place where the admiral or admirals hath or have power, authority, or jurisdiction; and thereupon, (if such commissioner or commissioners, justice, or justices of the peace, shall see cause,) by any warrant or warrants under his or their hand and seal or hands and seals, to cause the person or persons charged in such information or informations to be apprehended and committed to safe custody, to remain in such custody until discharged in due course of law, or until bailed, in cases in which bail may by law be taken."

This enactment, authorising magistrates to commit or bail on charges of offences alleged to have been committed within the jurisdiction of the admiralty, is new and important.

As to the commitment of offenders, in cases of murder or manslaughter on land out of the United Kingdom, see "*Foreign Country*," Vol. II.

As to the jurisdiction of justices over offences committed on the high seas against the customs or excise laws, and their power of mitigating penalties, see *post*, tit. "*Excise and Customs*," Vol. II.

5. *Jurisdiction of Justices, &c.*

Excise and customs.

VI. Forms. (a)

Warrant of one of commissioners under Admiralty commission to apprehend person on suspicion of murder on high seas.

To all Constables and others her Majesty's officers of the peace for the county of [Middlesex and city and liberty of Westminster,] whom these may concern, and especially to A B.

Admiralty of England, (to wit.) These are in her Majesty's name to command you and every of you, upon sight hereof, to take and bring before me, one of the commissioners of oyer and terminer for the jurisdiction of the Admiralty of England, the body of C. D., late [seaman in her Majesty's frigate, ,] of whom you shall have notice, to answer all such matters and things as on her Majesty's behalf are on oath objected against him by A. B., captain, and others, on suspicion of having been guilty of [the wilful murder of E. H., a seaman on board the said frigate,] at , and on the high seas within the jurisdiction of the Admiralty of England, against the peace [and against the statute.] Hereof fail not at your peril. Given under my hand and seal this day of 1843. E. F. (L. S.)

The like for an assault and battery on high seas.

To all Constables and others her Majesty's officers of the peace whom these may concern.

Admiralty of England, (to wit.) These are in her Majesty's name to command you and every of you upon sight hereof to take and bring before me or some other of her Majesty's commissioners for the jurisdiction of the Admiralty of England, the body of C. D., of whom you shall have notice, to answer all such matters and things as in her Majesty's behalf are on oath objected against him by A. B. for [violently assaulting, beating, and bruising him on, &c. on board a certain ship called] on the high seas, within the jurisdiction of the Admiralty of England aforesaid, against the peace [and against the statute.] Hereof fail not at your peril. Given under my hand and seal this day of 1843. E. F. (L. S.)

Admissions, see "*Confessions*," Vol. I.; "*Evidence*," Vol. II.

Ad quod damnum, *Writ of*, see "*Highways*," Vol. III.

Adultery, see "*Lewdness*," Vol. III.

Advertising *for Stolen Goods*, see "*Larceny*," Vol. III.

Advertisements in Newspapers, &c. *Duty on*, see "*Newspapers*," Vol. V.

Assessors, see "*Leet*," Vol. III.

Affidavit, see "*Oath*," Vol. V. As to Proof and Effect of, see *post*, "*Evidence*," Vol. II. To verify Plea in Abatement, *ante*, 5. To ground application for an Information, see "*Information*," Vol. III.

(a) See form of Admiralty Commission, 2 East's P. C. 795; 4 Ch. C. L. 160.

Affirmation of Quakers, see "*Oath*," Vol. V.; "*Evidence*," Vol. II.

Affray.

As to riots, see *post*, "*Riots*," Vol. V.

Herein of,

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II. *How far it may be suppressed by a Private Person*, 56.
III. *How far by a Constable*, 56.
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VI. *Forms*, 57.

I. What is an Affray.

What an affray in general.

An affray is a public offence to the terror of the Queen's subjects; so called (according to Lord Coke) because it affrighteth and maketh men afraid. (3 *Inst.* 158.)

From whence it seemeth clearly to follow, that there may be an *assault* which will not amount to an *affray;* as where it happens in a private place, out of the hearing or seeing of any, except the parties concerned, in which case it cannot be said to be to the terror of the people. (1 *Hawk.* c. 63, s. 1.)

Words do not amount to.

Also it is said, that no quarrelsome or threatening words whatsoever shall amount to an affray; and that no one can justify laying his hands on those who shall barely quarrel with angry words without coming to blows; yet it seemeth, that the constable may, at the request of the party threatened, carry the person who threatens to beat him before a justice, in order to find sureties. (1 *Hawk.* c. 63, s. 2.)

Challenge to fight.

Also it is certain, that it is a very high offence to challenge another either by word or letter to fight a duel, or to be the messenger of such a challenge; or even barely to endeavour to provoke another to send a challenge, or to fight, as by dispersing letters to that purpose full of reflections, and insinuating a desire to fight. (1 *Hawk.* c. 63, s. 3. See also, *post*, "*Challenge to Fight.*")

Duel.

It should seem a duel as managed in the present times is not an affray. (See 1 *Russ. C. & M.* 398, n.)

Where no violence.

But although no bare words, in the judgment of law, carry in them so much terror as to amount to an affray, yet it seems certain, that in some cases there may be an affray where there is no actual violence; as where a man arms himself with dangerous and unusual weapons in such a manner as will naturally cause a terror to the people, which is said to have been always an offence at the common law, and is strictly prohibited by statute; for by statute 2 Edw III. c. 3, it is enacted, that no man of what condition soever, except the king's servants in his presence, and his ministers in executing their office, and such as be in their company assisting them, and also upon a cry made for arms to keep the peace, shall come before the King's justices or other of the King's ministers doing their office with force and arms, nor bring any force in affray of peace, nor go nor ride armed by night or day in fairs or markets, or in the presence of the King's justices or other ministers or elsewhere, upon pain to forfeit their armour to the King, and their bodies to prison, at the King's pleasure. And the King's justices in their presence,

Carrying arms, 2 Edw. 3, c. 3.

sheriffs and other ministers in their bailiwicks, lords of franchises and their bailiffs in the same, and mayors and bailiffs of cities and boroughs within the same, and borough-holders, constables, and wardens of the peace within their wards, shall have power to execute this act. And the judges of assize may punish such officers as have not done their duty herein. (1 *Hawk.* c. 63, s. 4.)

1. *What is an Affray.*

Upon a Cry made for Arms to keep the Peace.]—It is holden upon these words of exception, that no person is within the intention of this statute who arms himself to suppress dangerous rioters, rebels, or enemies, and endeavours to suppress or resist such disturbers of the peace and quiet of the realm. (1 *Hawk.* c. 63, s. 10.)

In an Affray of Peace.]—*En affrayer de la pees* (Lord Coke has it *pais*,) of the country or the people; and so, he observes, that the writ grounded upon this statute saith, *in quorundam de populo terrorem;* and therefore the printed book in affray of peace ought to be amended. (3 *Inst.* 158.)

And it is holden upon these words, that no wearing of arms is within the meaning of this statute, unless it be accompanied with such circumstances as are apt to terrify the people; from whence it seems clearly to follow, that persons of quality are in no danger of offending against this statute by wearing common weapons, or having their usual number of attendants with them for their ornament or defence in such places and upon such occasions in which it is the common fashion to make use of them, without causing the least suspicion of an intention to commit any act of violence or disturbance of the peace. (1 *Hawk.* c. 63, s. 9.)

Nor to go nor to ride armed.]—It is holden that a man cannot excuse the wearing such armour in public, by alleging that such a one threatened him, and that he wears it for the safety of his person from his assault: but it hath been resolved, that no one shall incur the penalty of the said statute for assembling his neighbours and friends in his own house against those who threaten to do him any violence therein, because a man's house is as his castle. (1 *Hawk.* c. 63, s. 8.)

Their Bodies to Prison.]—Stat. 20 Rich. II. c. 1, adds a fine likewise.

Wardens of the Peace.]—It is holden that any justice of the peace, or other person who is empowered to execute this statute, may proceed thereon *ex officio;* and if he find any person in arms, contrary to the form of the statute, he may seize the arms and commit the offender to prison; and that he ought also to make a record of the whole proceeding, and certify the same into the exchequer. (1 *Hawk.* c. 63, s. 5.)

In addition to the above statute of Edward, by 7 Rich. II. c. 13, no man shall ride in harness within the realm, nor with launcegays; and the 20 Rich. II. c. 1, is to the same effect. (*a*)

7 Rich. 2, c. 13.
20 Rich. 2, c. 1.

(*a*) The act of 20 Rich. II. c. 1, is as follows:—"First, Whereas in a statute made the seventh year of the reign of the King that now is, it is ordained and assented, that no man shall ride armed within the realm against the form of the statute of Northampton thereupon made, nor with launcegays within the same realm, and that the said launcegays shall be utterly put out within the said realm as a thing prohibited by the King, upon pain of forfeiture of the same launcegays, armours, or any other harness in the hands and possession of them that bear them from henceforth within the same realm against the same statutes and ordinances, without the King's special license. Our Lord the King considering the great clamour made to him in this present parliament, because that the said statute is not holden, hath ordained and established in the said parliament that the said statutes shall be fully holden and kept and duly executed, and that the said launcegays shall be clear put out, upon the pain contained in the said statute of Northampton, and also to make fine and ransom to the King. And, moreover, that no lord nor knight, nor other, little nor great, shall go nor ride by night nor by day armed, nor bear sallet, nor skull of iron, nor of other armour, upon the pain aforesaid, save and except the King's officers and ministers in doing their office."

2. *How suppressed.*

II. How far it may be suppressed by a Private Person.

Private person's power to suppress.

It seems agreed, that any one who sees others fighting may lawfully part them, and also stay them till the heat be over, and then deliver them to the constable, to be carried before a justice to find sureties for the peace. (1 *Hawk.* c. 63, s. 11.) And he may likewise stop those whom he may see coming to join either party. (*Id.*)

And the law doth encourage him hereunto; for if he receive any harm by the affrayers, he shall have his remedy by law against them; and if the affrayers receive hurt by endeavouring only to part them, the standers-by may justify the same, and the affrayers have no remedy by law. (3 *Inst.* 158.)

And if either of the parties be slain or wounded, or so stricken that he falleth down for dead, in that case the standers-by ought to apprehend the party so slaying, wounding, or striking, or to endeavour the same by hue and cry, or else for his escape they shall be fined and imprisoned. (3 *Inst.* 158.)

As to arrests by private persons in general, see *post*, "*Arrest.*"

III. How far it may be suppressed by a Constable.

Constable's power over affrays in his presence.

It seems agreed that a constable is not only empowered, as all private persons are, to part an affray which happens *in his presence*, but is also bound at his peril to use his best endeavours to this purpose; and not only to do his utmost himself, but also to demand the assistance of others, which if they refuse to give him, they are punishable by fine and imprisonment. (1 *Hawk.* c. 63, s. 13. And see *R.* v. *Browne*, 1 *Car. & M.* 314.)

And it is said that if a constable see persons either actually engaged in an affray, as by striking or offering to strike, or drawing their weapons, or the like, or upon the very point of entering upon an affray, as where one shall threaten to kill, wound, or beat another, he may either carry the offender before a justice to find sureties for the peace, or he may imprison him of his own authority for a reasonable time till the heat shall be over, and also afterwards detain him till he find such surety by obligation: but it seems that he has no power to imprison such an offender in any other manner or for any other purpose; for he cannot justify the committing an affrayer to gaol till he shall be punished for his offence: and it is said that he ought not to lay hands on those who barely contend with hot words without any threats of personal hurt; and that all which he can do in such case is to command them under pain of imprisonment to avoid fighting. (1 *Hawk.* c. 63, s. 14; and see *Howell* v. *Jackson*, 6 *C. & P.* 723.)

But he is so far entrusted with a power over all actual affrays, that though he himself is a sufferer by them, and, therefore, liable to be objected against as likely to be partial in his own cause, yet he may suppress them; and, therefore, if an assault be made upon him, he may not only defend himself, but also imprison the offender in the same manner as if he were no way a party. (1 *Hawk.* c. 63, s. 15.)

A person merely standing in the way with intent to hinder a constable from preventing a breach of the peace, will not justify the constable in giving him a blow, though he may take him into custody. (*Levy* v. *Edwards*, 1 *Car. & P.* 40.)

If an affray be in a house, the constable may break open the doors to preserve the peace; and if affrayers fly to a house and he follow with fresh suit, he may break open the doors to take them. (1 *Hawk.* c. 63, s. 16.) It should seem, however, a demand of admittance ought to be first made.

But it is said that a constable hath no power to arrest a man for an affray done out of his own view without a warrant from a justice, unless a felony were done or likely to be done; for it is the proper business of a constable to preserve the peace, and not to punish the breach of it. (1 *Hawk.* c. 63, s. 17; see *Cook* v. *Nethercote*, 6 *C. & P.* 741, *post*, title, "*Arrest.*") He may however, it seems, carry those before a justice who were arrested by other

persons present at an affray, and who have been thus delivered into his hand. (*Id.* and *vide Reg.* v. *Tooley*, 2 Lord Raym. 1206; *Clifford* v. *Brandon*, 2 Camp 367.) 3. *How suppressed.*

Also a constable hath no power to arrest an affrayer without warrant *after* the affray is ended. (*Cook* v. *Nethercote*, 6 *C. & P.* 741.) Constable's power over.

As to the duty of a constable in taking a party into custody for disturbance in a church, see *Williams* v. *Glennister*, 2 *B. & Cress.* 699; 4 *Dowl. & R.* 217, S.C.; *post*, "*Church.*")

IV. How far it may be suppressed by a Justice of the Peace.

There is no doubt but that a justice of the peace may and must do all such things to the aforesaid purpose, which a private man or constable is either enabled or required by the law to do; but it is said that he cannot, without a warrant, authorise the arrest of any person for an affray out of his own view; yet it seems clear, that in such case he may make his warrant to bring the offender before him, in order to compel him to find sureties for the peace. (1 *Hawk.* c. 63, s. 18.) Justice's power over.

And a justice has a greater power over one who has dangerously wounded another in an affray than either a private person or a constable; for there does not seem to be any good authority that these have any power at all to take sureties of such an offender; but it seems certain that a justice has a discretionary power either to commit him or to bail him till the year and day be past. But it is said that he ought to be very cautious how he takes bail if the wound be dangerous; for that if the party die, and the offender appear not, he is in danger of being severely fined, if he shall appear upon the whole circumstances of the case to have been too favourable. (1 *Hawk.* c. 63, s. 19; see further, *post*, "*Arrest.*")

V. Punishment of an Affray.

All affrays in general are punishable by fine or imprisonment, or both (1 *Hawk.* c. 63, s. 20); and a very high fine will be imposed for an affray in a court of justice (3 *Inst.* 141; 12 *Co.* 71); and as to an affray in a church, see "*Church.*" Punishment of.

Affrays are inquirable in the leet as common nuisances. (3 *Inst.* 158.) Inquirable in the leet.

VI. Forms.

(1.) Warrant to apprehend affrayers.

Westmoreland { *To the Constable of and all other Constables and others whom these may concern.*

Whereas A. I. of yeoman, hath this day made oath before me, J. P. Esquire, one of Her Majesty's justices of the peace for the said county, that on the day of in the year of the reign of our Lady the now Queen Victoria, A. O. of yeoman, and B. O. of yeoman, at in the said county [in a tumultuous manner made an affray, to the terror and disturbance of her Majesty's subjects then and there being, wherein the person of the said A. I. was beaten and abused by them the said A. O. and B. O. without any lawful or sufficient provocation given to them or either of them by him the said A. I.] These are therefore to command you forthwith to apprehend the said A. O. and B. O., and bring them before me or some other of her Majesty's justices of the peace for the said county, to answer the premises and to find sureties as well for their personal appearance at the next general quarter sessions of the peace, to be holden for the said county, then and there to answer to an indictment to be preferred against them by the said A. I. for the said offence, as also for their keeping the peace in the meantime towards her said Majesty and all her liege people, and especially towards him the said A. I. Hereof fail not, as you will answer the contrary at your peril. Given under my hand and seal at in the said county, the day of 1843.

6. *Forms.*

(2.) Commitment for an affray.

[Commencement as usual, as *ante*, p. 9.] *that on the day of , A.D. at the parish of in the said county, C. D. of [labourer], E. F. of [labourer], and G. H. of [yeoman], did in a tumultuous manner, and with force and arms make an affray, to the terror and disturbance of her Majesty's subjects then and there being, [wherein the said A. B. was assaulted, beaten, and abused by the said C. D., E. F. and G. H., without any just or reasonable cause.]* [Conclude as usual, as *ante*, p. 9.]

(3.) Indictment for.

——(Venue.) to wit. *The Jurors for our Lady the Queen upon their oath present, that A. O. late of the parish of in the county of [labourer], and B. O. late of the same place [labourer], with force and arms on the day of in the year of the reign of our Lady the now Queen Victoria, at the parish aforesaid, in the county aforesaid [being arrayed and unlawfully assembled together in a warlike manner], did make an affray, to the terror and disturbance of divers of the subjects of our said Lady the Queen, then and there being, and to the evil example of all others, and against the peace of our said Lady the Queen, her crown and dignity.*

Agents.

AN agent may be indictable for taking too large a brokerage in negociating an annuity. (See 17 Geo. III. c. 26, s. 7; 6 *T. R.* 265; *post*, "*Annuity.*")

As to embezzlement by, see *post*, "*Larceny*," Vol. III.

When good witnesses, *post*, "*Evidence*," Vol. II.

As to how far a party may be criminally liable for the acts of his agent, see the instances of the liability of publishers of a libel, *post*, Vol. III. title "*Libel.*"

As to accessaries, *see ante*, "*Accessary.*"

Aiders and Abettors, see "*Accessaries*," *ante*, 14.

Alehouse.

I. *What an Alehouse, &c., who may keep it, and where*, 59.

II. *License for Selling Beer, &c. in Beer Houses not being Inns or Public Houses*, 60 *to* 81.

III. *License for Selling Wine, Spirits, Beer, &c. in Inns or Public Houses*, 82 *to* 107.

IV. *Making and Selling Unwholesome Victuals, &c.* 107.

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VI. *Wine and Spirit and Ale Measures*, 108.

VII. *Enhancing Price of Victuals, Ale, &c.* 109.

VIII. *Keeping Disorderly Houses; permitting Drunkenness, &c.; Harbouring Thieves, Police, &c.* 109.

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XVIII. *Their Privileges and Disqualifications,* 122.
XIX. *Forms,* 122.

I. What an Alehouse, &c.; who may keep it, &c. and where.

AN *inn* or hostel may be defined to be a house in which travellers, passengers, wayfaring men, and other such like casual guests, are accommodated with victuals and lodgings, and whatever they reasonably desire, for themselves and their horses, at a reasonable price, while on their way. (See *R.* v. *Luellin*, 12 *Mod.* 445, *Thompson* v. *Lacy*, 3 *B & Ald.* 283.) What an inn, &c.

A *beer house* or *shop* is a house in which beer, ale, porter, cider or perry is sold by retail, to be drunk or consumed on the premises. A beer house.

If an inn uses common selling of ale within the meaning of the recent statutes allowing persons licenses for that purpose, it is then also an *alehouse;* and if an alehouse lodges and entertains travellers it is also an inn.

A *coffee-house* is a house where coffee is sold to be consumed on the premises, and is not of itself an inn. (*Doe* d. *Pitt* v. *Laining*, 4 *Campb.* 77.) But in the case of *Thompson* v. *Lacy* (3 *B. & Ald.* 283) it was held, that a house of public entertainment in London, where beds, provisions, &c. are furnished for all persons paying for the same, but which was merely called a coffee-house and tavern, and was not frequented by stages and waggons from the country, and which had no stables, was to be considered as an inn. A coffee house.

A house in which lodgers are received and provided with meat and drink under an agreement at a stipulated rate, is not an inn, although the master of the house provides stabling. (*Parkhurst* v. *Foster*, 1 *Salk.* 387; 1 *Ld Raymond*, 479; *S. C.*, 12 *Mod.* 284.) A lodging house.

An *hotel* is a place for the accommodation of occasional lodgers, who are supplied with apartments hired for the night or by the week—it is not unlike an inn. (See last cited case, and *Jones* v. *Osborn*, 2 *Chit. Rep.* 484.) An hotel

A *tavern* is a place where wine and liquors are sold and drinkers entertained. A tavern.

A *victualling-house* is a house where persons are provided with victuals, but without lodging. A victualling-house.

At common law, any person may erect or keep an inn to lodge travellers without any license or allowance; (*Hutt.* 99; *Dalt.* c. 56;) and it is not an indictable offence to keep an inn without a license; (*Anon.* 3 *Salk.* 25; *Watson's case, id.*; *Rex* v. *Edwards*, 3 *Salk.* 27;) but we shall hereafter see, that where a license is necessary by statute, a restriction is imposed against some persons keeping an inn; and the statute provides a particular punishment. (*Post*, 82.) Who may keep one at common law.

Also, by local custom, the right to keep an inn may be confined to particular individuals, as burgesses, &c. and this, notwithstanding the recent statutes. (*Mayor of Leicester* v. *Burgess*, 5 *B. & Adol.* 246; 2 *N. & M.* 131, *S. C.*)

It has indeed been laid down in prior editions of this work, citing 1 *Hawk.* Inn not a franchise.

1. *What is, who may keep, &c.*

c. 78, s. 1, that no man can set up a new inn in a place where there is no manner of need of one, to the hinderance of other ancient and well-governed inns, or keep it in a place in respect of its situation wholly unfit for such a purpose; (and see *Newton* v. *Trigge*, 3 *Mod.* 329;) this, however, seems an incorrect doctrine, for no place is entitled to this privilege, unless it be of the character of a franchise originating in a grant from the crown. (See 2 *Roll. Ab.* 84, 85.)

At one time a doubt prevailed, whether an inn was not a franchise, but this was denied to be the case in 2 *Roll. Ab.* 84, 85.)

No common law restrictions peculiarly applicable to inns.

There does not appear to be any common law restrictions peculiarly applicable to innkeepers; (*Parker* v. *Flintt*, *Holt*, 366; *Stevens* v. *Watson*, 1 *Salk.* 45;) and though it has been said that the keeper of an inn may by the common law be indicted and fined as being guilty of a public nuisance, if he usually harbour thieves or persons of scandalous reputation, or suffer frequent disorders in his house; (1 *Hawk.* c. 78, s. 1;) yet this doctrine would apply to any other person. (See *post*, 82.)

It seems, however, an innkeeper might be indicted for taking exorbitant prices. (*Kirkman* v. *Shadcross*, 6 *T. R.* 7; see *post*, 109, 120.) There are also various other common law liabilities affecting innkeepers in a civil point of view, as will be seen, *post*, 88, *et seq.*

Alehouses, near bridges.

By the 13 Geo. III. c. 78, s. 62, a person collecting tolls of a public bridge was prohibited from keeping an alehouse; but that is now repealed by the 5 & 6 Will. IV. c. 50. (See title "*Highways in General*," Vol. III.)

II. Licence for the Sale of Beer, &c. by Retail, in Beer Houses (not being Inns or Public Houses.)

The statutes on the subject.

The statutes by which the sale of beer and cider by retail in *beer houses* and *shops* is now regulated are the 11 Geo. IV. & 1 Will. IV. c. 64; the 4 & 5 Will. IV. c. 85; and the 3 & 4 Vict. c. 61. The first statute is in force so far as it has not been altered by the second, and the first two are still operative, unless where they have been repealed or modified by the last.

Magistrates' license not necessary.

These statutes, it should be remarked, are applicable to such persons who take out an *excise* license for the sale of beer and cider only, by retail, or in other words, they extend to *retail beer-houses* as distinguished from *inns* or *public houses*. Such persons do not require a *magistrates'* license under the 9 Geo. IV. c. 61, (*post*, 82,) but they are authorised to sell beer and cider (which include ale, porter, and perry) by retail, on taking out an excise license and complying with the provisions of the before-mentioned acts.

Public house keeper need not take out a beer license.

The keeper of a *common inn, alehouse, or victualling-house* may procure a license to sell beer and cider as well as wine and spirits by retail, under the provisions of the 9 Geo. IV. c. 61, which shall be stated at length in the next section, and need not and does not usually take out a license for that purpose under the above acts.

The general provisions of the statutes on the subject.

We shall first consider the general provisions contained in these acts, whereby they are to be construed and interpreted, and which have the effect of incorporating and forming them into one code; and we shall then treat of the special provisions in detail, which together constitute the present law by which *beer-houses* are governed.

What is a retailing of beer, cider, or perry.

By 4 & 5 Will. IV. c. 85, s. 19, every sale of any beer, or of any cider or perry, in any less quantity than four gallons and a half, shall be deemed and taken to be a selling by *retail*.

Who deemed *dealers* in beer.

And by the 1 Will IV. c. 51, s. 22, every person who shall sell any beer or ale in quantities not less than four gallons and a half or two dozen reputed quart bottles, to be drunk or consumed elsewhere than on the premises where sold, shall be deemed a *dealer in beer*. (See title "*Excise*," Vol. II.)

2. *License, &c. for, &c.*

Rules for interpretation of words.

By 11 Geo. IV. & 1 Will. IV. c. 64, s. 32, reciting that, "In order to remove doubts as to the meaning of certain words in this act," it is enacted, "that the word 'justice' shall be deemed to mean justice of the peace; and that the word 'person,' and the word 'party,' shall be deemed to include any number of persons and parties; and that the word 'license,' and the word 'day,' and the word 'time,' and the word 'house,' and the word 'place,' shall each be deemed to include any number of licenses, days, times, houses, or places; and that the word 'beer,' shall in all cases be deemed to include beer, ale, and porter; and that the word 'cider' shall in all cases be deemed to include cider and perry; and that the word 'county,' and the words 'county or place,' shall be deemed severally to include any county, riding, division of the county of Lincoln, hundred, division of a county, liberty, division of a liberty, county of a city, county of a town, city, cinque port, or town corporate; and the words 'division or place' shall be deemed to include any division of a county or riding, liberty, division of a liberty, county of a city, county of a town, city, cinque port, or town corporate; and that the words 'parish or place,' shall be deemed to include any township, hamlet, tithing, vill, extra parochial place, or any place maintaining its own poor; and that the word 'penalty' shall be deemed to include any fine, penalty, or forfeiture of a pecuniary nature; and that the meaning of the several words in this act shall not be restricted, although the same may be subsequently referred to in the singular number or masculine gender only." And by the 4 & 5 Will. IV. c. 85, s. 12, and the 3 & 4 Vict. c. 61, s. 20, this clause shall be applicable to the interpretation of words in these acts respectively.

The 11 Geo. 4 & 1 Will. 4, c. 64, and 4 & 5 Will. 4, c. 85, to continue in force except as altered by 3 & 4 Vict. c. 61.

By the 3 & 4 Vict. c. 61, s. 20, "All the provisions of the said two recited acts, 11 Geo. IV. & 1 Will. IV. c. 64, and 4 & 5 Will. IV. c. 85, shall be deemed and taken to be in full force and applicable to this act, save and except where the provisions of the said first-recited act are altered by the provisions of the said secondly recited act, or where the provisions of either of the said two acts are altered by this act."

Penalties where not otherwise directed, to be recovered under provisions of the former acts.

Sect. 19. "All penalties and forfeitures by this act imposed, except where otherwise specially directed, shall be sued for, recovered, mitigated, and applied in the same manner and by the same means as the penalties imposed by the said recited acts of the first and fourth and fifth years of the reign of his late Majesty King William the Fourth are directed to be sued for, recovered, mitigated, and applied: and all the powers, provisions, authorities, and regulations in the said acts contained, for the recovery, mitigation, and application of penalties, shall, except where otherwise specially directed, extend to and be put in force, as to penalties imposed by this act, as fully and effectually as if they were herein repeated and re-enacted."

Powers, provisions, and penalties of former acts to apply to persons licensed under this act.

Sect. 21. "All the powers, regulations, proceedings, forms, penalties, forfeitures, enactments, and provisions contained in the said recited acts, or in either of them, with reference to persons licensed under either of the said acts, and to the offences committed by such persons against either of the said acts, or against the tenor of any license granted under the said acts, and also with reference to the sureties of such persons, and to persons doing the things thereby prohibited without the license required by the said acts or either of them, shall (except where they are altered by this act, or are repugnant thereto) be deemed and taken to be applicable to all persons licensed under this act, and to all offences committed by such persons of the same description as the offences mentioned in the said acts, and to the sureties of all such persons in respect of such offences, and to all persons doing, without the license required by this act, things of the same description as the things prohibited without the license required by the said recited acts, as fully and effectually as if all the said powers, regulations, proceedings, forms, penalties, forfeitures, enactments, and provisions had been repeated and re-enacted in this act, with reference to persons licensed under this act, and to the sureties of such persons, and to persons acting without the license required by this act; and also that all the powers, regulations, and provisions in the said acts contained, authorising any party convicted to appeal to the general session or quarter sessions of the peace against any conviction under the said acts, shall also

Appeal.

2. *License, &c. for, &c.*

extend and apply to any convictions under this act." The 4 & 5 Will. IV. c. 85, s. 11, contains a similar clause to this, enacting in like manner that the provisions of the 1 Will. IV. c. 64, shall apply to persons licensed under that act.

Acts not to affect the two universities, nor the vinters' company in London.

Nor to affect any license to the keeper of an inn, &c.

Nor to prohibit the sale of beer in booths at fairs as heretofore.

By 11 Geo. IV. & 1 Will. IV. c. 64, s. 29, "Nothing in this act contained shall extend to alter or in any manner to affect any of the rights or privileges of the universities of Oxford or Cambridge, or any of the powers and authorities vested by charter or otherwise in the chancellors, masters, and scholars of the said universities, and their successors, or in the master, wardens, freemen, and commonalty of the vinters of the city of London, but not to extend to those freemen of the said company of vinters who have obtained the same by redemption only; nor in any way to affect any license to the keeper of any inn, alehouse, or victualling-house, unless in so far as relates to the sale of beer by retail; nor to prohibit any person from selling beer in booths or other places at the time and within the limits of the ground or place in or upon which is holden any lawful fair, in like manner as such person was authorised to do before the passing of this act." The 3 & 4 Vict. c. 61, s. 22, contains similar provisions as to the universities; and see 2 & 3 Vict. c. 47, s. 41. See the case of *Reg.* v. *Archdall*, 8 Ad. & Ell. 281, where the right of the university of Cambridge to grant alehouse licenses was considered at length.

Covenants against houses, &c. being used as public houses to extend to persons licensed under this act.

Sect. 31. "Any and every covenant or clause of restriction contained in any lease or contract between any landlord and tenant, whereby the trade or business of a victualler or publican is prohibited from being carried on in any house, building, or place mentioned or comprised in such lease or contract, or whereby any such house, building, or place is prohibited from being used as a public house or alehouse, shall apply and extend, and shall be construed to apply and extend, to every person who shall be licensed to sell beer, ale or porter, or cider or perry, under the provisions of this act, and to any and every house specified and mentioned in the license granted to such persons."

Division of subject.

We will now proceed to notice the remaining provisions of these acts, which may be conveniently arranged and considered under the following titles:—

1. *Who may take out the License*, 63.
2. *Proceedings to obtain License—Form of Application—Certificate of Occupation and Character—Bond with Sureties, &c.* 65.
3. *License by whom, and how granted—Form, duration of, and entry of, and Entry of Premises with Excise*, 67.
4. *Amount of Duty paid for License, and how accounted for*, 69.
5. *Continuance of License on Death of Licensee*, 70.
6. *License, when it becomes void and forfeited*, 70.
7. *Management and regulation of Licensed Houses.*
   (a) *Descriptive Board to be put on Houses*, 71.
   (b) *Hours for opening and closing Houses*, 71.
   (c) *Standard Measures to be used*, 73.
   (d) *Officers of Excise and Constables, when authorised to enter Licensed Houses—License to be produced before Magistrates, if required*, 73.
   (e) *Permitting Drunkenness, or other disorderly conduct, &c. in Licensed House—Adulterating Beer*, 73.
8. *Penalties for selling Beer, Cider, &c. without License*, 74.
9. *Penalties for Persons licensed to sell Beer, selling or having in their possession Wines, Spirits, or Sweets, &c.* 75.

10. *Proceedings for the Recovery of Penalties*, 76.
(a) *What Justices may act*, 76.
(b) *Summons or Order, how served*, 77.
(c) *Information, how and by whom exhibited*, 77.
(d) *Evidence and Witnesses*, 77.
(e) *Proceedings before Justices, Mitigation of Penalties, and Conviction*, 77.
11. *Certiorari, Appeal, and Costs of Appeal*, 78.
12. *Proceedings against Sureties*, 80.
13. *Penalties, how levied and enforced*, 80.
14. *Actions against Justices, &c.* 81.

(1.) Who may take out the License.

All persons licensed may sell beer by retail.

By statute 11 Geo. IV. & 1 Will. IV. c. 64, intituled, "*An Act to permit the general Sale of Beer and Cider by Retail in England*," reciting, by s. 1, "That it is expedient, for the better supplying the public with beer in England, to give greater facilities for the sale thereof than are at present afforded by licenses to keepers of inns, alehouses, and victualling houses," it is enacted, "That from and after the 10th day of October, 1830, it shall and may be lawful for *any and every person* who shall obtain a license for that purpose under the provisions of this act, to sell beer, ale, and porter by retail [and also cider and perry, s. 30] in any part of England, *in any house or premises* specified in such license; any thing in any act or acts heretofore made or in force at the time of the passing of this act to the contrary in anywise notwithstanding."

The enactment, though it enables any person to obtain the license, does not supersede the custom of a borough, that no person shall carry on the trade of an alehouse therein who is not a burgess. (*Mayor, &c. of Leicester* v. *Burgess*, 2 *Nev. & Man.* 131; 5 *B. & Adol.* 246, *S. C.*)

Not to be granted to sheriff's officer or non-householder.

By sect. 2, no license shall be granted to any person being a sheriff's officer, or officer executing the legal process of any court of justice, nor to any person not being a householder assessed to the poor rates in the parish or place in which he shall be licensed to sell beer by retail, and that any license granted to any such person shall be void to all intents and purposes.

License to retail beer not to be granted to any but the real resident occupier, nor in respect of any house rated at less than 15*l.* per annum within the bills of mortality, or in cities, towns, &c. containing 10,000 inhabitants;

By the 3 & 4 Vict. c. 61, s. 1 [7th August, 1840], reciting the 11 Geo. IV. & 1 Will. IV. c. 64, and the 4 & 5 Will. IV. c. 85, and that it was expedient to alter and amend the said acts, it is enacted, "That no license to sell beer or cider by retail under the said recited acts or this act shall be granted to any person who shall not be the real resident holder and occupier of the dwelling-house in which he shall apply to be licensed, nor shall any such license be granted in respect of any dwelling-house which shall not, with the premises occupied therewith, be rated in one sum to the rate for the relief of the poor of the parish, township, or place in which such house and premises are situate on a rent or annual value of fifteen pounds per annum at the least if situated in the cities of London or Westminster, or within any parish or place within the bills of mortality, or within any city, cinque-port, town corporate, parish, or place, the population of which, according to the last parliamentary census, shall exceed ten thousand, or within one mile, to be measured by the nearest public street or path, from any polling-place used at the last election for any town having the like population, and returning a member or members of parliament; nor shall any such license be granted in respect of any dwelling-house which shall not, with the premises occupied therewith, be rated in one sum to the rate for the relief of the poor of the parish, township, or place in which such house and premises are situate on a rent or annual value of eleven pounds per annum, if situated within any city, cinque-port, town corporate, parish, or place, the population of which, according to

nor less than 11*l.* per annum in places exceeding 2,500 inhabitants;

2. *License, &c. for, &c.*

nor less than 8*l.* per annum in places situated elsewhere.

such last parliamentary census, shall exceed two thousand five hundred, and shall not exceed ten thousand, or within one mile, to be measured as aforesaid, from any polling place used at the last election for any town having the like population as last aforesaid, and returning a member or members of parliament; nor shall any such license be granted in respect of any dwelling-house which shall not, with the premises occupied therewith, be rated in one sum to the rate for the relief of the poor of the parish, township, or place in which such house and premises are situate on a rent or annual value of eight pounds, if situated elsewhere than as aforesaid; and every license granted contrary hereto shall be null and void."

Licenses may be granted to persons licensed before the passing of the act, whilst they continue the occupiers of the same house, although it is below the qualification.

It is provided, however, by sect. 18, "That nothing in this act contained shall prevent any person from obtaining, at the expiration of his existing license, a renewed license in respect of any house in which he shall at the time of the passing of this act be duly licensed to retail beer or cider under the said recited acts or either of them, notwithstanding such house may not be of the rent or annual value by this act prescribed, nor to oblige such person to produce any other certificate (where a certificate is required) for obtaining his license than the certificate required by the said recited acts; but it shall be lawful for the officers of excise duly authorised to grant licenses to renew and continue to grant licenses to such person (being in other respects properly qualified) on the production of such certificate as last aforesaid, so long as such person shall continue to be the resident holder and occupier of the same house, any thing in this act to the contrary notwithstanding."

Persons using or obtaining false certificates, disqualified.

Sect. 6. Every person convicted who shall forge any certificate, or make use of any certificate knowing it to be forged, or the matters therein certified to be false, in order to obtain a license or enable any other person to obtain it, shall be disqualified from obtaining any license, *post*, 67. The 4 & 5 Will. IV. c. 85, s. 8, *post*, 70, contains a similar provision.

Persons convicted of felony, or of selling spirits without license, disqualified.

Sect. 7. Every person who shall be lawfully convicted of felony, or of selling spirits without license, shall be disqualified from obtaining a license to sell beer and cider by retail, *post*, 70.

Persons guilty of a third offence against the tenor of their license, cannot take out a license for two years.

By s. 16, *post*, 71, persons convicted of a third offence against the tenor of their license, and whose license shall therefore have been adjudged void, are incapable of taking out another license for two years, to be computed from such adjudication.

Persons convicted twice of refusing to admit constable, disqualified.

And by 4 & 5 Will. IV. c. 85, s. 7 (*post*, 73), persons convicted for the second time of refusing to admit a constable into his house, shall, if the justices so adjudge, be disqualified from selling beer for the space of two years next after such conviction, or for such shorter space as they may think proper.

Persons disabled by conviction from keeping an inn, &c. not entitled to take out beer license.

The 6 Geo. IV. c. 81, s. 22, precludes persons disabled by conviction from keeping a common inn, &c. from retailing beer, cider, or perry, under any excise license. The enactment is as follows—"That all and every person or persons who shall be disabled by any conviction from holding or having a license to keep or from keeping a common inn, alehouse, or victualling-house, shall also by such conviction be disabled from taking out and from having any excise license to sell and from selling beer, cider or perry by retail, in any manner whatsoever, under any excise license or licenses obtained for such purpose; and if any such person shall, after such conviction as aforesaid, take out or have any excise license or licenses for any such purpose as aforesaid, the same shall and is hereby declared to be absolutely null and void to all intents and purposes; and every person who shall, after such conviction as aforesaid, sell any beer, cider or perry by retail in any manner whatsoever, shall incur the penalty for so doing without license; and in all such cases in the prosecution for the recovery of such penalty, a certificate from the clerk of the peace, or person acting as such, of any such conviction as aforesaid, shall, on the trial in such prosecution, be legal evidence thereof, which certificate such clerk of the peace, or other person acting as such, is hereby authorised and required, within one week after any such conviction shall have been returned to his office, to deliver to the collector of excise, or other person or persons authorised to grant excise licenses within the district or place in which such conviction shall have taken place, setting forth a copy of such conviction signed by himself, for which he shall demand no fee or

Penalty.

Evidence.

Clerk of peace to deliver copy of conviction or a certificate to collector of excise.

Penalty.

reward whatsoever, and if any such clerk of the peace, or other person acting as such as aforesaid, shall neglect or omit to deliver such certificate as aforesaid, he shall for every such offence forfeit the sum of ten pounds."

2. *License, &c. for, &c.*

(2.) Proceedings to obtain License—Form of Application—Certificate of Occupation and Character, &c.—Bond, with Sureties, &c.

By 11 Geo. IV. & 1 Will. IV. c. 64, s. 2, "in every application for such license there shall be specified, set forth, and inserted the Christian name and surname of the party applying for such license, and a description of the house or premises in which beer, ale, and porter is intended to be sold by retail by such person, together with the Christian names and surnames and the occupation and residence of the person or persons who shall be proposed as surety or sureties for the party so to be licensed."

Form of application for.

Sect. 4. "It shall not be lawful for the commissioners of excise or any person authorised by them, nor for any collector or supervisor of excise, to grant or deliver any such license to any person applying for the same, unless such person shall, before receiving such license, or at the time of receiving the same, enter into a bond to the commissioners of excise with one sufficient surety in the penalty of twenty pounds, or with two sufficient sureties in the penalty of ten pounds each, such surety or sureties being the person or persons named in the application of the party requiring the license, or some other person or persons approved of by the said commissioners or by the person authorised to grant such licenses; and such bond shall be executed by such person and his surety or sureties, conditioned for the payment by such person, or his surety or sureties, of any penalty or sum of money not exceeding the amount of such twenty pounds or ten pounds respectively, which shall be incurred for any offence against this act by the party to whom such license shall be granted, or for the payment of such sum of twenty pounds or ten pounds respectively, in case any penalty incurred by such party licensed shall exceed such twenty pounds or ten pounds respectively; and it shall be lawful for the said commissioners or the person so authorised by them, or for such collector or supervisor of excise respectively, to judge of and determine upon the sufficiency of any such surety or sureties: provided always, that such bond shall not be subject or liable to the payment of any stamp duty whatever; any thing in any act or acts to the contrary notwithstanding."

Applicant to enter into bond, with sureties, &c.

Stamp on bond.

Sect. 5. "That no person licensed to sell beer by retail under the provisions of this act, and that no person not being a householder assessed to and paying the poor rates within the parish in which the person licensed shall be resident, shall be deemed competent to be or shall be accepted as a surety in any such bond as aforesaid."

Who may not be a surety.

By 4 & 5 Will. IV. c. 85, reciting that much evil has arisen from the management and conduct of houses in which beer and cider is sold by retail, under the 11 Geo. IV. & 1 Will. IV. c. 64, and that it is expedient to amend the provisions of that act in certain particulars, sect. 1 enacts, "That from and after the commencement of this act it shall be lawful for the commissioners of excise, or other persons duly authorised, to grant licenses for the sale of beer, ale, porter, cider, or perry, under the provisions of the said recited act, to *any person* applying for the same, but that such license shall not authorise the person obtaining it to sell beer or cider to be drunk or consumed *in the house or upon the premises* specified in the same license, *unless the same be granted upon the certificate* hereinafter required."

Licenses to be granted for sale of beer, but not to authorise consumption thereof on the premises unless granted upon certificate.

Sect. 2. "Every person applying for a license to sell beer or cider by retail, intending the same *to be drunk in the house or on the premises*, shall (*in addition to the application setting forth the particulars required by the said recited act*) *annually* produce to and deposit with the commissioners of excise, collector, supervisor, or other person authorised to grant such license within the parish, township, or place in which the person so applying intends to sell beer or cider by retail, *a certificate signed by six persons* residing in and being and describing themselves to be inhabitants of such parish, township, or place, and respectively rated therein to the poor at not less than six pounds, or occupying a house therein rated to the poor at not less than six pounds,

Every person applying for a license to sell beer *to be drunk on the premises* to deposit with the commissioners of excise a certificate of good character signed by six rated inhabitants of the parish, &c. and certified by one of the overseers.

2. *License, &c. for, &c.*

(none of whom shall be maltsters, common brewers, or persons licensed to sell spirituous liquors or beer or cider by retail, nor owners or proprietors of any house or houses licensed to sell such liquors or beer or cider by retail,) stating that the person applying for the license is of good character, and that at the foot of such certificate one of the overseers of the parish, township, or place shall certify (if the fact be so) that such six persons are inhabitants respectively rated as aforesaid; and such certificate and license shall respectively be in the forms of the schedule annexed to this act. (See the forms, *post.*)

If not ten rated inhabitants in the place the certificate of the majority of them.

Provided always, that in any parish, township, or district maintaining its own poor in which there are not ten inhabitants rated to the relief of the poor to the amount of six pounds each, or not occupying houses respectively rated to the poor at six pounds each, (not being maltsters, common brewers, or persons licensed to sell spirituous liquors or beer or cider by retail) the *certificate of the majority of such inhabitants* of such parish, township, or district maintaining its own poor, as are rated to the amount of six pounds each, shall be deemed to be a sufficient certificate for the purposes of this act."

Penalty on overseers refusing to certify as required.

Sect. 3. "If any overseer of any parish, township, or place shall, after application made to him by or on behalf of the person applying for the license required by this act, refuse or neglect to certify (if the fact be so) that the persons who have signed such certificate (*as required by this act, ante*, 65) are inhabitants rated respectively as aforesaid, he shall forfeit and pay any sum of money not exceeding five pounds, to be recovered before any justice of the peace acting for the county in which such parish, township, or place shall be situate, on complaint of the person by whom the application shall have been made, unless such overseer of the poor shall show to the satisfaction of such justice reasonable cause for such neglect or refusal."

Penalty for making or using false certificates.

Sect. 8. "If any person shall, in any certificate required by this act (*ante*, 65), certify any matter as true, knowing the same to be false, or shall make use of any certificate for the purposes of this act, knowing such certificate to be forged, or the matters certified therein to be false, every such person shall, on conviction of such offence before two or more justices of the peace, forfeit and pay the sum of twenty pounds; and every license for the sale of beer or cider by retail which shall be granted to any person who shall have made use of any such certificate in order to obtain the same, such person knowing such certificate to be forged, or the matters certified therein to be false, shall be void to all intents and purposes; and any person who shall have made use of such certificate shall for ever hereafter be disqualified from obtaining a license to sell beer or cider by retail under the provisions of the said recited act or this act."

Licenses obtained on false certificates to be void

Persons obtaining it to be afterwards disqualified from obtaining a license.

No license for beer to be drunk on the premises to be granted without a certificate.

Sect. 9. "No license for the sale of beer or cider by retail to be consumed or drank in the house or on the premises shall be granted, except upon the certificate hereby required: provided always, that in all extra-parochial places the certificate required by this act may be signed and given by the inhabitants rated to the poor at six pounds in any adjoining parish or parishes."

Certificate not to be required for houses in certain situations if population exceed 5000.

Sect 21. "Provided always, that such certificate shall not be required as to any house situated within the cities of London and Westminster, or within any parish or place within the bills of mortality, nor within any city or town corporate, nor within the distance of one mile from the place used at the last election as the place of election or polling place of any town returning a member or members to parliament, provided that the population, to be determined according to the last parliamentary census that shall have been taken, in such city, town corporate, or town returning a member or members to parliament, shall exceed five thousand."

Applicant to produce a certificate of his being the real resident occupier of the house, and of the amount at which it is rated. (a)

By 3 & 4 Vict. c. 61, s. 2, "Every person who shall apply to be licensed to retail beer or cider shall produce to the proper officer of excise authorised to grant such licenses a certificate in writing from an overseer of the township, parish, or place in which he shall reside, certifying that such applicant is the real resident, holder, and occupier of the said house, and also certifying the

(a) This enactment does not require the certificate of *value* in *all* cases, but only for persons *not* licensed on 7th Oct. 1841: see sect. 18, *ante*, 64. The certificate of *character* is still required in *all* cases not excepted in the 4 & 5 Will. IV. c. 51.

true rent or annual value at which such house, with the premises occupied therewith, is rated in one rating to the poor rates, according to the last sum or rate made and allowed in such township, parish, or place for the relief of the poor; and every such certificate shall be deposited and left with the proper officer of excise by whom such license shall be granted; and a duplicate thereof shall be deposited and left with the clerk of the peace for the county, riding, or city, within which such township, parish, or place is situate."

2. *License, &c. for, &c.*

Certificate to be left with officer of excise, &c.

Sect. 3. "That when any person shall become the occupier of a house newly erected, and not yet rated, and shall be desirous of taking out a license to retail therein beer and cider before the making of a new rate, it shall be lawful for the proper officer of excise, if the applicant shall in other respects be duly qualified, to grant such license, on the certificate of the overseer of the poor certifying the rent or annual value to be not less than that at which such house, with the premises occupied therewith, will be rated in one sum to the relief of the poor in the next rate to be made and allowed, and certifying also that the applicant has claimed to be rated in respect of the said house and premises."

Provision for new houses occupied since a rate was made.

Sect. 4, reciting that "in some extra parochial places no assessments are made or rates collected for the relief of the poor, and it is expedient to provide for persons obtaining licenses in such places," enacts, "That in any extra-parochial or other place where no rates are made or collected for the relief of the poor it shall be lawful for the proper officers of excise authorised to grant licenses to grant a license to any person to retail beer or cider in a dwelling house, which, with premises occupied therewith, shall be of the real rent or annual value of fifteen pounds, eleven pounds, or eight pounds respectively, according to the situation thereof as aforesaid; and in such case the person applying for such license shall produce to and deposit and leave with the proper officer of excise granting such license a certificate in writing, signed by two inhabitant householders of the township or place, certifying that the party applying is the real resident in and occupier of the dwelling house sought to be licensed, and also certifying the true and real annual value of the same, with the premises occupied therewith, according to the best of their judgment and belief."

In extra parochial places licenses may be granted on the certificate of two inhabitant-householders of the required annual values.

Sect. 5. "Every overseer of the poor who shall refuse to grant a certificate of the rating or assessment of any rated house and premises, when demanded, or of any person having claimed to be rated in respect of any newly erected house not yet rated, or who shall falsely certify any house to be rated when the same was not duly rated at the time of the making and allowance of the last rate made and allowed for the relief of the poor, and every overseer or other person who shall falsely certify any person to be the real resident, holder, and occupier of any house, contrary to the fact, or falsely certify the rent or annual value at which any dwelling-house and premises shall now or will be rated, or the rent paid for the same, or the annual value thereof, or shall grant any certificate which shall in any other respect be wilfully false, shall forfeit twenty pounds."

Penalty on overseers refusing to grant certificates, and on overseers and other persons granting false certificates.

Sect. 6. "That every person who shall, for the purpose of obtaining for himself or enabling any other person to obtain a license to retail beer or cider, forge or counterfeit any certificate, or shall produce or make use of any certificate, knowing the same to be forged or counterfeit, or the matters certified therein or any of them to be false, shall forfeit fifty pounds; and every license for the retail of beer or cider obtained by any person on any such forged, counterfeit, or false certificate shall, on the conviction of such person, be void to all intents and purposes, and shall be so adjudged; and every person who shall be convicted of any of the said offences shall be disqualified from obtaining any license under the said recited acts or this act to retail beer or cider either to be drunk and consumed on the premises or off the premises.

Penalty on forging certificates, or using false certificates.

Licenses obtained by false certificates to be void, and the persons obtaining them disqualified.

(3.) License, by whom and how granted—Form, Duration, and Entry of—Entry of Premises with Excise.

By 11 Geo. IV. & 1 Will. IV. c. 64, s. 2, "Any and every such license which shall be taken out within the limits of the chief office of excise in Lon-

By whom to be granted in London.

2. *License, &c. for, &c.*

don shall be granted under the hands and seals of two or more of the *commissioners of excise* for the time being, or of such persons as they the said commissioners of excise, or the major part of them for the time being, shall from time to time authorise, employ, or direct for that purpose; and any and every such license which shall be taken out in any part of England, *not within the said limits*, shall be granted under the respective hands and seals of the several *collectors and supervisors* of excise within their respective collections and districts; and it shall be lawful for the said commissioners of excise, or any two or more of them respectively, and for the person to be authorised, employed, or directed by the said commissioners or the major part of them, and also for all such collectors and supervisors, and they are hereby respectively authorised and required, within ten days after the application shall have been made for the same, and upon execution by the party and his surety or sureties of the bond hereinafter mentioned (*ante*, 65), and any time after upon the execution of such bond, to grant such license to the persons who shall apply for the same; the person so applying first paying for such license a duty of £2. 2*s.*, to be applied and accounted for as hereafter mentioned." [Which duty is likewise now regulated by the 4 & 5 Will. 4, c. 85, *post*, 69] "And every such license shall be dated on the day when the same shall be granted, and shall expire at the end of twelve calendar months after the day on which such license shall be dated; and every such license shall be according to the form in the schedule annexed to this act (*post*), and shall be duly registered in the proper department of the excise; provided always, that no such license shall authorise or entitle the party licensed to receive any license to sell or retail wine or spirits, any thing in any act or acts of parliament to the contrary thereof notwithstanding: [or, by 4 & 5 Will. IV. c. 85, s. 15, sweets or made wines, or meed, or metheglin:] and a list or register of every license so granted, specifying the name and place of abode of every person licensed and of his sureties respectively, and the name and description of the house mentioned in such license, shall be kept at the excise office with respect to all licenses granted by the commissioners of excise or any person authorised by them, and at the office or dwelling house of every collector and supervisor of excise in their and his respective collections and districts: and such list or register shall at all times be produced to and shall be open to the inspection and perusal of any magistrate of the county or place where such license shall be granted, and where such house shall be situate; and a copy of such list or register shall once in every calendar month be transmitted by every such collector or supervisor to the clerk of the magistrates for the district in which such license shall be granted; and any copy of or extract from such list or register, which shall or may be at any time required by the clerk to the magistrates, shall be given to him by such collector or supervisor whenever thereto required." The schedule to the act gives the form of the license, which see, *post*, 125.

Elsewhere in England.

When to be granted.

Form of license.

Not to authorise sale of wine, &c.

Register of license.

Inspection of license by magistrate.

Sect. 7. "No person shall sell any beer by retail under the provisions of this act at any time after the expiration of any license granted under this act, nor in any house or place not specified in such license; provided always, that it shall be lawful for any persons so licensed to take out a fresh retail license for the selling beer by retail before the expiration of any former retail license, and so from year to year."

Not to sell beer after expiration of license.

License may be renewed.

Sect. 10. "Persons trading in partnership, and in one house or premises only, shall not be obliged to take out more than one license in any one year, for selling any beer by retail under the provisions of this act: provided also, that no one license which shall be granted by virtue of this act shall authorise or empower any person or persons to sell any beer, ale or porter, under the provisions of this act, in any house or place other than the house or place mentioned in such license for selling beer, ale, and porter by retail, under the provisions of this act, and in respect whereof such license shall be granted."

Partners in one house to take out but one license.

License not to extend to any other house.

Subject to the above provisions, the sale of *cider and perry* is regulated by 11 Geo. IV. & 1 Will. IV. c. 64, s. 30, which, after reciting that "it is expedient that the sale of cider and perry by retail should be licensed in like manner and should be subject to the like regulations as the sale of beer," enacts,

Licenses to retail cider and perry may be granted under the same regulations as those

"That from and after the tenth day of October, one thousand eight hundred and thirty, it shall be lawful for any person desirous of selling cider and perry by retail to apply for and to obtain an excise license for that purpose, under the same regulations in all respects (except as hereinbefore is otherwise provided) as are in this act prescribed and contained with respect to persons desirous of selling beer, ale, and porter by retail, and of being licensed for that purpose; and that all the clauses, regulations and provisions in this act contained relating to the sale of beer by retail, and to the licenses for selling the same, and to the sureties for the parties licensed, and to the conduct of the parties licensed, and to all other matters whatever respecting the selling of beer by retail, and the retailers thereof, and the licenses for the same, and the houses where the same are sold, and the penalties against the parties licensed, shall be taken and deemed to be applicable to the sale of cider and perry by retail, and to licenses for the same, and to the sellers of cider and perry by retail, as if cider and perry, and the retailers thereof, were expressly mentioned and specified in and throughout this act: provided always, that the person receiving a license for selling cider or perry by retail shall pay for such license a duty of one pound one shilling and no more, instead of the duty of two pounds two shillings hereinbefore mentioned, and which said duty of one pound one shilling shall be applied in like manner as the said duty of two pounds two shillings is hereinbefore directed to be applied; and every such license shall be according to the form in the schedule annexed to this act; provided also, that any person licensed under this act to sell beer by retail may sell also cider and perry by retail without receiving a separate license for that purpose; but that no person licensed to sell cider and perry by retail, and paying for such license, as herein provided, the sum of one pound and one shilling, shall be at liberty to sell beer by retail."

2. *License, &c. for, &c.*

for sale of beer, &c.

Provisions, &c. of act to apply to sale of cider.

Duty, 1*l.* 1*s.* on license for sale of cider or perry.

Persons licensed to retail beer may also retail cider; but not *vice versa*.

And by the 4 & 5 Will. IV. c. 85, s. 15, it is provided that "in every such license shall be specified whether the same is granted for the sale of cider and perry by retail to be drunk or consumed not in or upon the house or premises where sold, or for the retail of cider and perry to be drunk and consumed in or upon the house and premises where sold."

Such licenses to state particulars.

By the 3 & 4 Vict. c. 61, s. 9, "Every person whatever licensed to retail beer or cider under the said recited act or this act shall, in manner directed by the 7 & 8 Geo. IV. c. 53, and 4 & 5 Will. IV. c. 51, make entry with the officers of excise of every house, cellar, room, and place for storing, keeping or retailing beer or cider, on pain of forfeiting the penalties imposed by the said last-mentioned act for making use of any unentered room or place; and all beer and cider found in any such unentered house, cellar, room, or place shall be forfeited." (See "*Excise*," Vol. II.)

Persons licensed to make entry of premises with the excise.

(4.) Amount of Duty paid, and how accounted for.

By the 4 & 5 Will. IV. c. 85, s. 13, it is enacted "That from and after the passing of this act the duties payable on excise licenses for the selling of beer by retail under the provisions of the said recited act shall cease and determine, and that in lieu of such duties there shall be levied, collected, and paid upon the licenses hereby authorised to be granted the duties following: (that is to say,)

Duties on beer licenses.

For and upon every license to be taken out by any person for the selling by retail of beer *not to be drunk or consumed in or upon the house or premises where sold*, the annual sum of one pound one shilling.

For and upon every license to be taken out by any person for the selling by retail of beer *to be drunk or consumed in or upon the house or premises where sold*, the annual sum of three pounds three shillings." [The 3 Vict. c. 17, adds 5*l* per cent. to the above duties]

Sect. 14. "The said last-mentioned duties shall be under the management of the commissioners of excise, and shall be raised, levied, collected, and recovered, and accounted for and paid in the same manner and by the same means, and under the same regulations and provisions, pains, penalties, and forfeitures, as are prescribed in the said recited act with respect to the duties

Such duties to be under the management of commissioners of excise, and to be recovered and accounted for under

2. *License, &c. for, &c.*

the provisions of recited act.

hereby repealed; all of which said regulations and provisions, pains, penalties, and forfeitures, shall apply to the duties hereby imposed, and shall be enforced in respect of the same as fully and effectually as if repeated and re-enacted in this act."

Duty to be under management of commissioners of excise, and carried to consolidated fund.

And by the 11 Geo. IV. & 1 Will. IV. c. 64, s. 3, "The duty by this act imposed on licenses to sell beer by retail shall be under the management of the commissioners of excise for the time being, and shall and may be respectively raised, levied, collected, answered, paid, and recovered in such and the like manner, and in or by any or either of the general or special means, ways or methods by which any other duties of excise on licenses are or may be raised, levied, collected, answered, paid, or recovered; and all the monies arising by the duties by this act imposed and made payable as aforesaid, the necessary charges of raising and accounting for the same excepted, shall from time to time be paid into the receipt of his Majesty's Exchequer at Westminster, and the said money so paid into the receipt of the exchequer as aforesaid shall be carried to and made part of the consolidated fund of the United Kingdom of Great Britain and Ireland."

Duties on cider licenses.

As to the duties payable on licenses to sell cider and perry, see *ante*, 68.

(5.) Continuation of License on Death of Licensee.

On death of licensee, his executors or widow or child, may be authorised to sell for remainder of term of license.

By the 3 & 4 Vict. c. 61, s. 8, "Upon the death of any person whatever licensed to retail beer or cider under the said recited acts or this act before the expiration of the license, it shall be lawful for the person authorised to grant licenses to authorise and empower, by endorsement or otherwise, as the commissioners of excise shall direct, the executors or administrators, or the widow or child, of such deceased person, who shall be possessed of and occupy the dwelling-house and premises before used for such purpose, to continue to retail beer and cider in the same house and premises during the residue of the term for which such license was originally granted, without taking out any fresh license, or payment of any additional duty thereon; and also at the expiration of such license (in case the residue of the said term shall be less than three calendar months from the death of the person licensed) to grant a new license to such executors, administrators, or widow, on payment of the proper license duty, and entering into the usual bond."

(6.) License, when it becomes void or forfeited.

Penalty on forging certificates, or using false certificates.

Licenses obtained by false certificates to be void, and the persons obtaining them disqualified.

By the 3 & 4 Vict. c. 61, s. 6, "Every person who shall, for the purpose of obtaining for himself or enabling any other person to obtain a license to retail beer or cider, forge or counterfeit any certificate, or shall produce or make use of any certificate, knowing the same to be forged or counterfeit, or the matters certified therein or any of them to be false, shall forfeit fifty pounds; and every license for the retail of beer or cider obtained by any person, on any forged, counterfeit, or false certificate, shall, on the conviction of such person, be void to all intents and purposes, and shall be so adjudged; and every person who shall be convicted of any of the said offences shall be disqualified from obtaining any license under the said recited acts, or this act, to retail beer or cider either to be drunk and consumed on the premises or off the premises."

Licenses to be void on conviction of felony or of selling spirits without license.

Sect. 7. "That every person who shall hereafter be lawfully convicted of felony, or of selling spirits without license, shall for ever thereafter be disqualified from selling beer and cider by retail, and no license to sell beer and cider by retail under the said recited acts or this act shall be granted to any person who shall be so convicted as aforesaid; and if any such person shall, after having been so convicted as aforesaid, take out or have any license to sell beer or cider by retail under the said recited acts or this act, the same shall be void to all intents and purposes, and every person who shall, after being convicted as aforesaid, sell any beer or cider by retail, in any manner whatsoever, shall incur the penalty for so doing without license, and in all such cases in the prosecution for the recovery of such penalty a certificate

Certificate from clerk of the peace

from the clerk of the peace, or person acting as such, of any such conviction as aforesaid, shall on the trial in such prosecution be legal evidence thereof."

2. *License, &c. for, &c.*

Sect. 10 enacts, "That on conviction of any such person licensed to retail beer or cider in any penalty for having wine or spirits or sweets in his possession, or for selling or retailing wine or spirits or sweets, the license of such person for retailing beer or cider shall become null and void, and shall be so adjudged.

of conviction to be evidence thereof.

License in case of conviction for selling or having wine, sweets, &c. to be void.

Sect. 17. "No person licensed to retail beer or cider under the said recited acts or this act shall forfeit his license for a first offence against the tenor or conditions of his license, except as hereinbefore provided; and no such person shall be deemed to have forfeited his license, on any conviction by any justices of the peace for *any* offence, unless such forfeiture shall be adjudged and declared by the justice or justices by whom such person shall be convicted of the offence in respect of which the forfeiture shall be incurred; and when any justices of the peace shall adjudge and declare the license of any person to be forfeited, such justices shall cause notice in writing to be immediately given to the commissioners of excise within the limits of the chief office of excise, or to the collector of excise out of such limits, of such adjudication."

No person to forfeit his license for a first offence; and no license to be void unless so adjudged.

Notice to the Excise.

By the 11 Geo. IV. & 1 Will. IV. c. 64, s. 16, (*post*, 78), the licenses of persons guilty of a third offence against the tenor of their license, may be adjudged forfeited and void.

Third offence.

By the 4 & 5 Will IV. c. 85, s. 8, "Every license for the sale of beer or cider by retail which shall be granted to any person who shall have made use of any such certificate as required by that act (*ante*, 66), in order to obtain the same, such person knowing such certificate to be forged or the matters therein certified to be false, shall be void to all intents and purposes."

Using false certificate.

(7.) Management and Regulation of licensed Houses.

(a) *Descriptive Board to be put on Houses.*

By 11 Geo. IV. & 1 Will. IV. c. 64, s. 6, "Every person who shall be licensed to sell beer, ale, and porter by retail, under the provisions of this act, shall cause to be painted, in letters three inches at least in length, in white upon a black ground, or in black upon a white ground, publicly visible and legible, upon a board to be placed over the door of the house or premises in which such person shall be licensed to sell beer by retail, the Christian and surname of the persons mentioned in such license, at full length, together with the words 'licensed to sell beer by retail;' and every such person shall preserve and keep up such name and words so painted as aforesaid during all the time that such person shall continue so licensed, upon pain that every person in any respect making default herein shall forfeit and pay for every such offence the sum of ten pounds."

Descriptive boards to be put upon house.

And by 4 & 5 Will. IV. c. 85, s. 18, "Every person who shall be licensed to sell beer, or cider or perry by retail, under the authority of the said recited act (1 Will. IV. c. 64), and this act, shall, on the board by the said act required to be placed over the door of every person licensed under the same, paint or cause to be painted and kept thereon, after the words 'licensed to sell beer or cider by retail,' the additional words 'not to be drunk on the premises,' or 'to be drunk on the premises,' as the case may be, on pain of forfeiting the penalty by the said act imposed for not having such board affixed and continued over the door."

The board over the door to state "not to be drunk on the premises," or, "to be drunk on the premises."

(b) *Hours for opening and closing Houses.*

By 11 Geo. IV. & 1 Will. IV. c. 64, s. 11, "it shall be lawful for any one justice acting for any county or place where any riot or tumult shall happen, or for any two or more justices where any riot or tumult may be expected to take place, to order or direct that every person licensed under this act, and keeping any house, situate within their respective jurisdictions, in or near the place where such riot or tumult shall happen or be expected to

Houses to be closed by order of justices in riots, &c.

2. *License, &c. for, &c.*

take place, shall close his house at any time which such justice or justices shall order or direct; and every such person who shall keep open his house at or after any hour at which such justices shall have so ordered or directed such house to be closed shall be taken and deemed to have not maintained good order and rule therein, and to be guilty of an offence against the tenor of the license granted to such person."

Form of conviction for.

From the case of *Newman* v. *Hardwicke*, 8 *Ad. & Ell.* 124, it would seem that a conviction under this section should set out the order of the justices, and state the particular time at which the beer-house was kept open.

Hours for opening and closing houses.

By the 3 & 4 Vict. c. 61, s. 15, "No person licensed to sell beer or cider by retail under the said recited acts (11 Geo. IV. & 1 Will. IV. c. 64, and 4 & 5 Will. IV. c. 85,) or this act, shall have or keep his house open for the sale of beer or cider, nor shall sell or retail beer or cider, nor shall suffer any beer or cider to be drank or consumed in or at such house, *at any time before the hour of five of the clock in the morning nor after twelve of the clock at night* of any day in the week in the cities of London or Westminster, or within the boundaries of any of the boroughs of Marylebone, Finsbury, the Tower Hamlets, Lambeth, or Southwark, as defined by an act passed in the second and third years of his late Majesty King William the Fourth, intituled 'An Act to settle and describe the Divisions of Counties, and the Limits of Cities and Boroughs in England and Wales, in so far as respects the Election of Members to serve in Parliament,' nor *after eleven of the clock* within any parish or place within the bills of mortality, or within any city, cinque port, town corporate, parish, or place, the population of which, according to the last parliamentary census, shall exceed two thousand five hundred, or within one mile, to be measured as aforesaid, (that is, by the nearest public street or path, sect. 1, *ante*, 63), from any polling place used at the last election for any town having the like population, and returning a member or members to parliament, nor *after ten of the clock* in the evening elsewhere, nor at any time *before one of the clock in the afternoon*, nor at any time during which the houses of licensed victuallers now are or hereafter shall be closed, on any Sunday, Good Friday, Christmas Day, or any day appointed for a public fast or thanksgiving; and if any such person shall keep his house open for selling beer or cider, or shall sell or retail beer or cider, at any time other than as hereinbefore prescribed and directed, such person shall forfeit the sum of forty shillings for every offence, and every separate sale shall be deemed a separate offence."

2 & 3 W. 4, c 64. (See "*Parliament*," Vol. V.)

Penalty.

Public houses within the metropolitan police district not to be opened before one o'clock on Sundays, &c. &c.

By the 2 & 3 Vict. c. 47, no licensed victualler or other person shall open his house *within the metropolitan police district*, for the sale of wine, spirits, beer, or other fermented or distilled liquors, on Sundays, Christmas Day, and Good Friday, before the hour of one in the afternoon, except refreshment for travellers.

The 11 Geo. IV. & 1 Will. IV. c. 64, s. 14, and the 4 & 5 Will. IV. c. 85, s. 6, by which the hours for opening and closing beer-houses were formerly regulated, according to the order of the justices for that purpose, have been repealed by the 3 & 4 Vict. c. 61, s. 14, and these hours are now fixed by sect. 15 above cited.

Form of conviction for.

A conviction under 11 Geo. IV. & 1 Will. IV. c. 64, and 4 & 5 Will. IV. c. 85, *for keeping a house open for the sale of beer, and selling beer*, and *suffering it to be drunk* on the premises, (which expressions are repeated in the above section of the 3 & 4 Vict. c. 61), at a time of day prohibited by an order of justices, and fining the party charged in a single penalty for "the offence," was held bad, as charging more than one distinct offence. (*Newman* v. *Bendyshe*, 10 *Ad. & Ell.* 11.)

Penalty for suffering beer to be drunk in the house at prohibited times.

The penalty under the above 15th section of 3 & 4 Vict. c. 61, it will be seen, is incurred by keeping the house open for selling, or for selling at any time other than the prescribed hour, and does not extend to suffering beer to be drunk or consumed in the house, but this latter offence would be punishable under sect. 15, *post*, 77, which imposes a general penalty where the acts give no specific penalty.

(c) *Standard Measures to be used.*

2. *License, &c. for, &c.*

By 11 Geo. IV. & 1 Will. IV. c. 64, s. 12, "Every person under this act licensed to sell beer by retail shall sell or otherwise dispose of all such beer by retail (except in quantities less than a half-pint) by the gallon, quart, pint, or half-pint measure sized according to the standard, and shall also retail the same in a vessel sized according to such standard, and in default thereof he shall for every such offence forfeit the illegal measure, and pay a sum not exceeding forty shillings, together with the costs of the conviction, to be recovered within thirty days next after that on which such offence was committed before two justices; and such penalty shall be over and above all penalties to which the offender may be liable under any other act." (See title "*Weights and Measures*," Vol. VI.)

Standard measures to be used.

Forfeiture and penalty for not using them.

(d) *Officers of Excise and Constables when authorised to enter licensed Houses, and License to be produced before Magistrates if required.*

By 3 & 4 Vict. c. 61, s. 11, "It shall be lawful for any officer of excise, at all times during the hours in which any house licensed for the retail of beer or cider may be kept open, to enter into every house, cellar, room, or place entered for the storing, keeping, or retailing of beer or cider, and to make search for and seize all wine and spirits and sweets which may be found in any such house, cellar, room, or place, and to examine all beer or cider kept therein."

Officers of excise empowered to enter the premises of licensed beer retailers;

Sect. 12. "That it shall be lawful for any officer of excise, during the hours which any house is kept open for the sale of beer after the rate of one penny halfpenny or after a less rate the quart, to enter into every such house, cellar, room, or place for the keeping or retailing such beer, and to make search for and seize all wines, spirits, sweets, and all beer which by law they are not entitled to sell."

and also the houses of persons selling beer at the rate of 1½d. or less the quart.

And by 4 & 5 Will. IV. c. 85, s. 7, "It shall be lawful for all constables and officers of police, and they are hereby authorised and empowered, to enter into all houses which are or shall be *licensed* to sell beer or spirituous liquors *to be consumed upon the premises* when and so often as such constables and officers shall think proper; and if any person *having such license* as aforesaid, or any servant or other person in his employ or by his direction, shall refuse to admit or shall not admit such constable or officer of police into such house or upon such premises, such person having such license shall for the first offence forfeit and pay any sum not exceeding *five pounds*, together with the costs of the conviction, to be recovered within twenty days next after that on which such offence was committed before one or more justices of the peace; and it shall be lawful for any two or more justices before whom any such person shall be convicted of such offence for the second time to adjudge (if they shall so think fit) that such offender shall be disqualified from selling beer, ale, porter, cider, or perry by retail for the space of two years next after such conviction, or for such shorter space of time as they may think proper."

Constables, &c. empowered to visit licensed houses.

Penalty on conviction.

Sect. 10. "In case any complaint shall be laid before two justices of the peace against any person licensed for any offence against the tenor of his license, or against this act or the said recited act, it shall be lawful for the said justices (if they shall think fit) to require such person to produce his license before them for their examination; and if such person shall wilfully neglect or refuse so to do he shall forfeit and pay for such offence such sum, not exceeding five pounds, as the said justices shall think proper; and such person shall and may be convicted, proceeded against, and dealt with for such offence in all respects in the same manner, *mutatis mutandis*, as is directed by the said recited act with regard to persons guilty of a first offence against the said act; and the penalty imposed for such offence shall be applied in the same manner as a penalty for a first offence against the said act is thereby directed to be applied."

Retailers compellable to produce their licenses on requisition of two magistrates.

Penalty

(e) *Permitting Drunkenness or disorderly conduct in House—Adulterating Beer.*

By 11 Geo. IV. & 1 Will. IV. c. 64, s. 13, "Every seller of beer, ale, and

2. *License, &c. for, &c.*

Retailer permitting drunkenness, &c. in house, penalty for;

porter by retail, having a license under the provisions of this act, who shall permit any person or persons to be guilty of drunkenness or disorderly conduct in the house or premises mentioned in such license, shall for every such offence forfeit the respective sums following; and every person who shall in any way transgress or neglect, or shall be a party in transgressing or neglecting, the conditions and provisions specified in such license, or shall allow such conditions or provisions to be in any way transgressed or neglected, in the house or premises so licensed, shall be deemed guilty of disorderly conduct; and

or transgressing conditions of his license. (See form of license, *post*.)

every person so licensed who shall permit any such disorderly conduct, shall for the *first* offence forfeit any such sum, not less than forty shillings nor more than five pounds, as the justices before whom such retailer shall be convicted of such offence shall adjudge; and for the *second* such offence, any sum not less than

First offence.

five pounds nor more than ten pounds; and for the *third* such offence, any sum not less than twenty pounds nor more than fifty pounds; and it shall be lawful for the justices before whom any such conviction for such third offence shall take place to adjudge, if they shall so think fit, that such offender shall

Second offence.

Third offence.

be disqualified from selling beer by retail for the space of two years next ensuing such conviction, and also (if they shall so think fit) to adjudge that no beer shall be sold by retail by any person in the house or premises mentioned in the license of such offender."

Adulterating, &c. beer,

"And if any person so licensed as aforesaid shall knowingly sell any beer, ale, or porter made otherwise than from malt and hops, or shall mix or cause to be mixed any drugs or other pernicious ingredients with any beer sold in his house or premises, or shall fraudulently dilute or in any way adulterate

penalty for.

any such beer, such offender shall for the *first* offence forfeit any sum not less than ten pounds nor more than twenty pounds, as the justices before whom such offender shall be convicted of such offence shall adjudge; and for the *second* such offence, such offender shall be adjudged to be disqualified from selling beer, ale, or porter by retail for the term of two years, or to forfeit any

First offence.

sum of money not less than twenty pounds nor more than fifty pounds, at the discretion of the justices before whom such offender shall be adjudged

Second offence.

guilty of such second offence; and if any offender convicted of such offence as last aforesaid shall during such term of two years sell any beer, ale, or porter by retail, either in the house and premises mentioned in the license of such offender, or in any other place, he shall forfeit any sum not less than twenty-five pounds nor more than fifty pounds, and shall be subject to a like

Selling after conviction of second offence,

penalty at any and every house or place where he shall commit such offence; and if any person shall at any time, during any term in which it shall not be lawful for beer to be sold by retail on the premises of any offender, sell any beer by retail on such premises, knowing that it was not lawful to be sold,

penalty for.

such offender shall forfeit any sum not less than ten pounds nor more than twenty pounds, as the convicting justices shall adjudge."

Having prohibited articles, penalty for.

Besides the penalty imposed for the adulteration of beer by this section, a beer-house keeper is also liable to the penalties imposed by the 56 Geo. III. c. 58, s. 2 (see *post*, 108), for having in his possession any of the prohibited articles therein specified, or any other article or preparation to be used as a substitute for malt or hops. (*Att.-Gen.* v. *Lockwood*, 9 *M.* & *W.* 378.)

(8.) Penalties for selling Beer, Cider, &c. without License.

Penalty on unlicensed persons selling beer and cider by retail to be drunk off the premises, 10*l.*

By stat. 4 & 5 Will. IV. c. 85, s. 17, "Every person (not being duly licensed to sell beer, cider, and perry as the keeper of a common inn, ale-house, or victualling-house), who shall sell any beer, or cider, or perry by retail not to be drunk or consumed in or upon the house or premises where sold, without having an excise retail license in force authorising him so to do, shall forfeit *ten pounds;* and every person (not being duly licensed to sell beer, cider, and perry as the keeper of a common inn, alehouse, or victualling house), who shall sell any beer, cider, or perry by retail to be drunk or consumed in or upon the house or premises where sold, without having an excise

To be drunk on the premises, 20*l.*

retail license in force authorising him so to do, whether such person shall or shall not be licensed to sell beer to be drunk or consumed off the premises

where sold, shall forfeit *twenty pounds*; which said penalties shall be sued for and recovered, mitigated and applied, by the same means, and under the same provisions as any other penalty may be sued for and recovered, mitigated and applied, under any law or laws of excise." (See Vol. II. title "*Excise.*")

2. *License, &c. for, &c.*

Sect. 4. "If any person licensed to sell beer or cider not to be consumed upon the premises shall, with intent to evade the provisions of this act, take or carry, or authorise or employ or permit or suffer any person to take or carry, any beer or cider out of or from the house or premises of such licensed person for the purpose of being sold on his account, or for his benefit or profit drunk or consumed in any other house, or in any tent, shed, or other building of any kind whatever belonging to such licensed person, or hired, used, or occupied by him, such beer or cider shall be deemed and taken to have been drunk or consumed upon the premises, and the person selling the same shall be subject to the like forfeitures and penalties as if such beer or cider had been actually drunk or consumed in any house or upon any premises licensed only for the sale thereof as aforesaid."

Permitting drinking beer in a neighbouring house or in any shed, &c. with intent to evade the provisions of the act, to be deemed drinking on the premises.

Sect. 19. "'And whereas doubts are entertained as to what is a selling of beer or cider or perry by retail;' be it therefore enacted, that every sale of any beer, or of any cider or perry, in any less quantity than four gallons and a half, shall be deemed and taken to be a selling by retail."

What is a retailing of beer, cider, or perry.

By the 3 & 4 Vict. c. 61, s. 13, "If any person, not being duly licensed to sell beer or cider, shall retail any beer or cider, either to be consumed in or upon the house or premises or off the premises where sold, or if any person shall sell any beer or cider to be consumed in or upon the house or premises where sold, without being duly licensed so to do, such person shall, in addition to any excise penalty to which he may thereby become subject, forfeit five pounds, such penalty to be recovered in the same manner as any other penalty (not being excise penalties) are by the said recited acts (11 Geo. IV. & 1 Will. IV. c. 64, and 4 & 5 Will. IV. c. 85) or this act to be recovered, levied, and applied: Provided always, that no information or other proceeding for the recovery of the said penalty shall be exhibited or commenced except by and in the name of a constable or other officer of the peace."

Additional penalty on unlicensed persons selling beer or cider; to be sued for by a peace officer.

Sect. 7. If any person convicted of felony or of selling spirits without license shall, after being so convicted, take out or have any license to sell beer or cider by retail, the same shall be void, and every person who, after being so convicted, shall sell any beer or cider by retail in any manner whatsoever, shall incur the penalty for so doing without license, and in all such cases in the prosecution for the recovery of such penalty a certificate from the clerk of the peace, or person acting as such, of any such conviction shall be legal evidence thereof. (See *ante*, 70.)

Persons convicted of felony or of selling spirits without license if they sell beer incur the penalty of selling without license, though they may have taken out license for so doing.

(9.) Penalties for Persons Licensed to sell Beer, selling or having in their possession Wine, Spirits, or Sweets.

By statute 4 & 5 Will. IV. c. 85, s. 16, "No license to be granted under the said recited act and this act for the sale of beer or cider shall authorise any person to take out or hold any license for the sale of wine, spirits, or sweets or made wines, or mead or metheglin; and if any person licensed under the said recited act and this act to sell beer or cider shall permit or suffer any wine or spirits, sweets or made wines, mead or metheglin, to be brought into his house or premises to be drunk or consumed there, or shall suffer any wine, spirits, sweets, mead or metheglin, to be drunk or consumed in his house or premises by any person whomsoever, such person shall, over and above any excise penalty or penalties to which he may be subject, forfeit twenty pounds, to be recovered, levied, mitigated, and applied in the same manner as other penalties (not being excise penalties) are by this act to be recovered, levied, mitigated, and applied."

Licenses under this act not to authorise persons to hold licenses for sale of wine.

Penalty on persons licensed under this act permitting wine or spirits to be consumed on the premises.

Sect 20. "And whereas doubts have been entertained whether persons licensed to sell beer or cider under the said act of the first year of his Majesty's reign, who shall sell spirits or wine, or sweets or made wines, or mead or metheglin, without being licensed so to do, are liable to the penalties

Persons licensed to sell beer or cider under this act liable to excise penalties for sell-

2. *License, &c. for, &c.*

ing spirits or wine without license.

imposed by the laws of excise for selling spirits or wine, or sweets or made wines, or mead or metheglin without license; be it therefore declared and enacted, that all persons licensed under the said recited act and this act selling wine or spirits, or any sweets or made wines, or mead or metheglin, shall be liable to and shall incur all the penalties imposed by the laws of excise for selling spirits or wine, sweets or made wines, mead or metheglin, without license."

Penalty on persons licensed to sell beer or cider having wine, spirits, or sweets in their entered premises.

By stat. 3 & 4 Vict. c. 61, s. 10, "If any person licensed to retail beer or cider under the said recited acts or this act shall receive into or keep or have in his possession, in any cellar, room, or place entered for storing, keeping, or retailing beer or cider, any wine or spirits or sweets, such person shall, in addition to all other penalties, forfeit fifty pounds, to be recovered and applied under the powers and provisions of the said acts of the seventh and eighth years of the reign of his said late Majesty King George the Fourth, (c. 58,) and the fourth and fifth years of the reign of his said late Majesty King William the Fourth (c. 51); and all wine and spirits and sweets found in any such entered cellars, rooms, or places shall be forfeited; and on conviction of any such licensed person in any penalty for having wine or spirits or sweets in his possession, or for selling or retailing wine or spirits or sweets, the license of such person for retailing beer or cider shall become null and void, and shall be so adjudged." (See title "*Excise*," Vol. II.)

Wine, &c. to be forfeited.

License in such case to be void.

Search for wine, &c.

And sects. 11 and 12 authorise officers of excise to enter and search for and seize all such wine, spirits, and sweets. (*Ante*, 73.)

(10.) Proceedings for the Recovery of Penalties.

(a) *What Justices may act.*

Two justices sitting in petty sessions to act.

The 11 Geo. IV. & 1 Will. IV. c. 64, s. 15 (*post*, 77), enacts, that all penalties shall be recovered before *two justices acting in petty sessions* in or for the division or place in which the beer-house is situate.

Within the metropolitan police district.

By the 2 & 3 Vict. c. 71, (the Metropolitan Police Act,) any one magistrate appointed under that statute may do alone any act "which by any law now in force or by any law, not containing an express enactment to the contrary, hereafter to be made, is or shall be directed to be done by more than one justice: provided that none of the said (metropolitan police) magistrates shall be competent to act as a justice of the peace either alone or with any other justice or justices in any thing which is to be done at a special or petty session of *all* the justices acting in the division, or by the justices of any of the said counties or liberties in quarter session assembled."

If justices of liberties, &c. do not attend sessions, county justices may act

By 11 Geo. IV. & 1 Will. IV. c. 64, s. 23, it is enacted, that "Whenever at any session for any liberty, county of a city, county of a town, city or town corporate, there shall not be present at least two justices acting in and for any such liberty, county of a city, county of a town, city or town corporate, it shall be lawful for the justices acting in and for the county or counties adjoining to such liberty, county of a city, county of a town, city or town corporate, to act within such liberty or place, and with the justice or justices thereof who shall be present at any such sessions as aforesaid, for the purpose of hearing complaints as to offences against this act: any law, custom, or usage to the contrary notwithstanding."

Powers given to justices of counties not to extend to cinque ports.

Sect. 24. "Nothing herein contained shall extend to give the justices of the county or any division thereof any power or authority for the putting of the provisions of this act in execution within any of the cinque ports or either of the two ancient towns, or any of the corporate or other members or liberties of the cinque ports or two ancient towns, but that it shall be lawful for the justices of and for each of the principal cinque ports and two ancient towns, and the liberties thereof, and for the justices of and for the liberties thereof, and the corporate members, to act within the same respectively as they have been accustomed, and for them or any of them to act within each of the corporate members immediately belonging or subordinate to such principal cinque port or ancient town, with the justice or justices of each such

corporate member, for the purpose of hearing complaints as to offences against this act in all such cases in which the justices of the county are hereinbefore empowered or authorised to act with the justice or justices of any liberty, county of a city, county of a town, city or town corporate."

2. *License, &c. for, &c.*

(b) *Summons or Order, how served.*

Service of summons or order.

By the 4 & 5 Will. IV. c. 85, s. 22, "No summons or order issued by any justice of the peace or other magistrate shall be deemed to be legally served unless it shall be served by some constable, special constable, police, or other peace officer."

(c) *Information, how and by whom exhibited.*

Information, how and by whom exhibited.

By the 3 & 4 Vict. c. 61, s. 13, (*ante*, 75,) no information or other proceeding for the recovery of the penalty incurred under that section shall be exhibited or commenced except by or in the name of a constable or other officer of the peace.

In case of appeal (*post*, 80) the justices may order the constable or other peace officer of the parish to carry on the proceedings.

With the above exception an information under these acts may be exhibited by any person whomsoever. (11 Geo. IV. & 1 Will. IV. c. 64, s. 15, *infra*.)

In *Reg.* v. *Rawlins*, (8 C. & P. 441,) Patteson, J., inclined to think that the information (as directed by the 15th sect. of the 11 Geo. IV. & 1 Will. IV. c. 64, *infra*) need not be in writing, nor as it seems on oath. (See title "*Conviction*," *post*.)

(d) *Evidence and Witnesses.*

Evidence of conviction.

By 3 & 4 Vict. c. 61, s. 7, (*ante*, 70,) on the prosecution for the recovery of a penalty under that section, a certificate from the clerk of the peace or person acting as such, of any such conviction as mentioned in that section, shall be legal evidence thereof.

Evidence of bond.

By 11 Geo. IV. & 1 Will. IV. c. 64, s. 19, (*post*, 80), the certificate of the commissioners of excise, or their officer or other person by this act authorised to grant a license, of the date of the bond, and the names and descriptions of the surety or sureties mentioned in that section, shall be sufficient evidence of such bond, and of the contents and execution thereof, against any surety or sureties.

Penalty on witnesses not attending.

Sect. 20. "Any person summoned as a witness to give evidence before any justices or sessions touching any of the matters aforesaid, either on the part of the complainant or of the person accused, who shall neglect or refuse to appear at the time and place for that purpose appointed, and who shall not make such reasonable excuse for such neglect or refusal as shall be admitted and allowed by such justices or sessions, or who appearing shall refuse to be examined on oath or affirmation and give evidence, shall on conviction before such justice forfeit and pay for every such offence any sum not exceeding ten pounds." (See further, "*Evidence*," Vol. II.)

(e) *Proceedings before Justices—Mitigation of Penalties—Conviction.*

Penalties recoverable before two justices in petty sessions.

Limitation of prosecutions.

By 11 Geo. IV. & 1 Will. IV. c. 64, s. 15, "All penalties under this act, save and except the penalty hereinbefore mentioned for selling beer by any person not duly licensed, (*ante*, 74,) shall and may be recovered upon the information of any person whomsoever before *two justices acting in petty sessions*: and every such penalty shall be prosecuted and proceeded for *within three calendar months* next after the commission of the offence in respect of which such penalty shall be incurred; and every person licensed under this act who shall be convicted, before two justices so acting in and for the division or place in which shall be situate the house kept or theretofore kept by such person, of any offence *against the tenor of the license* to him granted under this act, or of any offence for which any penalty is imposed by this act, shall, unless proof be adduced to the satisfaction of such justices that such person had been theretofore convicted before two justices within the space of twelve calendar months next preceding of some offence against

2. *License, &c. for, &c.*

Penalty where no specific penalty named.

the tenor of his license or against this act, be adjudged by such justices to be guilty of a first offence against the provisions of this act, and to forfeit and pay any penalty by this act imposed for such offence, or if no specific penalty be imposed for such offence, then any sum not exceeding five pounds, together with the costs of the conviction; and if proof shall be adduced to the satisfaction of such justices that such person had been previously convicted before two justices within the space of twelve calendar months next preceding of one such offence only, such person shall be adjudged by such justices to be guilty of a second offence against the provisions of this act, and to forfeit and pay any penalty by this act imposed for such offence, or if no specific penalty be so imposed, then any sum not exceeding ten pounds, together with the costs of the conviction; and if proof shall be adduced to the satisfaction of such justices that such person had been previously convicted before two justices within the space of the eighteen calendar months next preceding of two such separate offences, and if proof shall be adduced to the satisfaction of the justices that such person so charged is guilty of the offence charged against him, such person shall be adjudged to be guilty of a third offence against the provisions of this act, and to forfeit and pay any penalty imposed by this act in respect of such offence, or if no such specific penalty shall be imposed, then to forfeit and pay the sum of fifty pounds, together with the costs of the conviction."

The like, for a second offence.

The like, for a third offence.

Form of conviction.

Sect. 25. "And, in order to prevent frivolous and vexatious appeals, a conviction in the form or to the effect following, *mutatis mutandis*, as the case may be, shall be good and effectual to all intents and purposes whatsoever, without stating the case or the facts or evidence in any more particular manner." (See this form, *post*, 127.)

Conviction to be returned to sessions and filed.

By sect. 26, "The justices before whom any such conviction shall have been made shall return the same, or cause the same to be returned, to the next general session or quarter session of the peace, holden for the county or place wherein the offence shall have been committed, and such conviction shall be then and there delivered to the clerk of the peace or other person acting as such, to be by him filed or enrolled amongst the records of the said court; and the certificate of the clerk of the peace of such conviction, which he is hereby required to grant, on demand, upon payment of one shilling, shall be legal evidence of every such conviction."

Conviction not to be quashed for want of form.

Sect. 27. "No conviction under this act, nor any adjudication made upon appeal therefrom, shall be quashed for want of form; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and that there be a good and valid conviction to sustain the same." (See *post*, title "*Conviction.*")

What a petty sessions.

Every meeting of two justices in one place for business constitutes in itself a "petty sessions," within sect. 15. (*Reg.* v. *Rawlins*, 8 *C. & P.* 439.) And such justices must be acting in and for that division or place in which the house is situate when the offence was committed. (*Ib.*)

Justices may mitigate penalties.

By 3 & 4 Vict. c. 61, s. 16, "it shall be lawful for any justice or justices of the peace, when he or they shall see cause, to mitigate any penalty incurred for any offence committed against the said recited acts or this act; provided that where any conviction shall take place on any information exhibited under the laws of excise, such mitigated penalty shall not be less than one fourth part of the penalty."

(11.) Certiorari—Appeal, and Costs of Appeal.

By 11 Geo. IV. & 1 Will. IV. c. 64, s. 27, no conviction nor any adjudication made upon appeal therefrom shall be removed by writ of certiorari or otherwise into any of her Majesty's superior courts of record. (See title, "*Certiorari*," *post*.)

Appeal to quarter sessions on third offence.

Sect. 16. "It shall and may be lawful for the party convicted of any such *third* offence (sect. 15, *ante*, 77) to appeal to the general sessions or quarter sessions of the peace then next ensuing, unless such sessions shall be held within twelve days next after such conviction, and in that case to the then

next subsequent sessions; and in such case the party so convicted shall before such justices so convicting forthwith enter into a recognizance, with two sufficient sureties, personally to appear at the said general session or quarter session, and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded; which recognizances such justices are hereby authorised to require and take; or, in failure of the party convicted entering into such recognizance, such conviction shall remain good and valid to all intents and purposes; and the said justices who shall take such recognizance from the party convicted are also hereby required to bind the person who shall make such charge in a recognizance to appear at such general or quarter sessions as aforesaid, then and there to give evidence against the person so charged, and in like manner to bind any other person who shall have any knowledge of the circumstances of such offence; and it shall be lawful for the said court of general session or quarter session to adjudge such person to be guilty of any such third offence against the provisions of this act, as the case may be, and such adjudication shall be final to all intents and purposes; and it shall be lawful for such court of general session or quarter session to punish such offender by fine not exceeding the sum of *one hundred pounds*, together with the costs of such appeal, or to adjudge the license granted to and held by or on behalf of such offender to be forfeited and void, or to adjudge that no beer shall be sold by retail in the house or premises mentioned in the license of such offender for the term of two years from the date of such adjudication, or to punish such offender by such fine as aforesaid, and to adjudge such premises to be disqualified for the sale of beer as aforesaid, and such license to be forfeited and void; and if such license shall be adjudged to be forfeited and void, it shall thenceforth be void accordingly; and whenever in such case or in any other case the license of such offender shall be adjudged to be void, such offender shall from and after such adjudication be deemed and taken to be incapable of selling beer, ale, or porter by retail, in any house kept by him, for the space of two years, to be computed from the time of such adjudication; and any license granted to such person during such term shall be void to all intents and purposes."

Recognizance to appear,

and give evidence.

Judgment of sessions.

May fine offender 100*l.*

and declare license void;

no beer to be sold on the premises for a year;

license granted to offender void.

Costs of appeal, (see title "*Costs*," Vol. I.)

Sect. 17. "Whenever it shall happen that any appeal respecting which any recognizance shall be entered into in pursuance of this act shall be dismissed, or that the conviction appealed against shall be affirmed, or that such appeal shall be abandoned, it shall be lawful for the court to whom such appeal shall have been made or intended to be made, and such court is hereby required to adjudge and order that the party so having appealed or having entered into such recognizance shall pay to the justices before whom such recognizance shall have been entered into, or to whomsoever they shall appoint, such sum by way of costs as shall in the opinion of such court be sufficient to indemnify such justices from all costs and charges whatsoever to which such justices may have been put in consequence of the intention or declared intention of such party to appeal; and if such party shall refuse or neglect to pay forthwith such sum, it shall be lawful for the said court to adjudge and order that the party so refusing or neglecting shall be committed to the common gaol or house of correction, there to remain until such sum be paid, or for any time not exceeding six calendar months, unless such sum be sooner paid: and in every case in which the conviction so appealed against shall be reversed, it shall be lawful for such court (if it shall think fit) to adjudge and order that the treasurer of the county or place in and for which such justices whose judgment shall have been so reversed shall have acted on the occasion when they shall have given such judgment, shall pay to such justices, or whomsoever they shall appoint, such sum as shall in the opinion of such court be sufficient to indemnify such justices from all costs and charges whatsoever to which such justices may have been so put; and the said treasurer is hereby authorised to pay the same, which shall be allowed to him in his accounts."

Commitment in case of non-payment(*a*).

Costs where judgment reversed.

(*a*) As to defects in form, of being cured, see the 27th section, *ante*, 78. As to commitments in general, see *post*, "*Commitment in Execution.*"

2. *License, &c. for, &c.*

Proceedings at session, when to be carried on by petty constable. (*a*)

Sect. 18. "In every case in which any appeal shall be made by any person convicted of any offence under the provisions of this act, to the general session or quarter session, it shall be lawful for the convicting justices, if no other fit and proper person shall appear to prosecute such charge and to carry on such proceedings as may be necessary to obtain at such session an adjudication thereon, to order that the constable or other peace officer of the parish or place in which shall be situate the house kept by the person charged shall carry on all proceedings necessary to obtain such adjudication as aforesaid, and to bind such constable or other peace officer in a sufficient recognizance so to do; and it shall be lawful for the justices before whom such offender shall have been convicted to order the treasurer of the county or place in and for which such justices shall then act to pay to such constable or other peace officer, and to the witness or witnesses on his behalf, such sum or sums of money as to the court shall appear to be sufficient to reimburse such constable or other peace officer, and such witness or witnesses respectively, the expenses that he or they shall have been severally put to in and about such prosecution, which order the clerk of the peace is hereby directed and required forthwith to make out and to deliver to such constable or other peace officer, or to such witness or witnesses; and the said treasurer is hereby authorised and required, upon sight of such order, forthwith to pay to such constable or other peace officer, or other person authorised to receive the same, such money as aforesaid, and the said treasurer shall be allowed the same in his accounts." (As to appeals in general, see *post*, "*Appeal.*")

Expenses of prosecution to be charged on county rates. (*b*).

(12.) Proceedings against Sureties.

The 11 Geo. IV. & 1 Will. IV. c. 64, s. 4, (*ante*, 65) provides that the party taking out license shall enter into a bond with sureties.

Proceedings against sureties on non-payment of penalties.

Sect. 19. "In case any person licensed under this act shall be convicted of any offence against this act, and shall not pay the penalty incurred by such conviction, it shall be lawful for the justices convicting such offender, after the expiration of one calendar month next after such conviction, to summon any surety or sureties named in the bond entered into and executed by such person and his surety or sureties at the time of obtaining his license, to appear before the said justices, and show cause why the penalty mentioned in such bond should not be paid by such surety or sureties, or so much thereof as shall be sufficient to pay any penalty incurred by the party licensed, or to satisfy so much of such penalty so incurred as shall remain unpaid, and in case any such surety shall not show any sufficient cause to the contrary, it shall be lawful for such justices to adjudge that such penalty, if not paid, or so much thereof as aforesaid, shall be paid by such surety within fourteen days; and in case such penalty, or so much thereof as aforesaid, shall not be paid within fourteen days, it shall be lawful for such justices, if they shall think fit, to issue their warrant, and to levy the amount of such penalty, or so much thereof as aforesaid, by distress and sale of the goods and chattels of such surety, together with the costs of such distress and sale; and the certificate of the commissioners of excise, or their officer, or other persons by this act authorised to grant any license, of the date of such bond, and the names and descriptions of the surety or sureties in such bond, shall be sufficient evidence of such bond, and of the contents and execution thereof, against any surety or sureties in any proceedings under this act."

(13.) Penalties, how levied and enforced.

Penalties may be levied by distress. (*c*)

By 11 Geo. IV. & 1 Will. IV. c. 64, s. 21, "In every case in which under the authority of this act any justices shall adjudge that any offender shall pay

(*a*) By 7 & 8 Geo. IV. c. 38, constables are not required to make presentments respecting unlicensed alehouses.

(*b*) As to these rates, see "*County Rate*," Vol. II.

(*c*) See 5 Geo. IV. c. 18, and further *post*, "*Distress by Justice's Warrant*," Vol. II.

or cause to be paid any penalty, and such offender shall refuse or neglect, within seven days after his conviction, to pay such penalty, and any costs which shall have been duly assessed and ascertained by such justices, it shall be lawful for such justices, if they shall think fit, to issue their warrant,(*a*) and to levy the amount of such penalty and costs by distress and sale of the goods and chattels of such offender, together with the costs of such distress and sale; and in every such case such offender, if in custody at the time that such warrant shall be so issued, shall be forthwith discharged; but if it shall appear to such justices that the goods and chattels of such offender are not sufficient whereon to levy such distress, together with the costs of such distress and sale, it shall be lawful for such justices to commit (*c*) the offender to the common gaol or to the house of correction of the county or place for which such justices shall be then acting, for any term not exceeding one calendar month if the penalty shall not be above five pounds, for any term not exceeding three calendar months if the penalty shall be above five pounds and shall not be more than ten pounds, and for any term not exceeding six calendar months if the penalty shall be above ten pounds: provided nevertheless, that whenever such offender shall have been committed to the common gaol or house of correction in consequence of his not having duly paid such penalty and costs, if such offender shall pay or cause to be paid to the gaoler or keeper of the house of correction, or to whomsoever such justices shall have appointed, the penalty imposed, and costs, together with all the costs of the apprehension of him and of the conveyance of him to the said gaol or house of correction, at any time previous to the expiration of the time for which such offender shall so have been committed, such offender shall be forthwith discharged."

2. *License, &c. for, &c.*

If not sufficient distress on goods, justices may commit. (*b*)

Proviso for offenders paying penalties, &c. to gaoler.

By sect. 22, "Any justices before whom any penalty shall be recovered under the provisions of this act shall award, *if they shall think fit*, any portion of the same, not in any case exceeding one moiety thereof, to the use of the prosecutor; and the remainder, or in case no part of such penalty shall be awarded to the prosecutor, then the whole of such penalty shall be awarded to be paid and shall be paid to the treasurer of the county within which such offence shall be committed, to be applied by the said treasurer towards defraying the expenses of such county, and in aid of the county rates of such county."

Application of penalties.

By the 3 & 4 Vict. c. 61, s. 10, *ante*, 61, the penalties under this act, where not otherwise directed, are to be recovered under the provisions of the former acts.

And by sect. 21, *ante*, 61, the powers, provisions, and penalties of the former acts, are to apply to persons licensed under this act.

(14.) Actions against Justices and others.

By 11 Geo. IV. & 1 Will. IV. c. 64, s. 28, "Every action against any justice, constable, or other person, for or on account of any matter or thing whatsoever done or commanded by him in the execution of his duty or office under this act, shall be commenced within three calendar months after the cause of action or complaint shall have arisen, and not afterwards; and if any person shall be sued for any matter or thing which he shall have done in the execution of this act, he may plead the general issue and give the special matter in evidence."

Actions against justices, &c.

Limitation of.

General issue.

As to enactments of this kind, and the law in general as to actions against justices of the peace and other officers, see *post*, "*Justices*," Vol. III.

(*a*) See the form (No. 26), *post*.

(*b*) As to defects in form being cured, see the 27th section, *ante*, 78; and see further, *post*, "*Commitment in Execution*."

(*c*) See the form (No. 27), *post*.

3. *Magistrates' License for, &c.*

III. License to sell Wine and Spirits, Beer, &c. in Inns or Public Houses.

What licenses requisite to keep an inn.

To enable a person to keep an inn, or (as it is now more generally called) a public house, and sell therein wine and spirits, beer, cider or perry, or other exciseable liquors, two licenses are necessary; first, a *magistrates'* license; and secondly, an *excise* license. Neither is operative alone, both together they become so. (*Rex* v. *Drake*, 1 *Burn's J.* 24th ed. 56; *Rex* v. *Downes*, 3 *T. R.* 560.)

Magistrates' license only here considered.

We shall in this place notice only the laws and regulations as to the *magistrates'* license; as to the license to be obtained from the *excise*, see *post*, "*Excise*," Vol. II. It may be as well to observe, that by the 9 Geo. IV. c. 61, s. 17, no excise license can be granted until a magistrates' license has been obtained.

The 9 G. 4, c. 61.

The only act now in force regulating the licensing of alehouses by *magistrates*, for the selling therein of wine, spirits, beer, cider, perry, or other exciseable liquors, is the 9 Geo. IV. c. 61, intituled, "*An Act to regulate the granting of Licenses to Keepers of Inns, Alehouses, and Victualling Houses in England*," (*a*) which commences by reciting the expediency of reducing into one act the laws relating to the licensing, by justices of the peace, of persons keeping or about to keep inns, alehouses and victualling-houses, to sell exciseable liquors by retail, to be drunk or consumed on the premises, in that part of the United Kingdom called England.

Title and recital of.

Division of subject.

We will consider this statute of 9 Geo. IV. c. 61, and the various laws and regulations relative to the *magistrates'* license for selling wine, spirits, beer, cider, or perry, or other exciseable liquors, in the following order:

1. *The Repeal of Statutes prior to the 9 Geo. IV. c. 61* .. 83.
2. *The Places, &c. exempted from the Provisions of that Act*, 83.
3. *The Rules for Interpretation of it*, 84.
4. *The Places which require the License*, 85.
5. *Who may have it*, 85
6. *Licensing Meeting, when and where held*, 86.
7. *Proceedings by Party before applying for License*, 87.
8. *What Justices may attend the Meeting—Proceedings at the Meeting to obtain License*, 86—*The Adjournment of the Meeting*, 89.
9. *License, how granted, its Form, Duration and Effect*, 89.
10. *The Transfer of the License, and Grant of a fresh License in Case of Removal, Death, Bankruptcy, or other Contingency*, 90.
11. *Fees for granting the License*, 93.
12. *Penalty for selling Wine or Spirits &c. without it*, 94.
13. *Penalty for not selling by Standard Measures*, 95.
14. *Penalty for not Closing Public Houses in Riots*, 95.
15. *Penalty and Punishment for Offences against the License*, 96.
16. *Compelling attendance of Witnesses—Conviction—Defects in Form—Certiorari, &c.* 98.
17. *Penalties, how to be recovered and applied*, 99.
18. *Appeal, &c.* 101.
19. *Actions against Justices, &c. Limitation of—Plea, &c.* 103.
20. *Remedies on Refusal to grant or transfer License, by Appeal, Mandamus, Action, Indictment, Criminal Information, &c.* 103.
21. *Remedy for improperly granting a License*, 105.

(*b*) The statute regulating alehouses in Scotland is the 9 Geo. IV. c. 58.

3. *Magistrates' License for, &c.*

9 Geo. 4, c. 61. Commencement of act. Repeal of acts.

(1.) Repeal of Statutes prior to 9 Geo. IV. c. 61.

By 9 Geo. IV. c. 61, s. 35, the act is to commence on the 10th of October, 1828, next ensuing the passing thereof: and the section then repeals the statute 5 & 6 Edw. VI. c. 25; the 1 Jac. I. c. 9; the 4 Jac. I. c. 4 & 5; the 7 Jac. I c. 10, and so much of the 21 Jac. I. c. 7, s. 4, as provides that any person, being an alehouse keeper, and who shall be convicted of any offence against the said act, shall be disabled from keeping an alehouse for three years;(*a*) and the 1 Car. I. c. 4; the 3 Car. I. c. 3; and so much of the 9 Geo. II. c. 23, s. 14, 15, 20, as relates to the licensing of retailers of spirituous liquors, and to the conviction of persons selling liquors by retail without a licence, and to the summoning of excise officers for the more easy discovery of such offenders; and so much of the 24 Geo. II. c. 40, s. 24, as relates to the fees of justices' clerks; and so much of the 26 Geo. II. c. 13, s. 12, as prevents justices of the peace in certain cases from granting licenses; and the whole of the 26 Geo. II. c. 31; and so much of the 28 Geo. II. c. 19, s. 2, as explains a clause in the last-mentioned act; and so much of the 29 Geo. II. c. 12, s. 23, 24, as relates to continuing and renewing licenses; and so much of the 30 Geo. II. c. 24, s. 14, as imposes a penalty on the keepers of public houses for suffering gaming; and so much of the 5 Geo. III. c. 46, s. 20, 21, 22, as requires retailers of exciseable liquors to exhibit their licenses, and clerks of the peace to deliver lists of persons licensed, and altering the punishment of such retailers selling without a license; and the whole of the 32 Geo. III. c. 59; and so much of the 38 Geo. III. c. 54, s 13, as exempts from the foregoing penalty persons selling beer or ale above certain quantities; and the whole of the 39 Geo. III. c. 86; and so much of the 48 Geo. III. c. 143, s. 7, 10, as relates to the form of justices' licenses, and to justices' clerks' fees; and so much of the 4 Geo. IV. c. 125, s. 1—6, as alters the time for holding such meetings, and for giving notices of applying for licenses for houses not before licensed, "except only such parts of any of the said acts as repeal any former acts or parts of acts, and except also, that all licenses granted and recognizances entered into under the said acts hereby repealed, or any of them, or under the 3 Geo. IV. c. 77,(*b*) shall remain in full force and virtue until the end of the terms for which such licenses and recognizances respectively have been or shall be granted or entered into; and all offences against the tenor of the said licenses, or in breach of the conditions of such recognizances, and all offences committed against the said recited acts, or any of them, before the commencement of this act, shall and may be prosecuted, heard, determined, and punished, as if this act had not been made; and all such offences committed after the commencement of this act shall be prosecuted, heard, determined and punished under the provisions of this act."

Except such of acts as repeal former acts, and except as to subsisting licenses, &c.

(2.) The Places, &c. exempted from 9 Geo. IV. c. 61.

Act not to affect two Universities; nor the Vintners of London; nor to alter the time for licensing in London; nor any law of excise, nor to prohibit sale of beer at fairs.

Sect. 36. "Nothing in this act contained shall extend to alter or in any manner to affect any of the rights or privileges of the Universities of Oxford or Cambridge, or the powers of the chancellors or vice-chancellors of the same, as by law possessed under the respective charters of the said Universities or otherwise; or the master, wardens, freemen, and commonalty of the Vintners of the city of London, but not to extend to those freemen of the said Company of Vintners who have obtained the same by redemption only; nor to alter the time (*c*) of granting licenses for keeping inns in the city of London provided also, that nothing in this act contained shall alter any law relating to the revenue of excise, except so far as the same is hereby expressly

(*a*) It would seem that the other provisions in this act against tippling, which see *post*, 112, are virtually repealed by the subsequent provisions of this act.

(*b*) Now expired.

(*c*) The magistrates of London must pursue the other regulations of this act relating to the manner and place of holding the meeting. See *R.* v. *Downs*, 3 *Term Rep.* 560; *R.* v. *Justices of Surrey*, 2 *D. & R. Mag. Cas.* 435.

3. *Magistrates' License for, &c.*

9 Geo. 4, c. 61.

altered and otherwise provided for; nor to prohibit any person from selling beer in booths or other places at the time and within the limits of the ground or place in or upon which is holden any lawful fair, in like manner as such person was authorised to do before the passing of this act." (See *Reg.* v. *Archdall*, 8 *Ad. & Ell.* 281, where the right of the University of Cambridge to grant licenses was fully considered.)

Freemen of Vintners' Company subject to certain provisions within the metropolitan police district.

But by the 2 & 3 Vict. c. 47, s. 41, "After the passing of this act every person who by reason of his or her freedom of the mystery or craft of vintners of the city of London, or of any right or privilege of such mystery, shall claim to be entitled to sell foreign wine by retail, to be drunk or consumed on the premises within the metropolitan police district, without license, shall be subject to all the provisions of all acts made for the regulation of persons so licensed, (except those provisions which require or refer to the taking out of a license either from any justice of the peace or from the commissioners of excise,) and, in the case of any offence committed by him or her against the tenor of the license granted under the provisions of any act for the sale of exciseable liquors by retail to be drunk or consumed on the premises, shall be liable to be dealt with, proceeded against, and punished in like manner as if selling wine by license, and not by virtue of such claim or privilege."

(3.) Rules for Interpretation of 9 Geo. IV. c. 61.

Rules for interpretation of act, 9 Geo. 4, c. 61.

In order to remove doubts as to the meaning of certain words in this act, the 37th section of the act, after reciting to that effect, enacts, "That the word 'justice' shall be deemed to mean justice of the peace; and that the words 'treasurer of the county or place' shall be deemed to include any officer acting in such capacity, or charged with the receipt and expenditure of monies from and out of which the cost of public prosecutions have been usually defrayed; that the words 'peace officer' shall be deemed to include any petty constable, tithing-man, headborough, beadle, or bailiff; that the words 'parish officer' shall be deemed to include any churchwarden, or chapel-wardens, or overseers of the poor; and that the said words 'justice,' 'treasurer of the county or place,' 'peace officer,' parish officer,' and the words "high constable,' and the words 'petty constable,' and the words 'overseer of the poor,' and the words 'clerk of justices,' shall each be deemed to include any person acting as such, and any number of justices, treasurers, peace officers, parish officers, high constables, petty constables, overseers of the poor, and clerks of justices; and that the word 'person,' and the word 'party,' shall be deemed to include any number of persons and parties; and that the meaning of the aforesaid several words shall not be restricted, although the same may be subsequently referred to in the singular number and masculine gender only; and that the word 'notice,' and the word 'license,' and the word 'adjournment,' and the word 'day,' and the word 'time,' and the word 'house,' and the word 'place,' shall each be deemed to include any number of notices, licenses, adjournments, days, times, houses, or places; and that the word 'county,' and the words 'county or place,' shall be deemed severally to include any county, riding, division of the county of Lincoln, hundred, division of a county, liberty, division of a liberty, county of a city, county of a town, city, cinque port, or town corporate; and the words 'division or place' shall be deemed to include any division of a county or riding, liberty, division of a liberty, county of a city, county of a town, city, cinque port, or town corporate; and that the words 'parish or place' shall be deemed to include any township, hamlet, tithing, vill, extra-parochial place, or any place maintaining its own poor; and that the word 'inn' shall be deemed to include any inn, alehouse, or victualling-house; and that the words 'inn, alehouse, or victualling-house,' shall be deemed to include all houses in which shall be sold by retail any exciseable liquor, to be drunk or consumed on the premises; and that the words 'exciseable liquor' shall be deemed to include any ale, beer, or other fermented malt liquor, sweets, cider, perry, wine, or other

spirituous liquor which now is or hereafter may be charged with duty either by customs or excise; and that the word 'penalty' shall be deemed to include any fine, penalty, or forfeiture of a pecuniary nature; and that the meaning of the said several words shall not be restricted, although the same may be subsequently referred to in the singular number only."

3. *Magistrates' License for, &c.*

9 Geo. 4, c. 61.

(4.) Places which require the License.

Places which require a license.

It does not appear that a magistrates' license under this act of 9 Geo. IV. is required for the keeping of a house of any particular denomination, the necessity for such license depending on the sale or disposal for consideration of exciseable liquors by retail to be consumed in the house. If such liquors are so sold or disposed of by retail, to be drunk or consumed on the premises, such house is an inn, alehouse, or victualling-house, within the meaning of the 9 Geo. IV. c. 61, and requires a license. (See 1 *Hawk.* c. 78, s. 4; *Hale, P. C.* 146.)

It seems, indeed, that a house in which persons board and pay a sum certain in respect of their entertainment, whether by the day or week, or any longer period, without relation to any quantity of any exciseable liquor with which they may be supplied, does not require a license; and it has accordingly been determined on prior statutes, that houses at Epsom, where they take in lodgers and boarders, coming to drink the waters there during the season, and dress victuals, and sell them ale and beer and entertain their horses at 8*d.* a day, but sell to no other persons, are not inns nor alehouses requiring a magistrates' license. (*Parker* v. *Flint*, 12 *Mod.* 254; *Salk.* 287; *Carth.* 417; 1 *Ld. Raym.* 479, *S. C.*)

Universities.

We have already seen, (*ante*, 83,) the 9 Geo. IV. c. 61, s. 36, does not affect the two Universities.

Canteens.

The annual Mutiny Act generally enacts, that when any persons shall hold any canteens under proper authority of the Board of Ordnance, it shall be proper for any two justices within their respective jurisdictions to grant or transfer any beer, wine, or spirit license to such persons without regard to the time of year or to the notices or certificates required by an act in respect of such licences; and the commissioners of excise, or their proper officers, within their respective districts, shall also grant such licenses as aforesaid, and such persons so holding canteens and having such licenses may sell therein victuals and exciseable liquors as empowered by such excise license, without being subject to any penalty or forfeiture.

(5.) Who may obtain the License.

Who disqualified from having license.

At common law any person may keep an inn or alehouse, and by 9 Geo. IV. c. 61, s. 1, *infra*, a license for selling wines and spirits, &c. may be granted to any one whom the magistrates may in their discretion deem fit and proper.

Sheriff's officers, &c.

But the 9 Geo. IV. c. 61, s. 16, enacts, "That no sheriff's officer, or officer executing the legal process of any court of justice in any county or place, shall be capable of receiving or using any license under this act; and that every license granted or transferred to any person exercising any such office shall be void to all intents and purposes."

When license void.

And sect. 21 provides, as a punishment for offences against the tenor of licenses, that "If the license of such offender shall be so (as therein mentioned) adjudged void, such offender shall, from and after such last-mentioned adjudication, be deemed and taken to be incapable of selling exciseable liquors by retail in any inn kept by him for the space of three years, to be computed from the time of such adjudication, and any license granted to such person during such term shall be void to all intents and purposes." See the section in full, *post*, p. 96.

No excise license to be granted, except to a person licensed under 9 Geo. IV. c. 61.

Sect. 17 enacts, "That no license for the sale of any exciseable liquors by retail, to be drunk or consumed on the premises of the person licensed, shall be granted by the commissioners of excise, or by any officer of excise, to any

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9 Geo. 4, c. 61.

person whatsoever, unless such person shall have previously obtained from the justices a license under this act, and which said license of such justices shall be retained by such person after being produced to the commissioners or officers of excise; and every license granted by the commissioners of excise, or by any officers of excise, contrary to this provision, shall be null and void to all intents and purposes."

Licensee may carry on the business for another person.

It may be here observed, that there is no enactment which prevents the licensee from carrying on the business for the benefit of another. (See *Brooker* v. *Wood*, 3 *Nev. & Man.* 596; 5 *B. & Adol.* 1052, *S. C.*)

(6.) Licensing Meeting, when and where and how held.

Licensing meetings.

It will be expedient to inquire as to the time when and place where a party is to apply for a license, before proceeding to point out the steps he is to take to obtain that license.

A general licensing meeting to be held annually.

The 1st sect. of the 9 Geo. IV. c. 61, enacts, "That in every division of every county and riding, and of every division of the county of Lincoln, and in every hundred of every county, not being within any such division, and in every liberty, division of every liberty, county of a city, county of a town, city, and town corporate, in that part of the United Kingdom called England, there shall be annually holden a special session of the justices of the peace, (to be called the General Annual Licensing Meeting,) for the purpose of granting licenses to persons keeping or being about to keep inns, alehouses, and victualling-houses, to sell exciseable liquors by retail, to be drunk or consumed on the premises therein specified; and that such meetings shall be holden in the counties of Middlesex and Surrey within the first ten days of the month of March, and in every other county on some day between the twentieth day of August and the fourteenth day of September inclusive; and that it shall be lawful for the justices acting in and for such county or place, assembled at such meeting, or at any adjournment thereof, and not as hereinafter disqualified from acting, to grant licenses, for the purposes aforesaid, to such persons as they the said justices shall, in the execution of the powers herein contained, and in the exercise of their discretion, deem fit and proper." (*a*)

Time of holding in Middlesex and Surrey.

In other counties.

Licenses to be granted at such meeting.

Mode of convening meeting;

a petty session to appoint it.

By sect. 2, "In every such division or place as aforesaid there shall be holden, twenty-one days at the least before each such general annual licensing meeting, a petty session of the justices acting for such county or place, (*b*) the majority of whom then present shall, by a precept (*c*) under their hands, appoint the day, hour, and place, upon and in which such general annual licensing meeting for such division or place shall be holden; and shall direct such precept to the high constable of the division or place for which such meeting is to be holden, requiring him, within five days next ensuing that on which he shall have received such precept, to order (*d*) the several petty constables or other peace officers within his constablewick to affix or cause to be affixed on the door of the church or chapel, and where there shall be no church or chapel, on some other public and conspicuous place within their respective districts, a notice (*e*) of the day, hour, and place at which such

Notice of meeting.

(*a*) By the 26 Geo. II. c. 31, s. 4, (now repealed by above act,) no ale license could be granted but on the 1st September yearly, or within twenty days after; and by section 16, alehouses in cities and towns corporate were excepted; but by 3 Geo. IV. c. 77, s. 7, (now expired,) all general annual meetings for granting licenses as well in cities and towns corporate as in all other places in England, should be held in the month of September, yearly, it was held in *R.* v. *Justices of Surrey*, 2 *D. & R. Mag. Ca.* 435, that the effect of this clause was not to repeal the general provisions of the former statute, but to extend its operation to cities and towns corporate only.

(*b*) Under the prior act it was considered that any justice of a county going to the meeting in the division was, for the purposes of the act, (26 Geo. II. c. 31, s. 4,) a justice of division. *R.* v. *Price*, *Cald.* 305, *per Ashton, J.* See rules for interpretation of act, *ante*, 84.

(*c*) See the form (No. 28), *post.*

(*d*) See the form (No. 29), *post.*

(*e*) See the form (No. 30), *post.*

meeting is appointed to be holden, and to give to or to leave at the dwelling-house of each and every justice acting for such division or place, and of each and every person keeping an inn, or who shall have given notice of his intention to keep an inn, and to apply for a license to sell exciseable liquors by retail, to be drunk or consumed on the premises, within their respective districts, a copy of such notice."

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9 Geo. 4, c. 61.

As to the adjournment of meetings, see sect. 3, 5, *post*, 89.

Adjournment.

As to the sessions for the transfer of licenses, see sect. 4, *post*, 90.

As to the manner and place of holding a petty session and the notices requisite to convene it, see *post*, "*Sessions*," Vol. V.

Manner and place of holding meeting must be public.

Lord Kenyon, in *R.* v. *Downes*, 3 *Term Rep.* 569, observed, that it was of importance to the public, that licenses of this sort should be granted openly and not by stealth, in order that they may have an opportunity of objecting to the granting of these licenses to particular persons on the ground of unfitness. And the license in that case having been granted by two magistrates at a *private meeting*, and which was also holden after the general meeting had passed; it was held illegal, and would not protect the party from the penalty for selling beer, &c. without a justices' license.

(7.) Proceedings by Party before applying for the License.

Notice to be given by applicant to keep an inn, not before kept as one.

By 9 Geo. IV. c. 61, s. 10, "Every person intending to apply for a license to sell exciseable liquor by retail, to be drunk or consumed in any house *not theretofore kept as an inn*, (*a*) shall affix or cause to be affixed a notice on the door of such house, and on the door of the church or chapel of the parish or place in which such house shall be situate, and where there shall be no church or chapel, on some other public and conspicuous place within such parish or place, on three several Sundays between the first day of January and the last day of February in the counties of Middlesex and Surrey, and elsewhere between the first day of June and the last day of July, at some time between the hours of ten in the forenoon and of four in the afternoon, and shall serve a copy of such notice upon one of the overseers of the poor, and upon one of the constables or other peace officers of the said parish or place, within the month of February in the counties of Middlesex and Surrey, and elsewhere within the month of July, prior to the general annual licensing meeting; and every such notice, and the copies thereof, shall be written in a fair and legible hand, or printed, and shall be according to the form in the schedule hereunto annexed, marked A. (*b*) and shall be signed by the party intending to make such application, or by his agent thereunto authorised, and shall set forth the situation of the house in a true and particular manner, and the christian and surname of the party applying, together with the place of his residence, and his trade or calling, during the six months previous to the time of serving such notice, and his intention to apply for a license to sell exciseable liquor by retail, to be drunk or consumed in such house or premises."

Form of notice.

Certificates.

The former enactments, (26 Geo. II. c. 31, s. 2,) and law relative to the obtaining of certificates from the parson, &c. is no longer in force, being repealed by the 9 Geo. IV. c. 61. The 7 & 8 Geo. IV. c. 77, is expired. (See *R.* v. *Young*, 1 *Burr.* 556.)

(8.) What Justices to attend the Meeting—Proceedings at, to obtain License—Adjournment of Meeting.

We shall consider this branch of the subject in the following order; *viz.* as to what justices may act, or not,—the presence of the applicant,—the grant or refusal of the license,—and the adjournment of the meeting.

What justices may act.

We have already seen that the first section of the 9 Geo. IV. c. 61, enacts, that the justices acting in and for the county or place wherein the meeting is held, not being disqualified from acting, may grant the required license as

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(*a*) See the form of the notice given by the act, *post*, No. 30.
(*b*) See the form (No. 30), *post*.

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they in the execution of the act and in their discretion shall think fit, (*ante*, 86.)

9 Geo. 4, c. 61. What justices may not act.

All justices who are interested or who may be reasonably supposed to be so, are prohibited from acting in or being present at the meeting by the 6th section of the 9 Geo. IV. c. 61, which enacts, "That no justice who shall be a common brewer, distiller, maker of malt for sale, or retailer of malt or of any exciseable liquor, or who shall be concerned in partnership with any common brewer, distiller, maker of malt for sale, or retailer of malt or of any exciseable liquor, shall act in or be present at any general annual licensing meeting, or at any adjournment thereof, or at any special session for granting or transferring licenses under this act, or shall take part in the discussion or adjudication of the justices upon any application for a license, or upon any appeal therefrom; and no justice shall act upon any of the aforesaid occasions, in the case of any house licensed or about to be licensed under this act, of which such justice shall be the owner, or for the owner of which he shall be manager or agent, or of any house being in whole or in part the property of any common brewer, distiller, maker of malt for sale, or retailer of malt or of any exciseable liquor, to whom such justice shall be, either by blood or by marriage, the father, son, or brother, or of whom such justice shall be the partner in any other trade or calling; and that every justice who, being hereby disqualified, shall knowingly or wilfully so offend, shall for every such offence forfeit and pay the sum of one hundred pounds: provided always, that nothing herein contained shall extend to disqualify any justice, (not otherwise disqualified, and having no beneficial interest in the house licensed or about to be licensed under this act,) from acting on any of the occasions aforesaid, by reason of the legal estate in such house being vested in him as trustee for any person or persons, or for any charitable or public use or purpose whatsoever."

Penalty for acting.

County justices to act in corporate jurisdictions where not two qualified justices.

The county justices are by the 7th section of the act empowered to attend and act at the meeting where holden for a corporate or inferior jurisdiction, where there are not two justices present who are legally competent to act. The section enacts as follows: "That whenever at any of the meetings to be holden as aforesaid for any liberty, county of a city, county of a town, city, or town corporate, there shall not be present at least two justices acting in and for any such liberty, county of a city, county of a town, city, or town corporate, who are not disqualified, it shall be lawful for the justices acting in and for the county or counties adjoining to such liberty, county of a city, county of a town, city, or town corporate, and not disqualified from acting, to act within such liberty or place, and with the justice or justices thereof, not as hereinbefore disqualified, who shall be present at any such meeting as aforesaid, for the purpose of granting or transferring licenses under, or of hearing complaints as to offences against this act; any law, custom, or usage to the contrary nothwithstanding."

But cinque ports exempted from this provision.

But by the 8th section the *cinque ports* are exempted from this last provision. The section enacts, "That nothing herein contained shall extend to give the justices of the county, or any division thereof, any power or authority for the putting of the provisions of this act in execution within any of the cinque ports or either of the two ancient towns, or any of the corporate or other members or liberties of the cinque ports or two ancient towns; but that it shall be lawful for the justices of and for each of the principal cinque ports and two ancient towns, and not as hereinbefore disqualified from acting, and none other, to act within and for the same, and the liberties thereof, not corporate, respectively, as they have been accustomed, and for them or any of them (not so as last aforesaid disqualified) to act within each of the corporate members immediately belonging or subordinate to such principal cinque port or ancient town, with the justice or justices of each such corporate member, (not so as last aforesaid disqualified,) for the purpose of granting or transferring licenses under, or of hearing complaints as to offences against this act, in all such cases in which the justices of the county are hereinbefore empowered or authorised to act with the justice or justices of any liberty, county of a city, county of a town, city, or town corporate."

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9 Geo. 4, c. 61. Where a concurrent jurisdiction.

When the county justices and justices of another jurisdiction have concurrent authority over the same place, whichever set first appoints a meeting for granting ale licenses for such place has so far assumed jurisdiction over that subject, that although it seems that the other set may join in that assembly, and act with them, they cannot appoint a subsequent separate meeting. If they do, and there grant licenses, not only are their proceedings illegal and void, but they are liable to be indicted, or a criminal information may sometimes be obtained against them. (*R.* v. *Sainsbury*, 4 *Term Rep.* 451.)

Publicity of meeting.

We have already seen the meeting must be public, and not in private, *ante*, 87. (*R.* v. *Downes*, 3 *T. R.* 569.)

Presence of applicant. When prevented by illness, &c.

Regularly the applicant should appear before the justices in person. The following provision, however, is to be found in 12th section of the 9 Geo. IV. c. 61, dispensing with such presence in certain cases, viz. "That if any person intending to apply at the general annual licensing meeting, or at any adjournment thereof, or at any special session, for any license to be granted under the authority of this act, or for the transfer of any such license, shall be hindered by sickness or infirmity, or by any other reasonable cause, from attending in person at any such meeting, it shall be lawful for the justices there assembled to grant or transfer such license to such person so hindered from attending, and to deliver the same to any person then present, who shall be duly authorised by the person so hindered from attending to receive the same, proof being adduced to the satisfaction of such justices, who are hereby empowered to examine upon oath into the matter of such allegation, that such person is hindered from attending by good and sufficient cause."

Adjournment of annual meeting.

The 3d section of the 9 Geo. IV. c. 61, gives a power of *adjourning* the general annual licensing meeting as follows: "That it shall be lawful for the justices acting at the general annual licensing meeting, and they are hereby required, to continue such meeting by adjournment to such day or days, and to such place or places within the division or place for which such meeting shall be holden, as such justices may deem most convenient and sufficient for enabling persons keeping inns within such division or place to apply for such license: provided nevertheless, that the adjourned meeting to be holden next after such general annual licensing meeting shall not be so holden in or upon any of the five days next ensuing that on which such general annual licensing meeting shall have been holden as aforesaid; and that every adjournment of the said general annual licensing meeting shall be holden within the month of March in the counties of Middlesex and Surrey, and of August or September in every other county."

When to be held.

Notice of adjournment.

A notice of the adjournment must be given, the 5th section of the act enacting, "That whenever the justices shall have ordered any such adjournment of the general annual licensing meeting, or shall have appointed such special sessions as aforesaid, the day, hour, and place for holding every such adjourned meeting, and every such special session, shall be appointed by precept of the majority of the said justices, directed to the high constable, requiring notices, (*a*) similar in form to those given at the general annual licensing meeting, to be affixed on the door of the church or chapel, or on some other public and conspicuous place, and to be served upon the same parties."

(9.) License, how granted, Form, Effect and Duration of.

Grant or refusal of license. Questions to be decided and license to be signed by majority of justices.

The 9th section of the 9 Geo. IV. c. 61, enacts, "That when (at any of the meetings aforesaid) any question touching the granting, withholding, or transferring any license, or the fitness of the person applying for such license, or of the house intended to be kept by such person, shall arise, such question shall be determined by the majority of justices, not disqualified, who shall be present when such question shall arise; and every license granted under the authority of this act shall be signed by the majority of the justices not disqualified, who shall be present when such license shall be granted."

(*a*) See the forms, *post*, (Nos. 28, 29.)

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We shall hereafter see what discretion the magistrates may adopt in the grant or refusal of a license, and the remedies on an improper *refusal*, or for an improper *grant*. No condition should be annexed to the grant, *post*.

As to the fees for granting, see *post*, 93.

Form and duration of license.

The form and duration of the license are pointed out by the 13th section of the 9 Geo. 4, c. 61, which enacts, "That every license which shall be granted under the authority of this act shall be according to the form in the schedule hereunto annexed (marked C.(*a*)), and shall be in force in the counties of Middlesex and Surrey from the fifth day of April, and elsewhere from the tenth day of October, after the granting thereof, for one whole year thence respectively next ensuing, and no longer; and every license for the purposes aforesaid, which shall be granted at any other time or place, or in any other form than that hereby directed, except as hereinafter excepted, shall not entitle any person to obtain an excise license for selling exciseable liquors by retail, to be drunk or consumed on the premises of the person licensed, and shall be utterly void to all intents and purposes."

No other license to entitle a party to excise license to retail exciseable liquors.

Where retail beer license is void by conviction, retail spirit license void also.

By 6 Geo. IV. c. 81, s. 23, where the retail beer license has become void by conviction, as mentioned in s. 22, *ante*, 64, the retail spirit license shall become void also. The enactment is, "That where the license for the sale of beer, cider, or perry by retail, to be drunk or consumed upon the house or premises of the person or persons to whom the same is granted, shall become void, and the person or persons thereupon disabled in such manner as beforementioned by this act; the license for the sale of any spirits, or foreign wine or sweets, or made wines or mead, or metheglin, by retail, to be drunk or consumed upon the house or premises thereupon granted, shall become null and void also to all intents and purposes; and in such case if the person or persons to whom the same respectively were granted shall sell any spirits, or any foreign wine, or any sweets, or made wines, or any mead, or metheglin respectively, by retail, to be drunk or consumed upon the house or premises after such conviction as aforesaid shall have taken place in manner beforementioned in this act, and every such license as aforesaid has thereby become void, such person or persons shall incur the penalty for selling spirits or foreign wines, or sweets or made wines, or mead or metheglin, to be consumed upon the premises, by retail, without license; and in all such cases, in the prosecution for the recovery of such penalty as aforesaid, such conviction shall be proved in such and the like manner as before specified by this act in a prosecution under similar circumstances for the sale of beer, cider, or perry, by retail, to be drunk or consumed on the house or premises without license."

Selling spirits, &c. after such conviction.

Penalty.

The 24th section of the same act points out in what cases, upon the expiration of a magistrate's license to keep a public house within the year, the proportional parts of duties on excise licenses are to be returned. (See "*Excise*," Vol. II.)

(10.) The Transfer of License and Grant of Fresh License in case of Removal, Death, or other Contingency.

5 & 6 Vict. c. 44. Empowering transfer of licenses by justices at petty sessions.

In order to facilitate the *transfer* of licenses at any time of the year, the 5 & 6 Vict. c. 44, intituled "*An Act for the Transfer of Licenses and Regulation of Public Houses*," (1st July, 1842,) enacts, "That from and after the passing of this act, at any petty session of justices of the peace holden in and for any division of every county and riding, and in any hundred of every county not being within such division, and in every liberty, city, town, or place within which any inn, alehouse, or victualling-house shall be situated, and for which the said justices shall be acting, at any time when no special session shall be holden for any such division, hundred, liberty, city, town, or place, it shall be lawful, in those cases where justices of the peace assembled at a special session are empowered, by an act passed in the ninth year of the reign of King George the Fourth, intituled "*An Act to regulate the granting of Licenses to Keepers of Inns, Alehouses, and Victualling-Houses in England*,"

(*a*) See form (No. 32), *post*.

to transfer or grant licenses, before the expiration thereof, to sell exciseable liquors by retail in the same house or premises in respect of which any person had been theretofore duly licensed, for the majority of the justices then present, upon application made to them at any such petty session, by indorsement under their hands and seals on any license which shall have been granted pursuant to the provisions of the said act at any general licensing meeting, or at any adjournment thereof, to authorise (if they shall deem it proper so to do, after examining upon oath all necessary parties) any person not disqualified by the said act, to whom it shall be proposed at the time of such application to transfer or grant any such license, to use, exercise, and carry on the business of a licensed victualler at the same house and on the same premises, and there to sell such exciseable liquors as might theretofore have been lawfully sold and retailed therein; and thereupon it shall be lawful for the officer of excise empowered to transfer licenses by indorsement on the excise licenses required to be transferred to give the like authority to the persons so authorised by the magistrate or justices; and the authority so granted shall continue and be in force until the then next ensuing special session which shall be holden for the division, hundred, liberty, city, town, or place within which such house and premises shall be situated, and no longer; at which special session the justices then and there assembled, upon application made to them pursuant to the said act, touching any transfer or grant of license to the party or parties to whom such authority shall have been so given at petty sessions as aforesaid, shall hear and dispose of such application according to the provisions of the said act: provided always, that nothing herein contained shall be construed to empower any justices at petty sessions to give any such authority as aforesaid within any of the divisions assigned or to be assigned to any of the police courts already established or to be established within the metropolitan police district, except in the borough of Southwark; but that any such application as is hereinbefore directed to be made at petty sessions shall, when the house and premises in respect whereof any license shall have been obtained under the said act shall be situated within any of the said police court divisions, and not in the borough of Southwark, be made to one of the police magistrates sitting at any of the said courts, and such magistrate shall in his discretion grant such authority in the manner and for the time hereinafter mentioned: provided also, that any person or persons who shall be authorised, under the provisions of this act, to continue to carry on the business of a licensed victualler, shall, after the obtaining such authority, and so long as the same shall continue in force, be subject to all the powers, regulations, proceedings, penalties, and provisions declared by or contained in any act or acts in force touching the regulation, government, or control of licensed keepers of inns, alehouses, and victualling-houses, in like manner as if the same had been repealed and re-enacted, and that all penalties and forfeitures imposed by any such act or acts shall be applied as directed by the same respectively."

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5 & 6 Vict. c. 44.

By indorsement on the license.

Excise licenses also to be transferred to same person by indorsement.

To continue in force until the next special session.

The aforesaid provisions not to extend to the metropolitan police district, except Southwark.

And the application to be made to a magistrate of such district.

Transferee liable to all provisions and penalties of acts then in force.

Sect. 2. "That whenever it shall be proved to the satisfaction of any such magistrate or justices at petty session, upon any application made as aforesaid, that any license granted pursuant to the said act passed in the ninth year of the reign of King George the Fourth has been lost or mislaid, it shall and may be lawful for the said magistrate or justices to receive a copy of such license, certified to be a true copy under the hand of the clerk to the licensing justices by whom the said license shall have been granted, and to make such indorsement thereon as he or they might make under the provisions of this act upon the original license; and such indorsement upon the copy so certified shall be as valid and effectual as if the same had been made upon the said license."

When licenses are lost a copy may be indorsed and considered valid.

Sect. 3. "That for every such certified copy and every such indorsement a fee of two shillings and sixpence, and no more, shall and may be demanded and taken."

Fee for indorsing the copy.

Sect. 4. "That no justice of the peace shall act upon any application which shall be so made at petty sessions as aforesaid who now is or shall be disqualified by law from acting in or being present at any general annual licensing

Disqualified justices not to act at petty sessions.

3. *Magistrates' License for, &c.*

5 & 6 Vict. c. 44.

meeting, or any adjournment thereof, or at any special session for granting or transferring licenses to sell exciseable liquors; and that every justice who, being so disqualified, shall wilfully offend against this provision, shall be liable to the same penalty and proceedings for the recovery thereof, as are specified and directed by the said act of the ninth year of the reign of King George the Fourth." (As to what justices are disqualified under the 9 Geo. IV. see *ante*, 88.)

Special sessions for the transfer of licenses.

By the 9 Geo. IV. c. 61, s. 4, it is enacted, "That the justices assembled at the general or quarter session which shall be holden at Michaelmas next after the passing of this act, and at the general annual licensing meeting in every subsequent year, shall appoint not less than four nor more than eight special sessions, to be holden in the division or place for which each such meeting shall be holden, in the year next ensuing such general annual licensing meeting, at periods as near as may be equally distant; at which special session it shall be lawful for the justices then and there assembled, in the cases and in the manner and for the time hereinafter directed, to license such persons intending to keep inns theretofore kept by other persons being about to remove from such inns, as they the said justices shall, in the execution of the powers herein contained, and in the exercise of their discretion, deem fit and proper persons, under the provisions hereinafter enacted, to be licensed to sell exciseable liquors by retail, to be drunk or consumed on the premises."

Notice of application to transfer.

By sect. 11, "Every person holding a license under the authority of this act, or his heirs, executors, administrators, or assigns, being desirous to transfer such license to some other person, and intending to apply at the special session then next ensuing for permission so to do, shall, five days at the least prior to such special session, serve a notice of such his intention upon one of the overseers of the poor, and upon one of the constables or other peace officers of the parish or place in which the house kept by the person so holding such license is situate; and every such notice shall be written in a fair and legible hand, or printed, and shall be according to the form in the schedule hereunto annexed, marked B. [*post*, No. 31,] and shall be signed by the party intending to make such application, or by his agent thereunto authorised, and shall set forth the christian and surname of the person to whom it is intended that such license shall be transferred, together with the place of his residence, and his trade or calling, during the six months previous to the time of serving such notice."

Other proceedings.

As to what justices may act or not in the transfer of licenses, see *ante*, 88; as to the presence of the applicant and when dispensed with, see *ante*, 89; as to the grant or refusal of the transfer, see *ante*, 89.

Fresh licenses on compulsory change of tenancy by death, bankruptcy, &c.

In cases where there is a compulsory change of tenancy, as by death, bankruptcy, &c., or the tenant yields up the premises, or where the tenant about to quit has neglected to renew his license, the 14th section of the 9 Geo. IV. c. 61, provides for the granting of fresh licenses. It is thereby enacted, "That if any person duly licensed under this act shall (before the expiration of such license) die, or shall be, by sickness or other infirmity, rendered incapable of keeping an inn, or shall become bankrupt, or shall take the benefit of any act for the relief of insolvent debtors; or if any person so licensed, or the heirs, executors, administrators, or assigns of any person so licensed, shall remove from or yield up the possession of the house specified in such license; or if the occupier of any such house, being about to quit the same, shall have wilfully omitted, or shall have neglected to apply, at the general annual licensing meeting, or at any adjournment thereof, for a license to continue to sell exciseable liquors by retail, to be drunk or consumed in such house; or if any house, being kept as an inn by any person duly licensed as aforesaid, shall be or be about to be pulled down or occupied under the provisions of any act for the improvement of the highways, or for any other public purpose; or shall be, by fire, tempest, or other unforeseen and unavoidable calamity, rendered unfit for the reception of travellers, and for the other legal purposes of an inn; it shall be lawful for the justices assembled as aforesaid at a special session, holden under the authority of this act, for the division or place in which the house so kept or having been kept shall be situate, in any one of

On removal of tenant.

On neglect of outgoing tenant to renew.

On pulling down of house.

In case of fire, accident, &c.

the above-mentioned cases, and in such cases only, to grant to the heirs, executors, or administrators of the person so dying, or to the assigns of such person becoming incapable of keeping an inn, or to the assignee or assignees of such bankrupt or insolvent, or to any new tenant or occupier of any house having so become unoccupied, or to any person to whom such heirs, executors, administrators, or assigns shall by sale or otherwise have *bonâ fide* conveyed or otherwise made over his or their interest in the occupation and keeping of such house, a license to sell exciseable liquors by retail, to be drunk or consumed in such house, or the premises thereunto belonging; or to grant to the person whose house shall as aforesaid have been or shall be about to be pulled down or occupied for the improvement of the highways, or for any other public purpose, or have become unfit for the reception of travellers, or for the other legal purposes of an inn, and who shall open and keep as an inn some other fit and convenient house, a license to sell exciseable liquors by retail, to be drunk or consumed therein: provided always, that every such license shall continue in force only from the day on which it shall be granted until the fifth day of April or the tenth day of October then next ensuing, as the case may be: provided also, that every person intending to apply, in any of the above-mentioned cases, at any such special session for a license to sell exciseable liquors by retail, to be drunk or consumed in a house or premises thereunto belonging (in which exciseable liquors shall not have been sold by retail, to be drunk or consumed on the premises, by virtue of a license granted at the general annual licensing meeting next before such special session), shall, on some one Sunday within the six weeks next before such special session, at some time between the hours of ten in the forenoon and of four in the afternoon, affix or cause to be affixed on the door of such house, and on the door of the church or chapel of the parish or place in which such house shall be situate, and where there shall be no church or chapel, on some other public and conspicuous place within such parish or place, such and the like notice [see form, (No. 30,) *post*] as is hereinbefore directed to be affixed by every person intending to apply at the general annual licensing meeting for a license to sell exciseable liquors by retail, to be drunk or consumed in a house not heretofore kept as an inn, and shall in like manner serve copies of the said notice on one of the overseers of the poor, and on one of the constables or other peace officers of such parish or place."

3. *Magistrates' License for, &c.*

9 Geo. 4, c. 61. New license to be granted, to whom.

Duration of such license.

Notices required.

Where G., the licensed keeper of a public-house, sold the lease of it to N., who entered into the occupation of it, the license still remaining in the name of G.; and a quantity of spirits, which required a permit for its removal under 2 Will. IV. c. 16, was supplied by a distiller on the order of N., and delivered on the premises in question: it was held, that a permit made out in the name of G. was a valid permit under the statute. (*Nicholson* v. *Hood*, 9 *Mee. & W.* 365.)

(11.) Fees for granting the License.

By the 9 Geo. IV. c. 61, s. 15, "It shall be lawful for the clerk of the justices, as well at the general annual licensing meeting as also at any special session to be holden under this act, to demand and receive from every person to whom a license shall be granted under this act, for the trouble of such clerk, and for all expenses connected therewith, the sums following, and no more: *videlicet*, for the petty constable or other peace officer, for serving notices, and for all other services hereby required of such petty constable or other peace officer, the sum of one shilling; for the clerk of the justices, for the license, the sum of five shillings; and for preparing the precepts to be directed to the high constable, and notices to be delivered by the petty constable, as required by this act, the sum of one shilling and sixpence; and every such clerk, who shall demand or receive from any person for such respective fees in this behalf any greater sum or any thing of greater value than the sums hereinbefore specified, being in the whole the sum of seven shillings and sixpence, shall for every such offence, on conviction before one

Fees to be paid for licenses.

3. *Magistrates' License for, &c.*

justice, forfeit and pay the sum of five pounds." (See *post*, 99, as to the recovery, &c. of the penalty.)

9 Geo. 4, c. 61. Penalty for extortion. Action to recover back fee improperly paid.

Where the mayor of an ancient borough, in which he was also a justice of the peace, took a fee of 4*s.* from a publican resident within the borough, for renewing his annual license; and though it appeared that for fifty-seven years a similar fee had been uniformly received by the mayor, for the time being, from every publican residing within the borough, applying to have his license; it was held, that such fee was illegal, and might be recovered back in *assumpsit* for money had and received, without notice of action. (*Morgan* v. *Palmer*, 2 *Dowl. & R. Mag. Ca.* 232; 2 *B. & Cress.* 729; 4 *D. & R.* 283, *S. C.*)

Copies of lost licenses.

See the 5 & 6 Vict. c. 44, s. 53, as to fees for copies of lost licenses, *ante*, 91.

(12.) Penalty, &c. for selling Wine and Spirits, &c. without a Magistrates' License.

Penalty for selling ale, &c. without a justices' license.

The 9 Geo. IV. c. 61, s. 18, imposes a penalty on a party selling any exciseable liquor to be consumed on his premises, not being duly licensed. The following is the enactment, viz. "That every person who shall sell, barter, exchange, or for valuable consideration otherwise dispose of, any exciseable liquor by retail, to be drunk or consumed in his house or premises, or shall permit or suffer *any exciseable liquor* to be sold, bartered, exchanged, or otherwise disposed of for valuable consideration, by retail, to be drunk or consumed in his house or premises, *without being duly licensed so to do;* and that every person, being duly licensed, who shall sell, barter, exchange, or for valuable consideration otherwise dispose of, or shall permit or suffer to be sold, bartered, exchanged, or otherwise disposed of for valuable consideration, any exciseable liquor by retail, to be drunk or consumed in his house or premises, not being the house or premises specified in such license; shall respectively for every such offence, on conviction (*a*) before *one justice*, forfeit and pay any sum not exceeding twenty nor less than five pounds, together with the costs of the conviction: provided always, that no penalty for such sale, barter, exchange, or other disposal of any such liquor by retail without license, shall be incurred by the heirs, executors, administrators, or assigns of any person licensed under this act, who shall die, become bankrupt, or take the benefit of any act for the relief of insolvent debtors, before the expiration of his license, so as such sale, barter, exchange, or other disposal of such liquor, be made in the house or premises specified in such license, and take place prior to the special session then next ensuing, unless such special session shall be holden within fourteen days next after the death, bankruptcy, or insolvency of the said person, and in any such case to the special session which shall be holden next after such special session aforesaid."

Proviso in case of death, &c.

Penalty of 20*l.* under 35 Geo. 3, c. 113. (*a*)

The 35 Geo. III. c. 113, appears to be still in force, (*b*) and comprehends a greater punishment than the above provision, though now rarely if ever acted upon. It is not an excise law, and provides a penalty of £20 for selling exciseable liquors without a magistrates' license. (See *R.* v. *Hanson*, 4 *Barn. & Ald.* 519; *R.* v. *Drake*, 6 *M. & Sel.* 116.)

Party disabled from keeping alehouse.

The enactment is as follows:—Sect. 1. "If any person shall sell ale or beer, or any other exciseable liquors by retail, or shall permit or suffer any ale or beer or any other exciseable liquors to be sold by retail in his, her, or their house, out-house, or yard, garden, orchard, or other place in that part of Great Britain called England, the dominion of Wales and town of Berwick-upon-Tweed, without being duly licensed so to do, and shall thereof be duly convicted, every such person so offending shall for every such offence forfeit and pay the sum of

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(*a*) See the form (No. 36), *post*.

(*b*) To make penalties cumulative, express words to that effect must be introduced into the act, as in 3 & 4 Vict. c. 61, s. 17, *ante*, 71; see *Attorney General* v. *Lockwood*, 9 *M. & W.* 378; *Henderson* v. *Sherborn*, 2 *M. & W.* 236, *Rex* v. *The Trustees of the Northleach and Witney Roads*, 5 *B. & Ad.* 978; *Barrett* v. *The Stockton Railway Company*, 2 *Scott, N. R.* 337.

£20, and also the costs and expenses attending the conviction, to be levied and recovered as herein is directed (*a*), and on and after a second conviction for the like offence, shall also be rendered incapable of being thereafter licensed to keep an alehouse, or to sell ale or beer or other exciseable liquors by retail." 3. *Magistrates' License for, &c.*

The 17th section of this act contains a proviso similar to the one, *ante*, 84, as to selling beer, &c. in fairs. Fairs.

Sect. 14. Where it shall be proved to the satisfaction of such justice that such offender hath not been before convicted of any offence against this act, such justice may mitigate the penalty hereby imposed, (in case of such first offence, but not otherwise,) to not less than £10. Mitigation of penalty.

Sect. 15. Any inhabitant of any parish, township or place in which any such offence shall be committed, shall be deemed a competent witness. Inhabitant a witness.

Sect. 16. All penalties within this act shall be sued for and determined within six months after the offence is committed.(*b*) Limitation of prosecution.

As to the recovery and application of the penalties, see *post*, 99, and as to appeal, see *post*, 101. Recovery and application of penalties.

In *R.* v. *Drake*, 6 *M. & Sel.* 116, it was held that the jurisdiction of justices under the 35 Geo. III. c. 113, upon an information for selling ale by retail without a license, was not taken away by the 48 Geo. III. c. 143.

In *R.* v. *Downes*, 3 *Term Rep.* 560, it was held, that a person who sold spirituous liquors without a license from two justices, was liable to the penalties of the 5 Geo. III. c. 46, though he had a license from the excise to retail spirituous liquors.

By 7 & 8 Geo. IV. c. 38, constables are not to be required to make presentments respecting unlicensed alehouses. Presentment by constable.

It has been held, that a brewer who delivered beer to be used in a particular public-house on the credit of a person not the licensed keeper of the house, may maintain an action against the latter for goods sold and delivered. (*Brooker* v. *Wood*, 3 *Nev. & Man.* 596; 5 *B. & Adolph.* 1052; *Meux* v. *Humphries*, 3 *C. & P.* 79; 1 *M. & M.* 132.) Selling beer to unlicensed person.

(13.) Penalty for not selling by Standard Measures.

By 9 Geo. IV. c. 61, s. 19, "Every person hereby licensed to sell exciseable liquors by retail, to be drunk or consumed in his house or premises, shall, if required, sell or otherwise dispose of all such liquors by retail therein, (except in quantities less that a half pint,) by the gallon, quart, pint, or half pint measure, sized according to the standard, and shall also, if required by any guest or customer purchasing such liquor, retail the same in a vessel sized according to such standard; and in default thereof he shall for every such offence forfeit the illegal measure, and pay a sum not exceeding forty shillings, together with the costs of the conviction, to be recovered within thirty days next after that on which such offence was committed, before any one justice; and such penalty shall be over and above all penalties to which the offender may be liable under any other act." (See 1 Will. IV. c. 64, s. 12, *ante*, 73.) Standard measures to be used.

(14.) Penalty for not closing Public Houses in Riots.

By 9 Geo. IV. c. 61, s. 20, "It shall be lawful for any two justices acting for any county or place where any riot or tumult shall happen or be expected to take place, to order or direct that every person licensed under this act, and keeping any house situate within their respective jurisdictions in or near the place where such riot or tumult shall happen or be expected to take place, Justices may order licensed houses to be closed during riots.

(*a*) See *post*, 99.

(*b*) A question has been raised without being decided, whether the penalty of keeping an alehouse without license be incurred by a person acting under a license which is void from an irregularity in the jurisdiction of the magistrates who granted it. The prevailing opinion seems to be in the affirmative of such question; but owing to a difference of opinion existing in the Court, the point was not determined in the case in which it arose, (*Cald.* 305, 306, n. 10; *R.* v. *Bryan*. *Andr.* 81; *Paley on Con. by Dowling*, 52.)

3. *Magistrates' License for, &c.*

9 Geo. 4, c. 61.

shall close his house at any time which the said justices shall order or direct; and every such person who shall keep open his house at or after any hour at which such justices shall have so ordered or directed such house to be closed, shall be taken and deemed to have not maintained good order and rule therein." (See 1 Will. IV. c. 64, s. 11, *ante*, 71.)

(15.) Penalty and Punishment for Offences against the License.

Offences against license.

The license itself, the form of which will be found, *post*, No. 32, contains a prohibition against the commission of several offences therein specified, and the reader is referred to it to ascertain what those offences are.

First offence to be determined by two justices.

The 9 Geo. IV. c. 61, s. 21, enacts different degrees of punishment against publicans for offences against the tenor of their license. The enactment is as follows:—"That every person licensed under this act who shall be convicted before two justices acting in and for the division or place in which shall be situate the house kept or theretofore kept by such person, of any offence against the tenor of the license to him granted, shall, unless proof be adduced to the satisfaction of such justices, that such person had been theretofore convicted before two justices, within the space of the three years next preceding, of some offence against the tenor of the license subsisting at the time when such last-mentioned offence was committed, be adjudged (*a*) by such justices to be guilty of a first offence against the provisions of this act relative to the maintenance of good order and rule, (*b*) and to forfeit and pay any sum not exceeding five pounds, together with the costs of the conviction.

Penalty for second offence in three years to be determined by two justices.

"But if proof shall be adduced to the satisfaction of such justices that such person had been previously convicted before two justices, within the space of the three years next preceding, of one offence only against the tenor of the license subsisting at the time when such last-mentioned offence was committed, such person shall be adjudged (*c*) by such justices to be guilty of a second offence against the provisions of this act as aforesaid, and to forfeit and pay any sum not exceeding ten pounds, together with the costs of the conviction.

Penalty for third offence, consideration to be adjourned to next special sessions or to general meeting.

"But if proof shall be adduced to the satisfaction of such justices that such person had been previously convicted before two justices within the space of the three years next preceding, of two separate offences against the tenor of the licenses subsisting at the times when such last-mentioned offences were committed, it shall be lawful for the said justices, and they are hereby required, to adjourn the further consideration of the charge, so made against such person as aforesaid, to the special session to be then next holden under this act for the division or place in which shall be situate the house kept by such person, or to the general annual licensing meeting for the said division or place, if such meeting shall take place before any such special session shall be holden.

Summons to party charged.

"And such justices shall issue their summons to the person so charged, to appear at such special session or at such general annual licensing meeting, then and there to answer to the matter of such charge;

Recognizance by complainant and witness.

"And shall bind the person who shall make such charge, and any other person who shall have any knowledge of the circumstances thereof, in a sufficient recognizance to appear at such special session or at such general annual licensing meeting, then and there to prosecute and to give evidence upon such charge; and if proof shall be adduced to the satisfaction of the justices assembled at such special session or at such general annual licensing meeting, that such person so charged is guilty of the offence with which he is so charged,

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(*a*) See form of conviction, *post*, (No. 33.)

(*b*) See the 20th section, *supra*, as to a magistrates' order to close the house in case of riot or tumult, the section enacting, that a disobedience of such order shall be deemed as a breach of good order and rule in the house.

(*c*) See form of conviction, *post*, (No. 39.)

such person shall be adjudged to be guilty of a third offence against the provisions of this act as aforesaid, and to forfeit and pay any sum not exceeding fifty pounds, together with the costs of the conviction.

9 Geo. 4, c. 61. Adjudication in case of third offence. Hearing of case may be adjourned to sessions.

"Provided always, that if at any time before the hearing of any such last-mentioned charge, the justices assembled as aforesaid shall in their discretion think fit to direct that the hearing of such charge shall be adjourned to the general or quarter session of the peace then next ensuing, there to be inquired of by a jury, or if the person so charged shall in writing under his hand request the said justices to direct that the hearing of such charge shall be so adjourned as aforesaid, the said justices are hereby required to direct that the hearing of such charge shall be so adjourned, provided that the person who shall have made such request shall, before such justices so assembled, forthwith enter into a recognizance with two sufficient sureties personally to appear at the said general or quarter session, and to try such charge and to abide the judgment of the Court thereupon, and to pay such costs as shall be by the Court awarded.

Recognizance by party accused and sureties to appear at session.

"And the said justices are hereby required to bind in a recognizance to appear at such general or quarter session as aforesaid, then and there to give evidence against the person so charged, the person who shall make such charge, and any other person who shall have any knowledge of the circumstance thereof.

Trial of third offence by jury.

"And it shall be lawful for the said Court of general or quarter session to direct a jury then and there duly impanelled to be sworn to inquire of the offence so charged to have been committed, and upon their verdict of 'guilty,' to adjudge such person to be guilty of a third offence against the provisions of this act as aforesaid, and such verdict and adjudication shall be final to all intents and purposes; and to punish such offender by fine, not exceeding the sum of one hundred pounds, or to adjudge the license granted to and held by or on behalf of such offender to be forfeited and void, or to punish such offender by such fine as aforesaid, and to adjudge such license to be forfeited and void, and if such license shall be adjudged to be forfeited and void, it shall thenceforth be void accordingly; and every excise license for selling any exciseable liquors by retail, then held by or on behalf of such offender, shall also be void; and if the license of such offender shall be so adjudged to be void, such offender shall from and after such last-mentioned adjudication be deemed and taken to be incapable of selling exciseable liquors by retail in any inn kept by him for the space of three years, to be computed from the time of such adjudication; and any license granted to such person during such term shall be void to all intents and purposes; provided also, that the Court may, upon sufficient cause shown, adjourn the hearing of such charge to the then next general or quarter session of the peace, when the same shall be finally determined."

Penalty or punishment on verdict of 'guilty.'

Sessions may adjourn hearing.

Proceedings at sessions on adjournment for third offence to be carried on by petty constable.

On an adjournment to the session on a charge of a third offence, the justices may order the constable or peace officer of the district to prosecute and allow him the expenses of the prosecution. The 22d section of the 9 Geo. IV. c. 61, enacts, "that in every case in which the justices assembled at any special session or at any general annual licensing meeting shall direct that the charge against any person licensed under this act shall be adjourned to the general or quarter session, it shall be lawful for such justices, if no other fit and proper person shall appear to prosecute such charge, and to carry on such proceedings as may be necessary to obtain at such session an adjudication thereon, to order that the constable or other peace officer of the parish or place, in which shall be situate the house kept by the person so charged, shall carry on all proceedings necessary to obtain such adjudication as aforesaid, and to bind such constable or other peace officer in a sufficient recognizance so to do; and it shall be lawful for the justices, before whom such charge shall have been heard, to order the treasurer of the county or place in and for which such justices shall then act, to pay to such constable or other peace officer, and to the witness or witnesses on his behalf, such sum or sums

Expenses of such prosecution to be charged on county rates. (a)

(a) See "*County Rates*," Vol. II.

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9 Geo. 4, c. 61.

of money as to the Court shall appear to be sufficient to reimburse such constable or other peace officer, and such witness or witnesses respectively, the expenses that he or they shall have been severally put to in and about such prosecution; which order the clerk of the peace is hereby directed and required forthwith to make out and deliver to such constable or other peace officer, or to such witness or witnesses; and the said treasurer is hereby authorised and required, upon sight of such order, forthwith to pay to such constable or other peace officer, or other person authorised to receive the same, such money as aforesaid; and the said treasurer shall be allowed the same in his accounts."

(16.) Compelling Attendance of Witnesses—Conviction—Defects in Commitment, &c.—Certiorari.

Penalty on witnesses not attending. (*a*)

By 9 Geo. IV. c. 61, s. 23, "If any person shall be summoned as a witness to give evidence before any justice touching any of the matters aforesaid, either on the part of the complainant or of the person accused, and shall neglect or refuse to appear at the time and place for that purpose appointed, and who shall not make such reasonable excuse for such neglect or refusal as shall be admitted and allowed by such justice, or who appearing shall refuse to be examined on oath or affirmation and give evidence, every such person shall, on conviction before such justice, forfeit and pay for every such offence any sum not exceeding ten pounds." (See the 35 Geo. III. c. 113, s. 10, *post*, 100.)

Conviction must be on oath.

Sect. 31. "Every conviction under this act shall be on the oath or oaths of one or more credible witness or witnesses; and any justice, not as hereinbefore disqualified, and acting in and for the county or place in which the offence complained of shall have been committed, is hereby authorised to administer the same."

Form of conviction. (*b*)

Sect. 32, "In order to prevent frivolous and vexatious appeals," enacts, "that a conviction in the form or to the effect following, *mutatis mutandis*, as the case may be, shall be good and effectual to all intents and purposes whatsoever, without stating the case, or the facts or evidence, in any more particular manner; that is to say,

'—— } *Be it remembered, that on this day of , in the year ,*
to wit. } *A. B. of , was duly convicted before of his Majesty's justices of the peace for the , of , for that* [here state the offence, and the time and place when committed], *whereby the said A. B. has forfeited the sum of , this being adjudged to be the first* [or '*second*,' or '*third*'] *offence* [as the case shall happen to be], *against the provisions of an act to regulate the granting of licenses to keepers of inns, alehouses, and victualling houses in England, besides the costs of this conviction, which the said justices do hereby assess at the sum of , pursuant to the statute in such case made and provided. Given under hand and seal the day and year above written.*'"

Conviction to be returned to sessions and filed.

Sect. 33. "Every justice before whom any such conviction shall have been made shall return the same, or cause it to be returned, to the next general or quarter session of the peace holden for the county or place wherein the offence shall have been committed; and it shall be then and there delivered to the clerk of the peace, or other person acting as such, to be by him filed or enrolled amongst the records of the said court; and the certificate of the clerk of the peace of such conviction, which he is thereby required to grant on demand upon payment of a fee of one shilling, shall be legal evidence of every such conviction."

Conviction or commitment not bad for want of form. (*c*)

No certiorari.

Sect. 34. "No conviction under this act, nor any adjudication made on appeal therefrom, shall be quashed for want of form, or be removed, by writ of certiorari or otherwise, into any of his Majesty's superior courts of record; and no warrant of commitment shall be held void by reason of any defect

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(*a*) See further, *post*, "*Evidence*," Vol. II.

(*b*) See in general, *post*, "*Conviction*."

(*c*) As to enactments of this nature, see *post*, "*Conviction*."

therein, provided it be therein alleged that the party has been convicted, and that there be a good and valid conviction to sustain the same." 3. *Magistrates' License for, &c.*

(17.) PENALTIES HOW TO BE RECOVERED AND APPLIED.

Sect. 24. "Every penalty and forfeiture imposed by this act upon any *justice* may be sued for and recovered by action of debt in any of his Majesty's courts of record at Westminster; and one moiety of every such penalty or forfeiture shall be paid to the use of his Majesty, his heirs and successors, and the other moiety to him who shall sue for the same." (See s. 6, *ante.*) Penalties on justices, how recovered, &c.

Sect. 25. "In every case in which, under the authority of this act, any justice shall adjudge that any offender shall pay or cause to be paid any penalty, and such offender shall refuse or neglect forthwith, or within such period as such justice shall appoint, to pay such penalty and any costs which shall have been duly assessed and ascertained by such justice, it shall be lawful for such justice, if he shall think fit, to issue his warrant, and to levy the amount of such penalty and costs by distress and sale of the goods and chattels of such offender, together with the costs of such distress and sale; and in every such case such offender, if in custody at the time that such warrant shall be so issued, shall be forthwith discharged; but if it shall appear to such justice that the goods and chattels of such offender are not sufficient whereon to levy such distress, together with the costs of such distress and sale, it shall be lawful for such justice to commit (*b*) the offender to the common gaol or to the house of correction of the county or place for which such justice shall be then acting, for any term not exceeding one calendar month, if the penalty shall not be above five pounds; for any term not exceeding three calendar months, if the penalty shall be above five pounds, and shall not be more than ten pounds; and for any term not exceeding six calendar months, if the penalty shall be above ten pounds: provided nevertheless, that whenever such offender shall have been committed to the common gaol or house of correction, in consequence of his not having duly paid such penalty and costs, such offender shall, if he pay or cause to be paid to the gaoler or keeper of the house of correction, or to whomsoever such justice shall have appointed, the penalty imposed, and costs, together with all the costs of the apprehension of him, and of the conveyance of him to the said gaol or house of correction, at any time previous to the expiration of the time for which such offender shall so have been committed, be forthwith discharged." Other penalties, how recovered. Distress. (*a*) Imprisonment. Discharge on payment of penalty.

Sect. 26. "It shall be lawful for any justice, before whom any penalty shall be recovered under the provisions of this act, to award, if he shall think fit, any portion of the same, not in any case exceeding one moiety thereof, to the use of the prosecutor, and the remainder to the treasurer of the county or place for which such justice shall then act; and the said treasurer shall place the same to the credit of such county or place, and shall duly account for the same." How penalties applied.

By stat. 35 Geo. III. c. 113, s. 2, 5, which, it would seem, is still in force, though rarely if ever acted on, one justice may hear and determine the offence in a summary way, and upon information exhibited, or complaint made to him, shall summon the party accused, and also the witnesses on either side; and upon appearance, or contempt by not appearing, shall proceed to hear the matter, and examine the witnesses on oath, and give judgment therein; and upon proof of the offence either by confession, or oath of one witness, may convict the party accused; and if he, being then present, shall not at the time, or if absent, within three days after notice, either personally served upon him, or left for him at the place where the offence was committed, pay the said penalty, together with the costs and expenses, to be ascertained by such justice, the same shall be levied by distress of the goods and chattels of such offender wheresoever found within the jurisdiction Penalties under 35 Geo. 3, c. 113, how recovered. (*c*)

(*a*) See 5 Geo. IV. c. 18, and in general, "*Distress by Warrant of Justices,*" Vol. II.

(*b*) See in general, *post*, "*Commitment in Execution.*"

(*c*) See as to this act, *ante*, (n.)

3. *Magistrates' License for, &c.*

35 Geo. 3, c. 113. How applied.

of such justice, or in any entered place of such offender, in the like manner as directed by 27 Geo. II. c. 20, and 33 Geo. III. c. 55, as far as the same relates to the execution of warrants of distress, as fully as if the powers of the said acts had been repeated herein; and shall be applied half to the informer and half to the poor of the parish, township, or place in which, &c. in such manner as such justice shall direct; and if a return shall be made that sufficient distress cannot be found whereon to levy the penalty and costs as aforesaid, it shall and may be lawful for any justice of any county or place within whose jurisdiction the party offending shall be found, upon producing to him such warrant and return, (and if such justice shall be of any other county or place, then upon oath made of the handwriting of the justice granting such warrant, and of the truth of such return,) to commit such offender to the common gaol, or other prison within his jurisdiction, for any term not exceeding six nor less than three calendar months, unless such penalty and the costs of all proceedings upon the conviction and warrant be sooner paid.

Sale of distress.

Sect. 3. Provided, that on the request of the owner, such distress may be sold within the four days allowed by the said act of 27 Geo. II. c. 20, s. 3.

Allowance to persons executing warrants, &c.

Sect. 4. And there shall be allowed to the officer executing such warrant of distress, for the safe keeping of the goods distrained, such sum not exceeding 5*s.* per day, and for any assistant any sum not exceeding 2*s.* per day for each, as the convicting justice shall direct, on proof on oath that sufficient cause existed for calling in the aid and assistance of such person or persons.

What a legal notice to persons summoned.

Sect. 6. And after reciting that many persons carry on the trade of alehouse-keeper and victualler, and retailer of beer and ale, without license, and make entry of places for keeping the same by assumed or feigned names, and such beer and ale is frequently retailed in houses and places detached from their places of residence, whereby the law hath been evaded, it is enacted, "that in case any summons shall be issued by any justice for any person to appear and answer to any information or complaint for selling by retail any beer, ale, or other exciseable liquors, without license, the directing such summons to such person by the name in which he made such entry, or is usually known, whether the same be his real or assumed or feigned name, and leaving such summons at such house or place where such offence is stated in the information to have been committed, and affixing a copy thereof on the door or other conspicuous part on the outside thereof, (such service being proved on oath of the person who shall have so served and affixed up such summons and copy,) shall be deemed a sufficient notice or summons to all intents and purposes."

Witnesses not appearing forfeit 10*l.*

Sect. 10. "And if any person shall be summoned as a witness, and shall neglect or refuse to appear at the time and place appointed, without a reasonable excuse, (to be allowed by such justice,) or appearing shall refuse to be examined on oath and give evidence, he shall forfeit 10*l.*, to be levied by warrant of distress, [to be applied to the poor where such offence was committed, in such manner as such justice shall direct]; and for want of sufficient distress, such offender shall be committed by the said justice to the common gaol or other prison, for (not exceeding) six calendar months, unless such penalty shall be sooner paid."

Goods conveyed away may be distrained in thirty days wherever found.

Sect. 11. "And if any person, after service of any summons to appear to any charge of selling ale or beer or other exciseable liquors, without license, shall convey away any goods or chattels hereinbefore made liable to distress from the house or place wherein such offence shall have been committed, or belonging thereto, or occupied therewith, or which hath been entered as aforesaid, it shall be lawful for the officer to whom such warrant is directed, or other person acting in his aid or assistance, within thirty days after such conveying away, to seize the same wherever they may be found, and dispose of them in such manner as if they had been distrained on the premises.

Warrants may be indorsed.

And if carried out of the jurisdiction of the justice, who originally issued the warrant, any justice of the county, city, liberty or place into which the same shall be conveyed, is required, on proof on oath of the handwriting of such justice originally signing such warrant, to indorse his name on the

back thereof, which shall be sufficient authority to any person bringing such warrant, and to all other persons to whom the same was originally directed, to execute the same, and to proceed as if such goods had been seized within the jurisdiction of the justice who signed the original warrant."

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Sect. 12 gives the right of appeal, *post*, 102.

(18.) Appeal.

By 9 Geo. IV. c. 61, s. 27, "Any person who shall think himself aggrieved by any act of any justice, done in or concerning the execution of this act, may appeal against such act to the next general or quarter sessions of the peace holden for the county or place wherein the cause of such complaint shall have arisen, unless such session shall be holden within twelve days next after such act shall have been done, and in that case to the next subsequent session holden as aforesaid, and not afterwards, provided that such person shall give to such justice *notice in writing* of his intention to appeal, and of the cause and matter thereof, within five days next after such act shall have been done, and seven days at the least before such session, and shall within such five days enter into a *recognizance*, with two sufficient sureties, before a justice acting in and for such county or place as aforesaid, conditioned to appear at the said session, and to try such appeal, and to abide the judgment of the Court thereupon, and to pay such costs as shall be by the Court awarded; and upon such notice being given, and such recognizance being entered into, the justice before whom the same shall be entered into shall liberate such person if in custody for any offence in reference to which the act intended to be appealed against shall have been done; and the Court at such session shall hear and determine the matter of such appeal, and shall make such order therein, with or without costs, as to the said Court shall seem meet; and in case the act appealed against shall be the *refusal to grant or to transfer any license*, and the judgment under which such act was done be reversed, it shall be lawful for the said Court to grant or to transfer such license, in the same manner as if such license had been granted at the general annual licensing meeting, or had been transferred at a special session; and the judgment of the said Court shall be final and conclusive to all intents and purposes; and in case of the dismissal of such appeal, or of the affirmance of the judgment on which such act was done, and which was appealed against, the said Court shall adjudge and order the said judgment to be carried into execution, and costs awarded to be paid, and shall if necessary issue process for enforcing such order; provided that no justice shall act in the hearing or determination of any appeal to the general or quarter sessions as aforesaid from any act done by him in or concerning the execution of this act; provided also, that when any cause of complaint shall have arisen within any liberty, county of a city, county of a town, city, or town corporate, it shall be lawful for the person who shall think himself so as aforesaid aggrieved to appeal against any such act as aforesaid, if he shall think fit, to the quarter sessions of the county within or adjoining to which such liberty or place shall be situate, subject to all the provisions hereinbefore contained." See as to appeals in general, *post*, "*Appeal.*"

Appeal may be to sessions.

Notice of.

Recognizance.

Costs.

Appeal against refusal to grant or transfer license.

Judgment of sessions final.

No justice to act on appeal who was a party to act complained of.

Appeal in limited jurisdiction may be to county sessions.

In *Rex* v. *Justices of Middlesex*, (3 *B. & Ad.* 938,) it was held that the words in the above clause "think himself aggrieved," mean a person *immediately* aggrieved, as by refusal of a license to himself, by fine, &c. and not one who is only consequently aggrieved: and therefore that where magistrates had granted a license to a party to open a public-house not before licensed, within a very short distance of a licensed public-house, the occupier of the latter house could not appeal against such grant.

If justices refuse a license to keep an inn an appeal lies to the quarter sessions against their determination under the above section, although they duly heard the application, and refused the license according to the discretion entrusted to them by the statute. (*R.* v. *Reading Justices*, 10 *Law Jour. Rep. M. C.* 126.)

A licensed victualler convicted by two justices under section 21 (*ante*, 96),

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of an offence against the tenor of his license, cannot be heard on appeal to the quarter sessions under the above section, unless he has served notice of such appeal on both the convicting justices And this, although at the time of giving notice the conviction had in fact been signed only by one justice at least, if there be no proof that the conviction so signed was communicated to the appellant before he gave notice, so that he might have been misled thereby. *Reg.* v. *Cheshire, Justices*, 11 *Ad. & Ell.* 139.)

No appeal lies to the sessions from a conviction for selling liquors without an excise license. (*Rex* v. *Hanson*, 4 *B. & Ald.* 519; *ante*, 94; *post*, "*Excise*," Vol. II.)

Witnesses may be bound over.

By sect. 28, "When any person shall have given notice of his intention to appeal as aforesaid, and shall have entered into recognizance as hereinbefore directed, it shall be lawful for the justice, before whom such recognizance shall have been entered into, to summon any person whose evidence shall appear to him to be material, and to require such person to be bound in recognizance to appear at the said general or quarter sessions, and to give evidence in such appeal; and in case any such person as aforesaid shall neglect or refuse to obey such summons, or shall refuse to enter into such recognizance, it shall be lawful for such justice as aforesaid to issue his warrant to apprehend such person so neglecting or refusing to obey such summons, and to bring him before such justice, and if such person shall continue to refuse to enter into such recognizance, to commit him to the common gaol or house of correction of the county or place for which such justice shall be then acting, there to remain until he shall enter into such recognizance, or shall be otherwise discharged by due course of law."

Consequences of refusal to obey summons or enter into recognizance.

Costs.

Sect. 29. "In every case where notice of appeal against the judgment of any justice in or concerning the execution of this act shall have been given, and such appeal shall have been dismissed, or the judgment so appealed against shall have been affirmed, or such appeal shall have been abandoned, it shall be lawful for the Court to whom such appeal shall have been made or intended to be made, and such Court is hereby required, to adjudge and order that the party so having appealed, or given notice of his intention to appeal, shall pay to the justice to whom such notice shall have been given, or to whomsoever he shall appoint, such sum, by way of costs, as shall in the opinion of such Court be sufficient to idemnify such justice from all cost and charge whatsoever, to which such justice may have been put in consequence of his having had served upon him notice of the intention of such party to appeal; and if such party shall refuse or neglect forthwith to pay such sum, it shall be lawful for the said Court to adjudge and order that the party so refusing or neglecting shall be committed to the common gaol or house of correction, there to remain until such sum be paid; and that in every case in which the judgment so appealed against shall be reversed, it shall be lawful for such Court, if it shall think fit, to adjudge and order that the treasurer of the county or place in and for which such justice, whose judgment shall have been so reversed, shall have acted on the occasion when he shall have given such judgment, shall pay to such justice, or to whomsoever he shall appoint, such sum as shall, in the opinion of such Court, be sufficient to idemnify such justice from all costs and charges whatsoever to which such justice may have been so put; and the said treasurer is hereby authorised to pay the same, which shall be allowed to him in his accounts."

On default of payment appellant may be committed. (a)

If judgment reversed, justices indemnified against costs.

Appeal under 35 Geo. 3, c 113, to sessions.

By the 35 Geo. III. c. 113, s. 12, it is enacted, that if any person shall think himself aggrieved by the judgment of such justice, he may appeal against any such conviction to the next general or quarter sessions of the peace, (and such justice shall make known to such person at the time of such conviction the right to appeal,) unless such session be holden within six days next after such conviction, and in such case to the next subsequent sessions, and not afterwards; such person at the time of such conviction giving to such justice notice in writing of his intention to appeal, and also giving

Notice and recognizance.

(a) See *post*, "*Commitment in Execution.*"

security, to the satisfaction of such justice, for the payment of the penalty and costs in case such judgment be confirmed on appeal; and also further entering into a recognizance at the time of such notice, with sufficient sureties, to try the appeal, abide the judgment, and pay such costs as shall be awarded at such sessions. And the judgment of such sessions shall be final and conclusive; and if the justices at such sessions shall adjudge such appeal to be frivolous or vexatious, they may give costs to the party aggrieved by such appeal, not exceeding 5*l.* in the whole.

3. *Magistrates' License for, &c.*

Judgment of sessions final.

Costs.

(19.) Limitation of Actions against Justices, &c. and Plea.

By 9 Geo. IV. c. 61, s. 30, "Every action against any justice, constable, or other person, for or on account of any matter or thing whatsoever done or commanded by him in the execution of his duty or office under this act, shall be commenced within three calendar months after the cause of action of complaint shall have arisen, and not afterwards; and if any person shall be sued for any matter or thing which he shall have done in the execution of this act, he may plead the general issue, and give the special matter in evidence." (See *post*, "*Justices*," Vol. III.)

Limitation of actions against justices.

General issue.

As to enactments of this kind, and as to the law of actions against magistrates in general, see *post*, "*Justices*," Vol. III.

(20.) Remedies on Refusal to grant License.

We have already noticed, (*ante*, 101,) the remedy which a party has by *appeal* in case of a refusal to grant or transfer license.

By appeal.

By Mandamus.]—It is discretionary in the justices whom they will license, and a *mandamus* will not lie to compel the justices to license any person; and on a conviction for selling exciseable liquors without license, the want of such license could only come in question, and not the reason why it was denied. (*Giles's case*, 2 *Str.* 881.) Therefore, even where affidavits were offered to be produced, of the justices declaring that they would grant no licenses to any of the inhabitants who signed a petition to the parliament for erecting a workhouse there; and that the person, on whose behalf the motion was made, had been a victualler in the town for above thirty-five years, the motion was refused. (1 *Barnard.* 402; *Rex* v. *Young*, 1 *Burr.* 556.)

By *mandamus*.

And in a late case a *mandamus* was refused to command justices to hear an application for an ale license, which they had refused, though it was suggested that their refusal proceeded from a mistaken view of their jurisdiction; *et per curiam*, "It being conceded that the magistrates have heard and determined upon this application for a license, which is a matter peculiarly for their consideration, we cannot grant a *mandamus* to them to re-hear what they have already determined." (*Rex* v. *Licensing Justices of Ward of Farringdon Without*, 2 *D. & R. Mag. Ca.* 365; and see a still later case, *Rex* v. *Justices of Surrey*, *id.* 435. See further, *post*, "*Mandamus*," Vol. V.)

By Action.]—An action is not maintainable against justices for refusing to grant a license for the same reason that a *mandamus* will not be awarded; that is, because the legislature had left the granting or refusing such license to the discretion of the justices, who are not responsible for errors in judgment; (*Bassett* v. *Godscall*, 3 *Wilson*, 121, 124;) and even if they acted maliciously or corruptly, no action would lie. (See 1 *Salk.* 306; *Bushell's case*, *Vaughan*, 138; *Rex* v. *Whitwell*, 5 *T. R.* 86.)

By action.

A party may indeed sue a magistrate in an action for money had and received, to recover back a fee improperly taken by the magistrate for granting a license, though such fee had uniformly been taken for fifty-seven years before, and no notice of action is necessary. (*Morgan* v. *Palmer*, 2 *B. & Cress.* 782; 4 *D. & R.* 483, S. C.; *post*, "*Justices*," Vol. III.)

By Indictment or Information.]—Where a magistrate acts in his office

By indictment or information.

3. *Magistrates' License for, &c.*

with a partial, malicious, or corrupt motive, he is guilty of a misdemeanor, and may be proceeded against by indictment or criminal information in the Queen's Bench, which exercises a general supervision over all justices of the peace. And either of these modes of proceeding may be adopted where a magistrate partially, maliciously, or corruptly refuse to grant or transfer a publican's license, provided such improper refusal can be distinctly proved or plainly inferred from the circumstances under which the magistrate acted.

It is most usual to proceed in such a case by criminal information in preference to an indictment; but sometimes where there has been delay in the application, or a jury may be more fit to apply to than the Court, then an indictment should be the form of remedy. The general rules as to when an indictment or criminal information will lie against a justice of the peace, as also the mode of proceeding therein against him, and the consequences, will be found, *post*, "*Justices*," Vol. III.

Remedies for not granting.

In *Rex* v. *Young and Pitts*, (1 *Burr.* 556,) a motion was made for an information against the defendants, for arbitrarily, obstinately, and unreasonably refusing to grant a license to one *Henry Day* to keep an inn at Eversley, Wilts: Lord *Mansfield*, C. J., said, "It is certain that this court has no power or claim to review the reasons of justices of the peace, upon which they form their judgments in granting licenses, by way of appeal from their judgments, or over-ruling the discretion intrusted to them. But if it clearly appears that the justices have been partially, maliciously, or corruptly influenced in the exercise of this discretion, and have (consequently) abused the trust reposed in them, they are liable to prosecution by indictment or information; or even possibly by action, if the malice be very gross and injurious. If their *judgment* be wrong, yet their *heart* and *intention* pure, God forbid that they should be punished." And he declared that he should always lean towards favouring them; unless partiality, corruption, or malice clearly appeared. And having gone through all the particulars, both of the charge and of the defence, he concluded with declaring it as his opinion that there was not sufficient ground for a criminal charge against these justices. *Dennison*, J., said, "It must be *clear* and *apparent* partiality, or wilful misbehaviour, to induce the court to grant an information; not a mere error in *judgment*." And, by the court unanimously, the rule was discharged with costs.

Not so for mere error in judgment.

In *Rex* v. *Athay*, (2 *Burr.* 653,) on showing cause why a rule should not be made absolute, for an information against a justice for a misdemeanor in refusing to grant a license to one *Francis Symes* (who had been licensed for several preceding years) to sell ale, as usual, it appeared that one of the grounds upon which this rule had been obtained was, that the only reason why the license was refused him was his declining to pay a sum of money (viz. 5*l.*) which was claimed of him upon a distinct and collateral account, and which he denied to be due from him; the payment of which sum of money was (as he alleged) insisted upon by the justice, as a condition precedent to his granting the man a license. The court were unanimous, that the allegation appeared to be false in fact; but, at the same time, they declared explicitly that the justices have no sort of authority to annex any such conditions to the grant of these licenses.

Justices not to annex condition to license.

In *Rex* v. *Williams and Davis*, (3 *Burr.* 1317,) an information was granted against the defendants, justices of the peace for the borough of Penryn, for refusing to grant licenses to those alehouse-keepers who *voted against their recommendation of* candidates for *members of parliament* for that borough. It appeared that they had acted very grossly in this matter, having previously threatened to ruin these people, by not granting them licenses, in case they should vote against those candidates whose interest these justices themselves espoused, and having afterwards actually refused them licenses upon this account only. And Lord *Mansfield* declared that the court granted this information against the justices, *not* for the mere refusal to grant the licenses, (which they had a discretion to grant or refuse, as they should see to be right and proper,) but for the *corrupt motive* of such refusal, for their *oppressive* and *unjust* refusing to grant them, because the persons applying for them

would not give their votes for members of parliament as the justices would have had them.

3. *Magistrates' License for, &c.*

An information against the justices of the town of Nottingham, by Lord *Hardwicke*, for refusing to grant licenses for twenty public houses, to the occupiers of which licenses had been granted for several preceding years. It appearing that the persons who kept these houses had voted, at the last election for the town, for the candidates opposed to those whose interests the justices had espoused, his lordship said, "The abuse of such a discretionary power ought to be more severely punished than the abuse of a power which is not discretionary. It appears in this case to have been very grossly abused, for it is not probable that the occupiers of twenty houses should have all so misconducted themselves at the same time, as to render it improper to grant them licenses." (*Rex* v. *Justices of Nottingham, Sayer's Rep.* 216, 217.)

In *Rex* v. *Temple*, (1 *Keb.* 727,) an information was granted against a justice of the peace for extortion and compounding to give new licenses to unlawful alehouses, and taking away good ones, and for discharging recognizances for appearance at sessions.

In *Rex* v. *Cornelius*, (2 *Stra.* 1210,) an information was granted against *Cornelius* and another justice of the peace of a borough, for a misdemeanor in taking money for granting licenses to alehouse-keepers.

In *Rex* v. *Hann and Price, Justices of the Peace for the Borough of Corfe Castle*, (3 *Burr.* 1716,) on showing cause against an information which had been prayed for against the defendants, for a misdemeanor in the execution of their office, in refusing to grant a license to sell ale to one *Ingram*, an innkeeper in that borough, *merely from a motive of resentment* against him, for having espoused an opposite interest in the election for members of that borough; the defence was, that they did not act from any resentment or corrupt motive, but solely because *Ingram* was an improper person, and had kept a disorderly house, and continued to keep it after full notice to the contrary, and in particular that he encouraged gaming and cockfighting at his house. Lord *Mansfield*, C. J., said, "The court should never interpose against magistrates, unless they have acted from bad motives and *malâ fide*, especially in such a case as this, where they are intrusted with an absolute discretion: but for that very reason, this is the strongest case for the interposition of the court, *if* it appear that they *have* acted upon corrupt motives. If it did appear clearly that this man kept a disorderly house, it would be a reason against the court's interposing against the justices. But this does not clearly appear." And he declared it to be of very dangerous consequence to permit the due discretion of the justices to be influenced by considerations of this kind. The court made the rule absolute.

Defendants must appear personally to receive judgment.

Afterwards, these justices confessing themselves guilty of the information, it was moved for a rule to dispense with their personal appearance, on the undertaking of their clerk in court to answer for their fines. But the court upon full debate were unanimous in refusing the motion. The general doctrine laid down by the court was, that although such a motion was subject to the discretion of the court, either to grant or refuse it, where it was clear and certain that the punishment would not be corporal; yet it ought to be denied in every case where it was either probable or possible that the punishment would be corporal; and this for the example sake; as the notoriety of their being called up might deter others from the like offences. And finally, upon their appearance in court, the sentence was, that they should be committed for a month, fined 50*l.* each, and further imprisoned till the fine be paid. (*Rex* v. *Hann and Price*, 3 *Burr.* 1716, 1786.)

Time of applying for information, &c.

We shall hereafter, (*post*, "*Justices*," Vol. III.) consider as to the time when the application for a criminal information should be made, and the other proceedings relative thereto.

(21.) Remedy for improperly granting a License.

Improperly granting license.

A criminal information will be awarded against justices for granting an alehouse license under the influence of corrupt motives, as well as for re-

3. *Magistrates' License for, &c.*

fusing it; for in the former case it may be productive of mischief to the whole community; in the latter, the grievance is only felt by the individual. (See *R.* v. *Temple*, 1 *Keb.* 727; *R.* v. *Cornelius*, 2 *Stra.* 1210.)

Information for.

In *R.* v. *Holland and Forster*, (1 *T. R* 692,) an information had been moved for against the defendants, who were justices for the county of Middlesex, for improperly granting an ale license to one *Harrison*, who had been refused one by the justices at their last general meeting, on account of misbehaviour. It appeared that the defendant *Forster* had been present at that general meeting at the time when the license was refused; but he had afterwards told the other defendant *Holland*, who was not present at the general meeting, that the only reason why a license had not been granted then was, that they might have an opportunity of inquiring into the character of *Harrison*, and had accordingly prevailed upon *Holland*, at a private meeting held by those two only, to join in granting a license. The court were clearly of opinion that an information should be granted against a justice as well for *granting* a license improperly, as for *refusing* one in the same manner: that it had already been done in the case of *R.* v. *Filewood and another*, E. T. 26 Geo. III. *B. R.*; and indeed the mischief of granting a license improperly was infinitely greater than that of refusing one; for in the former case it might be productive of injury to the whole community, while in the latter the grievance was felt only by the individual. That the only ground of these applications was the improper conduct of the magistrates. But as it appeared in this case that *Holland*, though not altogether blameless, had been deceived by *Forster*, they discharged the rule as to the former, upon his paying the costs of the application as against himself; and as to *Forster*, they granted the information.

In *R.* v. *Bingham, Clerk*, (1 *Burn's J.* 24th ed. 48, reported also by Mr. Gurney,) the defendant was convicted at Winchester Sum. Ass. 1813, of a conspiracy to defraud the revenue of certain stamp duties. It appeared in evidence at the trial that he was a justice of the peace, and one of those who attended on the general licensing day, when he obtained, through an improper influence, a license in order to enhance the value of some premises which were his own property. In pronouncing judgment, King's Bench, Nov. 26, 1813, *Le Blanc*, J., said, "The court does not go out of its way to cast reflections upon the conduct of those who are not before the court; but it would not discharge its duty if it did not declare, that it is not a proper exercise of the functions of any magistrates so to grant a license, when they know that no house exists to which that license is to be applied. The legislature has taken particular care that no person concerned in public houses or victualling houses, under the description of brewers or dealers in spirits, shall themselves take part in the granting of licenses, in order to guard against any improper influence in the granting of them, and it is subject to the same mischief and the same inconvenience that any person in the situation of a magistrate, being the owner of a house, which afterwards may be converted into a public house, should know and should consent to a license being kept on foot, which may ultimately tend to increase the value of his property, whenever that house may be conveyed to a person to whom the license may attach." The defendant was sentenced to be imprisoned in Winchester gaol for six calendar months, and Lord *Ellenborough*, C. J., directed the proceedings to be laid before the lord chancellor.

Indictment for.

If there be two sets of magistrates, as for a county and a borough, and having a co-ordinate jurisdiction in that borough, and one of the two sets appoint a meeting for granting alehouse licenses, and when the day arrives, refuse a license to an applicant for one; and then the other set of magistrates, having subsequently to the prior appointment, but before the first licensing day, appointed a future day for the same purpose, license on that day the person to whom on a former day a license had been refused, it is an indictable offence. (*R.* v. *Sainsbury*, 4 *T. R.* 451.) Et per *Ashhurst*, J., S. C., "There being no words of exclusion in the city charters, it follows as a consequence that the justices of the county have a concurrent jurisdiction in the borough of Southwark; if so, it also follows that the jurisdiction of holding

the meeting directed by the 26 Geo. II. attached in those magistrates, who first gave notice of the meeting; and it was a breach of the law in the other magistrates to attempt to wrest this jurisdiction out of their hands; for what the law says shall not be done, it becomes illegal to do, and is therefore the subject-matter of an indictment, without the addition of any corrupt motives. And though the want of corruption may be an answer to an application for an information, which is made to the extraordinary jurisdiction of the court, yet it is no answer to an indictment, where the judges are bound by the strict rule of law."

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IV. Making and Selling Unwholesome Victuals.

A publican selling unwholesome wine or victuals may, it is said, be indicted for a misdemeanor at common law; and any person to whom the same has been sold may maintain an action against him for the injury done. (*Rol. Ab.* 95; and see 2 *East's P. C.* 822; 4 *Bla. Com.* 162; *R.* v. *Southerton*, 6 *East*, 133.)

Indictment for selling unwholesome victuals.

By stat. 21 Jac. I. c. 21, s. 2, (which repeals former statutes in this matter,) hostlers and innholders are prohibited from making any horse-bread, but bakers shall make it, and the assize shall be kept, and the weight be reasonable, after the price of the corn or grain in the markets adjoining.

Innkeepers' charges. Horse bread.

And they shall sell their horse-bread, and also their hay, oats, beans, pease, provender, and also all kinds of victual, both for man and beast, for reasonable gain, having respect to the prices for which they shall be sold in the markets adjoining, without taking any thing for litter.

Hay, oats, &c. to be sold for reasonable gain.

Sect. 3 enables them to make horse-bread when no baker dwells in the same town.

By sect. 4, if the horse-bread which any of the said hostlers or innholders make be not of due assize, or if any of them shall offend in any thing contrary to this act, the justices, sheriffs, and stewards in their leets may hear and determine, &c.; and for the first offence the hostler or innholder shall be fined; for the second offence be imprisoned for one month; and for the third offence shall stand upon the pillory; and for the fourth shall be forejudged for keeping any inn again.

Power of justices herein.

But the punishment of the pillory is abolished by 56 Geo. III. c. 138, except in cases of perjury and subornation of perjury; and in those cases also by the subsequent act of 7 Will. IV. & 1 Vict. c. 23.

By the commission of the peace, two justices, one being of the quorum, may inquire of innholders, and of all and singular other persons, who shall offend in the abuse of weights and measures, or in the sale of victuals, against the form of the ordinances in that behalf made. (See *post*, "*Sessions*," Vol. V.)

Power of justices by the commission.

V. Brewing, Selling, &c. Unwholesome Beer.

By stat. 1 Will. III. s. 1, c. 24, s. 17, no common brewer or retailer of beer or ale shall use any molasses, coarse sugar, honey, or composition or extract of sugar, in the brewing or working of any beer or ale, upon the penalty of forfeiting the liquor, and also a penalty of 100*l*, half to the King, and half to him that shall sue in six months.

Using sugar, honey, &c in brewing, prohibited.

And by stat. 10 & 11 Will. III. c. 21, s. 34, if any common brewer or retailer of beer or ale shall use any molasses, coarse sugar, honey, or composition or extract of sugar, in the brewing, making, or working of any ale or beer; or if any common brewer shall receive into his custody any quantity of any of the said materials exceeding 10lb., he shall forfeit 100*l.*, to be recovered and mitigated as by the laws of excise.

And by sect. 20, the servant or other assisting therein shall forfeit 20*l.* in like manner, and in default of payment shall be imprisoned three months.

And by stat. 9 Anne, c. 12, s. 24, 26, no common brewer, innkeeper, or victualler, shall use any broom, wormwood, or any bitter ingredient, (to serve instead of hops,) in brewing or making any beer or ale for sale, (except

Using wormwood, &c. in brewing.

5. *Bad beer, &c.*

infusing broom or wormwood, after it is brewed and tunned, to make broom or wormwood ale or beer,) on pain of 20*l.*, half to the king, and half to the prosecutor, to be levied as by the laws of excise.

Using unwholesome ingredients.

And by 12 Anne, stat. 1, c. 2, s. 32, no common brewer or retailer of beer or ale shall use any sugar, honey, foreign grains, Guinea pepper, essentia bina, coculus Indiæ, or any unwholesome ingredients in the brewing of beer or ale, or mix any of them therewith, on pain of 20*l.*, to be recovered and mitigated as by the laws of excise, half to the king, and half to him that shall sue.

And by 56 Geo. III. c. 58, s. 2, any dealer in or brewer or retailer of beer receiving or having in his custody or possession, or making, using or mixing with, or putting into any worts or beer, any liquor, extract, calx, or other material or preparation to darken the colour, or which has been or shall be used for that purpose, other than brown malt, ground or unground, as commonly used in brewing, or receiving or having in his custody or possession, or using or mixing with, or putting into any worts or beer any molasses, honey, liquorice, vitriol, quassia, coculus Indiæ, grains of paradise, Guinea pepper, or opium, or extract or preparation thereof or any article or preparation whatever, for or as a substitute for malt or hops, shall forfeit all such liquors, extract, calx, molasses, honey, vitriol, quassia, coculus Indiæ, grains of paradise, Guinea pepper, opium, extract, article and preparation; and also the worts and beer, together with the casks and other packages containing the same, (which shall be seized by the officer of excise,) and also for each and every such offence 260*l.* (See *Attorney General* v. *Lockwood*, 9 *M. & W.* 378.)

Mixing beer and adulterating.

Any common or other brewer, innkeeper, victualler, or retailer of beer or ale, mixing, or causing or suffering to be mixed in any vessel, tub, measure, or otherwise, any strong beer, ale or strong worts with any small beer or small worts or with water, after the gauge of such strong beer, ale, or strong worts by the officer of excise, shall for every offence forfeit 50*l.* (2 Geo. III. c. 14, s. 2; and vide 42 Geo. III. c. 38, s. 12.)

The wine, spirit, beer, and cider license, under the 9 Geo. IV. c. 61, also contains a clause of forfeiture for fraudulently diluting or adulterating any exciseable liquor, or selling the same knowing them to have been fraudulently diluted or adulterated. (See the form of licence, *post*, No. 32.) And such an offence would be punishable under sect. 21, *ante*, 96, as an offence against the tenor of the license.

Contracts with brewers.

A contract to take beer from a particular house is not, it seems, illegal; (see *Calvert* v. *Reid*, 10 *B. & Cress.* 855;) but under a contract by the innkeeper that he should take all his beer from his landlord, a brewer, or pay an advanced rate, it seems, that if the landlord supplies the innkeeper with beer not of a fair merchantable quality, such as ought to be to the satisfaction of the customers, the innkeeper may deal with other brewers until better beer be tendered. (*Holcomb* v. *Hewson*, 2 *Camp. N. P.* 391, 392; *Thornton* v. *Sherratt*, 8 *Taunt. Rep.* 529.) In the latter case it was considered that contracts, by which brewers bind publicans to deal with them, are not to be favoured, as tending to prejudice the health of the subject. But if there be a contract to buy beer, the supply of bad beer only *suspends* the obligation, and on an offer of good beer it must be taken. (*Id.*)

A brewer who delivered beer to be used in a particular public-house on the credit of a person not the licensed keeper of the house, may sue the latter for goods sold and delivered. (*Brooker* v. *Wood*, 5 *B. & Adol.* 1052; overruling *Meux* v. *Humphreys*, 1 *M. & M.* 132.)

VI. Ale Measures.

What to be used.

By the 9 Geo. IV. c. 61, s. 19, *ante*, 95, we have already seen that persons licensed under that act are to use standard measures in the sale of exciseable liquors; and the wine, spirit, beer, cider and perry license, under that statute, has a clause implying a forfeiture of it in case of selling by any mea-

sures not of the legal standard. (See form of license, *post*, No. 32.) And such an offence would be punishable under sect. 21, *ante*, 96, as an offence against the tenor of the license.

6. *Ale measures.*

Offence against the tenor of license.

By stat. 8 Eliz c. 9, the justices in Easter sessions yearly (and mayors in corporations) shall rate the price of all barrels, kilderkins, firkins, and other vessels to be sold for ale or beer to be uttered therein; and if any cooper shall not sell the same according to such rate, he shall forfeit 3*s.* 4*d.*, half to the king, and half to him that shall sue.

Justices to rate the price of vessels.

As to what is the standard measure and the law relating to ale measures in general, see *post*, "*Weights and Measures*," Vol. VI.

The measure itself.

An indictment will lie for selling ale in pots unsealed, although the statute appoints another method of proceeding; because measures are by the common law, and the statutes only direct the manner of ascertaining them. (2 *Blackerby*, 14.) But in such case the indictment must not be upon the statute, but at common law; and the offence ought to be laid, not for selling in pots unsealed, that being no offence at common law, but in pots wanting measure.

Indictment.

VII. Enhancing the Price of Victuals, Ale, &c.

By statute 2 & 3 Edw. VI. c. 15, if brewers conspired to sell their victuals but at certain prices, they were subject to severe penalties; but that provision is repealed by the 5 Geo. IV. c. 95.

Enhancing by conspiracy.

But by statute 2 Geo. III. c. 14, no brewer, innkeeper, victualler, or other retailer of strong beer or ale, shall be sued or molested by indictment, information, popular action, or otherwise, for advancing the price of strong beer or ale in a reasonable degree.

Conspiring to enhance the price of victuals might be an offence at common law. (See *post*, "*Conspiracy*.")

VIII. Keeping Disorderly House, or permitting Drunkenness, &c.; Harbouring Thieves, &c.; Offenders against Revenue Laws, &c.

All *disorderly* inns or alehouses, or other houses, are public nuisances, and may at common law, upon indictment, be suppressed, and the keepers of them fined. (4 *Bla. Com.* 167.)

Disorderly inns indictable.

The 9 Geo. IV. c. 61, s. 21, *ante*, 96, &c. imposes penalties for offences against the tenor of the license under that act; and which license contains clauses of forfeiture in case of knowingly permitting or suffering persons of notoriously bad character to assemble or meet together in the house, or permitting drunkenness or other disorderly conduct in the house or premises. (See form of license, No. 32, *post*.)

Offence against the tenor of the license. Forfeiture of license.

These provisions are extended to other houses of public resort within the metropolitan police district, by the 2 & 3 Vict c. 47, s. 44, which, after reciting that it is expedient that the provisions made by law for preventing disorderly conduct in the houses of licensed victuallers be extended to other houses of public resort, enacts, that every person who shall have or keep any house, shop, room, or place of public resort within the metropolitan police district, wherein provisions, liquors, or refreshments of any kind shall be sold or consumed, (whether the same shall be kept or retailed therein or procured elsewhere,) and who shall wilfully or knowingly permit drunkenness or other disorderly conduct in such house, shop, room, or place, or knowingly suffer any unlawful games, or any gaming whatsoever therein, or knowingly permit or suffer prostitutes or persons of notoriously bad character to meet together and remain therein, shall for every such offence be liable to a penalty of not more than five pounds: provided always, that if the offender be a licensed victualler, or licensed to sell beer by retail to be drunk on the premises, this enactment shall not be construed to exempt him from the penalties or penal consequences to which he may be liable for committing an offence against

Regulations of 9 Geo. 4, c. 61, for the prevention of disorderly conduct, &c. in public houses to extend to other houses of public resort within the metropolitan police district.

8. *Disorderly houses, &c.*

the tenor of the license to him granted. (The 2 & 3 Vict. c. 94, s. 28, contains a similar enactment for the city of London.)

Harbouring thieves, &c. indictable.

The innkeeper who harbours or permits the resort of thieves or persons of scandalous reputation, or suffers frequent disorders in his house, is guilty of a misdemeanor at common law, for which he may be fined or imprisoned. (1 *Hawk.* c. 78; *Hale's P. C.* 146.)

Apprehending vagrants, &c.

By the 5 Geo. IV. c. 83, s. 13, any justice, on information on oath that any idle or disorderly person, or rogue or vagabond, or incorrigible rogue, is reasonably suspected to be harboured or concealed in any house kept or purporting to be kept for the reception, lodging, or entertainment of travellers, may, by warrant under his hand and seal, authorise any constable or other person or persons to enter at any time into such house and apprehend and bring before him or any other justice every such idle and disorderly person, rogue and vagabond, and incorrigible rogue, as shall be found therein. (See *post*, "*Vagrant*," Vol. VI.; and see also a clause in the Police Act, 3 Will. IV. c. 19, s. 31, *post*, "*Police*," Vol, V.)

Breaking open doors to suppress disorder.

It seems also at common law, if there be disorderly drinking or noise at an unseasonable time of night, especially in inns, taverns, or alehouses, the constable or his watch, demanding entrance and being refused, may break open the doors to see and suppress the disorder. (2 *Hale's P. C.* 95.)

Presentment by constable.

By 7 & 8 Geo. IV. c. 38, constables are not to be required to make presentments respecting unlicensed or disorderly alehouses.

For more concerning disorderly houses, see "*Disorderly House*," Vol. II. "*Gaming*," Vol. III.; "*Police*," "*Riot*," Vol. V.

Harbouring police officer.

By the 10 Geo. IV. c. 44, s. 6, (the Metropolitan Police Act,) publicans harbouring police officers during their hours of duty are subject to a penalty of not more than 5*l.*, to be recovered before two justices (See *post*, "*Police*," Vol. V.)

Offenders against revenue laws.

As to the harbouring of offenders against the revenue laws, see 7 & 8 Geo. IV. c. 53, s. 29, *post*, "*Excise*," Vol. II.

IX. Holding Seditious Meetings.

Licenses of public houses, where unlawful clubs held, forfeited.

By stat. 57 Geo. III. c. 19, for the more effectually preventing seditious meetings, any two justices, upon evidence on oath that any meeting of any society or club hereby declared to be unlawful (*i. e.* societies or clubs calling themselves Spenceans or Spencean Philanthropists, and all other societies or clubs by whatever name called or known, who hold and profess the same objects and doctrines, 57 Geo. III. c. 19,) or any meeting for any seditious purpose, hath been held at any house, room, or place, licensed for the sale of ale, beer, wine, or spirituous liquors, with the knowledge and consent of the person keeping such house, &c. to adjudge the license for selling ale, &c. granted to the person keeping such house, &c. to be forfeited; and the person so keeping such house, &c. shall, from and after the day of the date of such adjudication and notice thereof given to him, be liable to all the penalties and forfeitures for any act done after that day which such person would be liable to if such license had expired or otherwise determined on that day. (See the enactment in full, *post*, "*Riot*," Vol. V.)

Seditious pamphlets.

By the 39th Geo. III. c. 79, s. 31, "Every place licensed for the sale of ale, &c. shall be deemed a place licensed for the reading of books, pamphlets, and other publications under this act, but any two justices of the jurisdiction, upon evidence on oath that books, pamphlets, and other publications of a seditious or immoral nature are usually distributed to be read at such place, may adjudge and declare the ale and spirit license forfeited, and the persons keeping such place shall afterwards be subject to all the penalties as though such licenses had expired or been otherwise determined. (See the act, *post*, "*Riot*," Vol. V.)

Forfeiture of license.

See further as to seditious meetings, *post*, "*Riot*," Vol. V.; "*Treason*," Vol. VI.

X. Closing Doors in Riots.

10. *Closing doors in riots.*

Closing doors of inns during riots.

We have already seen the 9 Geo. IV. c. 61, s. 20, empowers two justices to order the closing of doors of houses licensed under that act to be closed during riots, &c. *ante*, 95.

And if a publican, notwithstanding such order, keep his house open, he would be guilty of an offence against good order and rule, which is punishable under s. 21, *ante*, 96, as an offence against the tenor of his license.

We have also seen the 1 Will. IV. c. 64, s. 11, empowers one or more justices to order the closing of houses licensed under that act to be closed during riots, &c. *ante*, 71.

XI. Permitting Gaming, Music, Dancing, &c. in Inn.

Gaming.

The law relative to gaming-houses in general will here apply. (See *post*, "*Gaming*," Vol. II.) It may be as well to notice, however, that if the guests at an inn or tavern call for dice or tables, and for their recreation play with them, or if any neighbours play at bowls for their recreation or the like, these are not within the statute 33 Hen. VIII. c 9, s. 11, if the house is not kept for gaming, nor the gaming be for lucre or gain. (*Dalt.* c. 46.)

Permitting gaming in any licensed house is an offence against the terms of the license, and as such is punishable under sect. 21, *ante*, 96, (see form of license, No. 32, *post*.) It also involves a forfeiture of the license.

Permitting gaming in other houses of public resort within the metropolitan district is also punishable by the 3 & 4 Vict. c. 47, s. 44, *ante*, 109.

Music, dancing, &c.

For the law relative to keeping houses for performance of music, dancing, and other entertainments in general, (see "*Disorderly House*," Vol. II.) It may be as well, however, here to notice, that by stat. 25 Geo. II. c. 36, s. 2, any house, room, or garden, or other place kept for public dancing, music, or other public entertainment of the like kind in *London* and *Westminster*, or *within twenty miles thereof*, without license from the last preceding Michaelmas quarter sessions, under the hands and seals of four or more justices there assembled, (except the theatres of Drury Lane, Covent Garden, and Haymarket, and other entertainments exercised by letters-patent or license of the Crown or of the Lord Chamberlain, s. 4,) shall be deemed a disorderly house or place, and the keeper thereof shall forfeit 100*l.* with full costs to him who shall sue (in six months) in any of the courts of Westminster, and be otherwise punishable as in case of disorderly houses; and the person who shall appear to act as master, or as having the management of such gaming-house or other disorderly house, shall be deemed a keeper thereof and liable as such; and it shall be lawful for any constable or other person, being authorised by warrant under the hand and seal of one justice, to enter such house or place, and to seize every person found therein, that they may be dealt with according to law. See this provision in full, *post*, "*Disorderly House*," Vol. II.

XII. Tippling in. Supplying Spirits to Children.

Former penalty on persons guilty of tippling.

Tippling is a species of drunkenness, and was provided against by the 21 Jac. I. c. 7, s. 2, which in effect enacted, that if any person or persons wheresoever his or their habitation or abiding, remained or continued drinking or tippling in any inn, victualling-house, or alehouse, and the same being viewed and seen by any mayor or other head officer, or justice or justices of the peace within their several limits, or duly proved in such manner as was directed by stat. 1 Jac. I. c. 9, (*a*) [*i. e.* since 21 Jac. I. c. 7, s. 1, 2, by the oath of one witness, or voluntary confession of the party; and after such confession his oath may be taken, and be sufficient proof against any other offending,] unless it was in such case or cases as was tolerated or excepted in

(*a*) Repealed by the 9 Geo. IV. c. 61.

12. *Tippling, &c.*

1 Jac. I. c. 9, s. 1 (*a*); (*viz.* labouring and handicraftsmen in cities and towns corporate and market towns; upon the usual working days, for one hour at dinner-time to take their diet in an alehouse; and labourers and workmen, which for the following of their work by the day or by the great, in any city, town corporate, market town, or village, shall for the time of their said continuing in work there, sojourn, lodge, or victual in any inn, alehouse, or other victualling-house, other than for urgent and necessary occasions, to be allowed by two justices of peace;) every person or persons so offending forfeited for every such offence the sum of 3*s.* 4*d.* to the use of the poor of the parish where the said offence was committed, to be levied by distress. And if any offender or offenders be not able to pay the said forfeiture, it shall and may be lawful for any mayor, bailiff, or other head officer, justice or justices of the peace, where any such conviction shall be, to punish the said offender or offenders by setting him, her, or them in the stocks for every such offence by the space of four hours."(*b*) But these provisions, it would seem, are now in effect repealed by the 9 Geo. IV. c. 61; and at all events the provisions in 1 Jac. I. c. 9, and 1 Car. I. c. 4, against publicans for suffering tippling in their houses, are repealed, see *ante*, 83.

Forfeiture of license.

The wine, spirit, beer, and cider license, under the 9 Geo IV. c. 61, contains a clause of forfeiture for wilfully or knowingly permitting drunkenness or other disorderly conduct in the inn or house. (See forms, (No. 32, 35,) *post.*)

The 24 Geo. II. c. 40, s. 12, *post*, 119, prohibits the recovery of small sums under 20*s.* for spirits.

Publicans within the metropolitan police district prohibited from supplying liquors to persons under sixteen years of age.

By the 2 & 3 Vict. c. 47, s. 43, it is enacted, "That every person licensed to deal in exciseable liquors within the metropolitan police district, who shall knowingly supply any sort of distilled exciseable liquor to any boy or girl apparently under the age of sixteen years to be drunk upon the premises, shall be liable to a penalty not more than twenty shillings, and upon conviction of a second offence shall be liable to a penalty not more than forty shillings, and upon conviction of a third offence shall be liable to a penalty not more than five pounds." (The London Police Act, 2 & 3 Vict. c. 94, s. 27, contains a similar enactment.)

XIII. Drunkenness.

Punishable in Ecclesiastical Court.

Drunkenness is an offence for which a man may be punished in the Ecclesiastical Court, (*c*) as well as by justices of peace by statute.

Drunkenness no excuse for a crime.

He who is guilty of any crime whatever, through his voluntary drunkenness, shall be punished for it as much as if he had been sober (*d*) (1 *Hawk. c.* 1, s. 6.) It was indeed considered in *R.* v. *Grindley*, 1 *Russ. C. & M* 8, that though voluntary drunkenness cannot excuse from the commission of a crime, yet where, as upon a charge of murder, the material question is, whether an act was premeditated or done only with sudden heat and impulse, the fact of the party being intoxicated was a proper circumstance to be taken into consideration; but this decision, according to the recent case of *R.* v. *Carroll*, 7 *Car. & P.* 145, is not law.

(*a*) Repealed by the 9 Geo. IV. c. 61.

(*b*) This penalty and punishment is enacted by the 4 Jac. I. c 5, the 21 Jac. I. enacting that it shall be also imposed on persons offending against that act The 1 Jac. I c. 5, and 1 Car. I c. 4, are repealed by the 9 Geo. IV. c. 61. Before these two acts were repealed, it was held in *Rex* v. *Dove*, 3 *B. & Ald* 596, that a conviction against an alehouse keeper for suffering persons to tipple in his house, stating it to be on the oath of one witness, was bad, for not stating those persons were inhabitants or strangers, the 1 Car. I. c. 4, having required a conviction for suffering strangers to tipple to be on the oath of two witnesses.

(*c*) See *Burn's Ecclesiastical Law*, title "*Drunkenness.*"

(*d*) There was a law in Greece, "that he who committed a crime when drunk should receive a double punishment," one for the crime itself, and the other for the ebriety which prompted him to commit it. (4 *Bla. Com.* 26.)

By stat. 21 Jac. I c. 7, s. 1, 3, incorporating the second section of 4 Jac. I. c. 5, every person who shall be drunk, and thereof shall be convicted before one justice, or mayor, on view, confession, or oath of one witness, shall forfeit for the first offence 5s., to be paid within one week after conviction to the churchwardens, who shall be accountable for the same to the use of the poor; and if he shall refuse or neglect to pay the same as aforesaid, it shall be levied by distress; and if the offender be not able to pay the said sum of 5s. he shall be committed to the stocks, there to remain by the space of six hours. (a).

13. *Drunkenness.*

Penalty for in general.

And by sect. 3, any person upon a second conviction of drunkenness shall be bounden with two sureties in one recognizance or obligation of 10*l.*, with condition to be thenceforth of good behaviour.

Second offence.

Lord *Hale*, speaking of stat. 34 Edw. III. c. 1, which gave justices power to bind malefactors to their good behaviour, generally, without any time limited, says, that it is not meant that the same shall be perpetual, but in the nature of bail, viz. to appear at such a day at their sessions, and in the meantime to be of good behaviour (2 *Hale*, 136. See further, *post*, "*Surety*," Vol. V.)

Binding to good behaviour.

By the 2 & 3 Vict. c. 47, s. 58, drunkards found in any street or public thoroughfare within the Metropolitan Police District, and who when drunk shall be guilty of any riotous or indecent behaviour, shall be subject to a penalty of not more than 40s., or be committed, at the magistrate's discretion, to the house of correction for not more than seven days.

In the Metropolitan Police District.

Every person in his Majesty's pay in the navy, being guilty of drunkenness, shall incur such punishment as a court-martial shall think fit to impose. 22 Geo. II. c. 33, Art. 2, Navy. (See *post*, "*Military Law*," Vol. III.)

Navy.

As to the forfeiture of a publican's license for, see *ante*, 97.

Forfeiture of license.

A publican cannot recover for beer furnished to third persons by the order of an individual who has previously become intoxicated by drinking in his house. (*Brandon* v. *Old*, 3 *C. & P.* 440.)

Action for bill.

It would seem that drunkenness, if of that description as totally to deprive the drunkard of reason, is a ground for his avoiding a contract made by him while so drunk, although no fraud was practised upon him. (See *Pitt* v. *Smith*, 3 *Camp.* 33; *Fenton* v. *Holloway*, 1 *Stark.* 126; *Sentance* v. *Poole*, 3 *C. & P* 1, *Chit. jun. Contracts*, 140.)

When a defence.

XIV. Opening Houses, &c. on Sundays, Fast-days, &c.

The 21st section of the 9 Geo IV. c. 31, *ante*, 96, imposes penalties for offences against the tenor of the wine and spirit &c. license under that act; and in such license there is a clause of forfeiture for keeping open the house except for the reception of travellers, or permitting or suffering any beer or other exciseable liquor to be conveyed from or out of the premises during the usual hours of the morning and afternoon service in the church or chapel of the parish or place in which the house is situate, on Sundays, Christmas-day, or Good Friday; or not maintaining good order or rule therein. (See form of the license, *post*, No. 32.)

Offence against tenor of license.

The 2 & 3 Vict. c. 47, s. 42, enacts, "That no licensed victualler or other person shall open his house, within the metropolitan police district for the sale of wine, spirits, beer, or other fermented or distilled liquors on Sundays, Christmas-day, and Good Friday, before the hour of one in the afternoon, except* refreshment for travellers." (The 2 & 3 Vict. c. 94, s. 26, contains a similar enactment for the city of London.)

Public houses in the metropolitan police district not to open before one o'clock on Sundays, &c.

* *Sic.*

The 5 & 6 Vict. c. 44, s. 5, enacts, "That no wines, spirits, or other exciseable liquors shall be sold by retail on board of any boat, steam boat, or other vessel which shall be moored or lying at anchor within the metropolitan police district, during the hours and times on Sundays, Good Friday, and Christmas-day on which licensed victuallers are by law obliged to keep their

No wines, &c. to be sold on board any boats or ves sels moored or lying at anchor within the metropolitan police dis-

(a) See forms of proceedings with respect to drunkenness, *post*, (No. 41,) *et seq.*

14. *Opening on Sundays, &c.*

trict during the time when prohibited to be sold in public houses.

houses closed; and any master, steward, mistress or stewardess, or any other person on board any such boat, steam boat, or other vessel, who shall during those hours on Sundays, Good Friday, and Christmas-day in which the houses of licensed victuallers shall be closed, sell any wines, spirits, or other excise able liquors, in and on board such boat, steam boat, or other vessel, within the said district, shall be liable to a penalty not exceeding five pounds, which may be recovered before any magistrate of the metropolitan police courts, or if the offence shall be committed beyond the limits of any metropolitan police court established or to be established, before any two justices of the peace having jurisdiction therein, or shall, in the discretion of the magistrate or justices of the peace before whom the conviction shall take place, be imprisoned for any time not longer than one calendar month in any gaol or house of correction within his jurisdiction; and in every case of the adjudication of such pecuniary penalty, and nonpayment thereof, it shall be lawful for such magistrate or justices of the peace to commit the offender to such gaol or house of correction for a term not exceeding one calendar month, the imprisonment to cease on payment of the sum due; and such penalty shall be paid to the receiver of the metropolitan police, and be applied by him towards the expenses of the police courts established within the said district."

Indictment for.

It would be an offence at common law and indictable to keep open an inn on a Sunday, and suffer tippling and noise therein, if it amounted to a common nuisance (See "*Nuisance*," Vol V. and form of indictment, *post*, No. 46.)

The 21 Geo. III. c. 49, s. 1, prohibits, under penalties, the keeping open of inns, &c. for debating on Sundays. (See *post*, "*Lord's-Day*," Vol. III.)

XV. Quartering of Soldiers.

By the annual acts against mutiny and desertion, the constable, and in his default a justice of the peace, may quarter soldiers in inns, livery stables, alehouses, and victualling-houses; as is set forth more at large in title "*Military Law*" (*Soldiers*), Vol V.

By 4 & 5 Will. IV. c. 85, s. 5, the terms of the license under that act for selling beer or cider by retail, to be drunk and consumed on the premises, all provisions for billeting officers and soldiers in victualling-houses, contained in any act for punishing mutiny and desertion, and for the better payment of the army and their quarters, are to extend and apply to the house and premises mentioned in the license. (See forms of the license, *post*, Nos. 3, 5.) But by sect. 5 the provisions are not to extend to persons not licensed to sell beer and cider to be consumed on the premises.

XVI. Liability of Innkeepers towards their Guests, &c.

(1.) Liability to receive guests.

Herein, *first*, of their liability to receive and entertain the guests; and, *secondly*, of their liability for the loss of goods.

(1.) *Liability to receive and entertain Guests, &c.*]—Innkeepers are bound by law to receive travellers, passengers, wayfaring men, and such like persons who come to their inns, and are also bound to protect the property of those guests. They have no option either to receive or reject guests; and as they cannot refuse to receive guests, so neither can they impose unreasonable terms on them. (Per Lord *Kenyon*, C J., *Kirkman* v. *Shawcross*, 6 *T. R.* 17.) And an innkeeper continues so liable, notwithstanding he has taken down the sign, provided he continue to carry on the inn as such (*Palmer*, 373.)

But although a traveller is entitled to reasonable accommodation in an inn, he is not entitled to select a particular apartment, or to insist on occupying a bedroom for the purpose of sitting up all night, so long as the innkeeper is willing and offers to furnish him with a proper room for that purpose. (*Fell* v. *Knight*, 8 *Mee. & W.* 269.)

Nor is an innkeeper bound to receive a guest when the inn is so full that

it cannot conveniently hold him; nor is he liable for not receiving a guest, unless he be tendered a fair remuneration for his accommodation, for he is not bound to give him credit, or unless the tender has been dispensed with. (*Fell* v. *Knight*, 8 *Mee. & W.* 269.)

16. *Innkeepers' liability.*

Tender of remuneration.

This same liability attaches as to the reception of the travellers' horses, and he is bound to receive the horses of those travellers who choose only to put their horses in his stables and themselves resort elsewhere, unless his stable be already full. (*Watbroke* v. *Griffith*, *Mo.* 876, 877; *Saunders* v. *Plummer*, *Or. Bridg.* 227.)

Horses.

An innkeeper is also bound to receive whatever goods his guests bring with them; but he is not bound to receive the goods of one who purposes to deposit them with him and to go elsewhere; for as he reaps no profit from the deposit of goods, he is not bound to take them under his charge. (*Id. Ibid. York* v. *Grindstone*, 1 *Salk.* 388.) It is no excuse for not receiving goods with the guest, that there are suspicious persons in the house. (*Jones on B.* 95, 96.)

Goods.

An innkeeper is not bound to furnish any guest who requires them with post horses, although he has taken out a license and has painted over his door "licensed to let post horses," and he may let or refuse them to whom he pleases. (*Semble*, *Dicas* v. *Hides*, 1 *Stark. C. N. P.* 247; *Holt*, *C. N. P.* 207, *S. C.*) But if the party does hire and the innkeeper agrees to let, he must so let them, if the fair price of the letting is tendered. (*Massiter* v. *Cooper*, 4 *Esp. Rep.* 260.)

To furnish post horses.

If one who keeps a common inn improperly refuse either to receive a traveller as a guest into his house, or to find him victuals or lodging upon his tendering him a reasonable price for the same, he is not only liable to render damages for the injury, in an action on the case, at the suit of the party grieved, but may also be indicted and fined at the suit of the king. (1 *Hawk.* c. 78, s. 2.) And it is said in 4 *Bla. Com.* 167, that inns being intended for the lodging and receipt of travellers, may be indicted, suppressed, and the innkeepers fined, if they refuse to entertain a traveller without a very sufficient cause. And in a recent case it was considered that an indictment lies against an innkeeper who refuses to receive a guest, he having room in his house at the time. And it is no defence for the innkeeper that the guest was travelling on a Sunday, and at an hour of the night after the innkeeper's family had gone to bed; nor is it any defence that the guest refused to tell his name and abode, as the innkeeper had no right to insist upon knowing those particulars; but if the guest come to the inn drunk, or behaves in an indecent or improper manner, the innkeeper is not bound to receive him. (*R.* v. *Ivers*, 7 *Carr. & P.* 213.)

Remedies for refusal to receive, &c.

The indictment should state the person refused was a *traveller*, otherwise it would be quashed; (*R.* v. *Luellin*, 12 *Mod.* 445;) stating his being a sick person would not do.

No action lies for a mere refusal to receive the traveller, unless some special damage attend such refusal, such as the traveller being compelled to go a distance elsewhere, &c. (See *Bro. Ab. Action on the Case*, 76; *Godb.* 346; *Palm.* 374.)

It is said that the innkeeper may be compelled by the constable of the town to receive and entertain a traveller as his guest; and that it is no way material whether he hath a sign before his door or not, if he make it his common business to entertain travellers. But how the officer may compel him may be a question: it seemeth that all the officer can do, is either to cause such alehouse to be suppressed, or else to present such offence at the assizes or sessions, so that such offender may be thereupon indicted. (*Dalt.* c. 7; see *Bull. N. P.* 73; *Bennett* v. *Mellor*, 5 *T. R.* 273; *R.* v. *Luellin*, 12 *Mod.* 445; *Newton* v. *Trigg*, 1 *Show.* 270.)

(2.) *Liability for Loss of Goods, &c.*]—The innkeeper is not only bound to receive and entertain all travellers, and their horses and goods, as above mentioned, but is also liable for any loss or damage arising to such horses or goods while the traveller remains as a guest in the inn with the same. (1

(2.) Liability for loss of goods, &c.

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Rol. 2, l. 35, 37; 8 *Co.* 32; *Burgess* v. *Clements*, 4 *M. & Sel.* 310; *Richmond* v. *Smith*, 8 *B. & Cress.* 9; 3 *M. & Ry.* 235, *S. C.*)

The innkeeper is in fact in the nature of an insurer for the safety of the goods of his guest, and his liability in this respect is analogous to that of a common carrier, and is liable for any loss not occasioned by the act of God or the king's enemies. (*Richmond* v. *Smith*, *supra*, 9.)

He is thus liable for every kind of goods which the guest may have with him in that character as long as he continues his guest, as well for charters, obligations, bonds, &c. as for other property, although the stealing of such was not formerly a larceny; (*Calye's case*, 8 *Rep.* 33 a;) and he is thus liable for the loss of money, though kept in a purse or reticule by the owner; (*Kent* v. *Shuckard*, 2 *B. & Adol.* 803;) but this liability extends only to the horse and goods of the guest, and not to the person; therefore he is not liable for the battery of the guest, though committed by the innkeeper's servants. (*Calye's case*, 8 *Rep.* 33 a.)

Not liable for injury to person of guest.

Who a guest.

It is necessary to render the innkeeper thus liable that the party leaving the goods in the innkeeper's custody should at the time of the injury be a *guest* at the inn. One who goes casually to an inn and eats and drinks, or sleeps there, is a guest, although not a traveller; (*York* v. *Grindstone*, 1 *Salk.* 388; *Bennett* v. *Mellor*, 5 *T. R.* 273; *Cro. Jac.* 224;) so is one who remains at the end of his journey at an inn without a special contract, even for half a year. (*Latch.* 126, 127; *Parker* v. *Flint*, *Holt*, 366; 12 *Mod.* 255, *S. C.*)

Where the plaintiff's servant came to the inn, and desired to have the liberty of leaving the goods, which he could not dispose of in the market, until the next week, which proposal was rejected, whereupon he sat down in the inn as a guest, with the goods behind him, and, during the time, the goods were taken away; it was held, that although his request was not complied with, he was entitled to protection for his goods during the time he continued in the inn as a guest. (*Bennett* v. *Mellor*, 5 *T. R.* 273.)

The party continues a guest though he goes to view the town for any time; (2 *Cro.* 189;) or goes out and says he will return at night; (*White's case*, *Dyer*, 158 b;) or is absent for two or three days, if the keeping the goods is beneficial to the innkeeper in the meantime, as a horse, &c. (1 *Rol.* 3, l. 20; 2 *Cro.* 189.)

The owner may sue for the loss of goods deposited in the inn by his servant, while the latter is a guest there, though he himself be not a guest; (*Beedle* v. *Morris*, *Cro. Jac.* 224; *Bennet* v. *Mellor*, 5 *T. R.* 273; 1 *Rol. Ab.* 3, E. 7; 3 *Bulstr.* 270;) so if they be thus deposited by a party not his servant (1 *Rol. Ab.* 3, E. 6; *Robinson* v. *Walter*, 3 *Bulstr.* 270.)

Soldiers quartered upon innkeepers are guests, and entitled to the same protection as other guests. It has been said that a soldier is entitled to this protection during the first fourteen days only, and that he is afterwards to be considered as a lodger. But the case of *Harland* goes only to show that he is a guest, though he has resided fourteen days in the inn at which he was quartered, in opposition to an opinion before entertained that one ceased to be a guest after residing three days, and does not limit the soldier's privilege as a guest to the fourteenth day. (*Harland's case*, *Clayton*, 97; *Com. Dig. Action on Case for Negligence*, B. 1; *Willcock on Alehouses*, 54.)

Who not a guest.

On the other hand, if a man comes to an inn and delivers his horse to the hostler, and requires him to be put to pasture, which is done accordingly, and the horse is stolen, the innholder shall not answer for it. (*Calye's case*, 8 *Rep.* 32.)

Holt, C.J., doubted whether a man is a guest by setting up his horse at an inn, though he never went into the inn himself; but the other three justices held that such person is a guest by leaving his horse, as much as if he had staid himself, because the horse must be fed, by which the innkeeper has gain; otherwise if he had left a trunk, or a dead thing. (*York* v. *Grindsone*, 1 *Salk.* 388.)

So if a man comes to an inn with a hamper, in which he hath certain goods (to wit, hats, as the case was), and depart leaving it with the host, and

two days after come again, and in the time of his absence this was stolen; he shall not have any action against the host, because he was not a guest at the time of the stealing, and the host had no benefit by the keeping thereof, and therefore shall not be charged for the loss thereof in his absence. (1 *Rol. Abr.* 2.)

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If one come to an inn, and make a previous contract for lodging for a set time, and do not eat or drink there, he is no guest, but a lodger, and so not under the innkeeper's protection; but if he eat and drink, or pay for his diet there, it is otherwise. (*Parker* v. *Flint*, 12 *Mod.* 255; *Holt*, 366, *S. C.*)

So if an attorney hire a chamber in an inn for a whole term, the host is not chargeable with any robbery in it, because the party is as it were a lessee. (*Mod.* 877; *Latch.* 127.)

If a person ask to have a room in the inn, to be used by him for the purposes of his trade or other special purposes, he does not hold such room as a guest. (*Burgess* v. *Clements*, 4 *Maule & Sel.* 306, *post*, 118.)

A person is not a guest who, having been invited by the innkeeper to sup as a friend, remains to sleep there on account of the lateness of the hour, for he is voluntarily received as a visitor in a private house, and not in respect of the innkeeper's liability to entertain him, for which he would be entitled to make his charge. (*Calye's case*, 8 *Rep.* 32 a.)

Delivery to innkeeper, how far necessary.

Although the guest doth not deliver his goods to the innholder to keep, nor acquaints him with them, yet if they be damaged, lost, or stolen, the innkeeper shall be charged. (*Id.* 33.)

It has been said that there must be *quasi* a committal to the innkeeper's custody, and that merely leaving a thing about the house does not constitute such committal. (*Kitchen* v. *Hill*, *Lancaster Summer Assizes*, 1828, cor. *Hullock*, B.)

But this as a general position appears incorrect, for it is clear that the goods need not be in the special keeping of the innkeeper to make him liable. (Per *Buller*, J., *Bennett* v. *Mellor*, 5 *T. R.* 273.) He is certainly not liable for the loss of or damage to goods left by his guest in an improper part of the inn, as if valuable commodities be left openly in a court-yard: nor is he liable for goods cumbersome left very negligently by the guest in an exposed situation; as where a person brought packages of linen and left them in the waggon in an outer yard, after the innkeeper had told him that he would not be responsible for them unless he removed them into an inner yard. Nor is he liable for goods left in an open yard, or in a public room, after the innkeeper has informed the guest that he would not be liable for them unless placed in a particular place. (See *Calye's case*, 8 *Rep.* 33 a; *Sanders* v. *Spencer*, 3 *Dyer*, 266, pl. 9; *Brande* v. *Glass*, *Mo.* 158.)

Where an agreement.

The innkeeper is not liable for the other goods of his guest after an agreement between them that he should be answerable for such things only as should be delivered into the immediate custody of himself or his wife, whether made before or after he became a guest, for such an agreement is a waiver on the part of the guest of the general security which the common law has given; and if the guest practise a deceit upon the innkeeper by stating he has no goods, or less than he really has, he can recover only for such as he made known to him. (*Brande* v. *Glass*, *Mo.* 158.)

Deceit by guest.

Liability where innkeeper has not custody of the goods.

The innkeeper will be exonerated where the guest chooses to have his goods under his own care.

If a guest take upon himself the exclusive charge of the goods which he brings into the house of an innkeeper, he cannot afterwards charge the innkeeper with the loss. An innkeeper is not bound to furnish a shop to every guest who comes into his house; and if a guest takes exclusive possession of a room, which he uses as a warehouse or shop, he discharges the innkeeper from his common law liability. (*Farnwall* v. *Packwood*, 1 *Stark. C. N. P.* 247; *Curtin* v. *Packwood*, *Holt's C. N. P.* 209; *Burgess* v. *Clements*, 4 *M. & Sel.* 306.)

Where a person, originally coming as a guest, applied for a room for the purpose of exhibiting goods for sale, the use of which was granted to him by the innkeeper's wife, who at the same time told him, that there was a key in

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the door, and that he might lock it (which was equivalent to telling him that he must take charge of it), but which he neglected to do, and during the night a part of the goods were stolen; it was held, that the innkeeper was not responsible. (*Burgess* v. *Clements*, 4 *M. & Sel.* 306.)

Where a traveller went to an inn and desired to have his luggage taken into the commercial room to which he resorted, from whence it was stolen, it was held the innkeeper was responsible, although he proved that according to the usual practice of his house the luggage would have been deposited in the guest's bed room, and not in the commercial room, if no order had been given respecting it. Lord *Tenterden*, C. J. said, "It appears that the plaintiff went to the defendant's inn as a guest, taking certain goods with him. It was the habit of the servants of that inn to place the goods of their customers in their bed-rooms, but the plaintiff chose to have the package in question carried into the room to which travellers in general resorted. It is clear that at common law, when a traveller brings goods to an inn, the landlord is responsible for them; and if it had been intended by the defendant not to be responsible unless his guests chose to have their goods placed in their bed rooms, or some other place selected by him, he should have said so. In this respect I think the situation of the landlord was precisely analogous to that of a carrier." (*Richmond* v. *Smith*, 8 *B. & Cres.* 9.)

An innkeeper on a fair day, upon being asked by a traveller, then driving a gig of which he was owner, "Whether he had room for the horse?" put the horse into the stable of the inn, received the traveller with some goods into the inn, and placed the gig in the open street, without the inn yard, where he was accustomed to place the carriages of his guests on fair days. The gig having been stolen from thence, it was held, that the innkeeper was answerable. (*Jones* v. *Tyler*, 1 *Adol. & Ell.* 522.)

When not liable by refusing to take charge of goods.

If an innkeeper bid his guest take the key of his chamber, and lock the door, and tell him that he will not take the charge of the goods, yet if they be stolen he shall be answerable, because he is charged by law for all things which come to his inn; and he cannot discharge himself by such or the like words. (*Dalt.* c. 56; *Blackerby*, 169.)

But if it be proved that the guest accepted the key, and took on himself the care of his goods, it is for the jury to determine whether this evidence of his receiving the key proves that he did it *animo custodiendi*, and with a purpose of exempting the innkeeper, or whether he took it merely because the landlord forced it on him, or for the sake of securing greater privacy, in order to prevent persons from intruding themselves into his room. (*Per* Lord *Ellenborough*, C. J.; *Burgess* v. *Clements*, 4 *M. & Sel.* 310, 311.)

If the innkeeper be desirous of locking up the goods, saying he cannot otherwise warrant them, and the guest refuses, he is not liable, *per curiam.* (*Sanders* v. *Spencer*, 3 *Dyer*, 266 b.) If the innkeeper's house be full, he is not liable for refusing to take the goods, *per curiam.* (*White's case*, 2 *Dyer*, 158 b.; 1 *Rol.* 3, l. 45.)

Liable though an infant, &c. ill or absent, &c.

The innkeeper is thus liable, though he be of non-sane memory and the guest knows it; (1 *Rol. R.* 2, l. 40; *Cross* v. *Andrews*, *Cro. Eliz.* 622;) or though he be an infant. (*Id. sed vid.* 1 *Rol.* 2, l. 43.)

The innkeeper is liable although ill at the time and incapable of attending to his affairs, for he is bound to retain servants to secure the goods of his guest when incapable of doing so himself; for the same reason he is liable though absent when the guest arrived, or though he was obliged to go elsewhere after the guest arrived. (*Cross* v. *Andrews*, *Cro. Eliz.* 622; 1 *Rol. Abr.* 4 G. 3, 4.)

When liable where goods stolen by guest's servant.

It seems an innkeeper is not liable for damage occasioned by the misconduct of his guest or the guest's servant, and if goods be stolen, lost, or injured by the servant of the guest, or by any person introduced into the inn by the guest. (*Calye's case*, 8 *Rep.* 33 a; *Yelv.* 162; *Com. Dig. Action on Case for Negligence*, B. 1, 2.)

Guests stealing goods.

A guest in a common inn, rising in the night-time, and carrying goods out of his chamber into another room, and from thence to the stable, intending to ride away with them, is guilty of felony: for the least removal of the thing

taken from the place where it was before, is a sufficient asportation for this purpose. (*Dalt.* c. 40, s. 87; 1 *Hawk.* c. 33, s 18; see "*Larceny*," Vol. III.)

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If the chamber of the guest at an inn be forced open and his goods stolen, the burglary must be laid in the dwelling-house of the landlord. (1 *Hale*, 557; *R.* v *Prosser*, 2 *East*, 502.)

Burglary.

XVII. Rights of Innkeeper to Remuneration, Lien, &c., and herein of the Tippling Act.

Herein, *first*, of his remuneration; *secondly*, his remedy for it by lien; and *thirdly*, his remedy for it by action.

(1.) *Remuneration, amount of, &c.*]—An innkeeper is not entitled to greater charges than what are reasonable. In deciding as to what is reasonable, not only the intrinsic value of the goods must be taken into estimation, but also the trouble and risk which the innkeeper takes upon himself in his character of innkeeper. (*Newton* v. *Trigg*, 1 *Show.* 268; *Carth.* 150.) It has indeed been said that an innkeeper cannot fix his own prices, and that the Court of Queen's Bench or the judges of assize may set them. (*Id.* 1 *Bulstr.* 109.)

(1.) Remuneration, amount of, &c.

If an innkeeper be guilty of a gross over-charge in his bill, the guest may tender him a reasonable amount, or the innkeeper may be indicted and fined for his extortion. (*Kirkman* v. *Shawcross*, 6 *T. R.* 7; *Johnson's case*, *Cro. Jac.* 610; see *ante*, 109.)

Extortion.

Sale of Spirits under 20*s.* &c.]—By the 24 Geo. II. c. 40, s. 12, it is enacted, "No person shall recover any sum of money, debt, or demand on account of *spirituous liquors*, unless it shall *bonâ fide* have been contracted at one time to the amount of 20*s.* or upwards; nor shall any particular article in any account for distilled spirituous liquors be allowed where the liquors delivered at one time shall not amount to the full value of 20*s.* at the least, and that without fraud or covin, and where no part of the liquors so sold shall have been returned or be agreed to be returned directly or indirectly; and if any retailer, *with* or without license, shall take any pawn by way of security for payment of any money for such spirituous liquors or strong waters, he shall forfeit 40*s.* for every pawn or pledge so taken, to be levied by warrant of one justice, half to the poor and half to the informer, and the owner shall have such remedy for recovering such pawn or the value thereof as if it had never been pledged."

Sale of spirits, &c. under 20s. at a time.

Penalty for taking pawn for.

Under this act it has been decided that an innkeeper cannot recover the amount of the items in his bill for spirits or spirits mixed with water, unless each item is for spirits furnished at one time to the amount of 20*s.* although forming items in a bill for a dinner, and that furnished not to the defendant but to others at his request. (*Gilpin* v. *Rendle*, 1 *Selw. N. P.* 55; *Burnyeat* v. *Hutchinson*, 5 *B. & Ald.* 241.)

If an innkeeper or other person sell two sorts of spirits at the same time to an amount above 20*s.*, he may recover the price, although the amount of each species of spirits be under 20*s.* (*Owens* v. *Porter*, 4 *C. & P.* 367; *et per Bosanquet*, *J.*, *S. C.*) "The object of the act seems to have been, that if a number of articles each under 20*s.* are delivered at different times, it should not be lawful to charge them in one item so as to make them amount to more than 20*s.*

The act applies to all sales of spirits unless delivered in quantities amounting to more than 20*s.* in value at one time, and though the sale be to a person living in the hotel, or to a person not the consumer. (*Burnyeat* v. *Hutchinson*, 5 *B. & Ald.* 241.) Therefore the price of spirits sold in quantities less than to the required amount of 20*s.* by a spirit merchant to a publican, to be consumed, not by the publican himself, but by his customers, cannot be recovered in an action. (*Hughes* v. *Done*, 1 *Ad. & Ell. N. S.* 294.)

In a case where the defendant was indebted to the plaintiff in different sums in respect of spirituous liquors so furnished and other goods, and the plaintiff being indebted to the defendant in the less sum, they agreed on a

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balance, the Court held that this balance might be recovered, for the defendant was to be taken to have paid the amount due for spirituous liquors in setting off against the plaintiff's account generally what was due from the plaintiff to him, (which appeared to have been more than the charge for spirits); and on the ground that though the plaintiff had originally no action to recover a debt so incurred, it being reasonable that defendant should pay it; had he paid it in money he could not have recovered back the amount, and such allowance in the account stated (which was not to be referred to the legal rather than to the illegal demand) was equivalent to payment. (*Dawson* v. *Remnant*, 6 *Esp.* 24.)

It has been held that the plaintiff was not entitled to recover on a bill of exchange, which the defendant had accepted in part in respect of money lent and in part for a debt for *spirits* furnished in small quantities, although the residue of the consideration was good. (*Scott* v. *Gillimore*, 3 *Taunt.* 226; and see *Gaitskill* v. *Greathead*, 1 *D. & R.* 359, 360; and *Spencer* v. *Smith*, 3 *Camp.* 9.)

A publican cannot sue for beer, &c., furnished to a party already intoxicated, or knowingly to a party to enable him to become so. (*Ante*, 113.)

Lien for remuneration.

(2.) *Remedy for Remuneration by Lien.*]—An innkeeper may detain the *goods* of the guest who eats, till payment; and he may do so without any agreement for that purpose, for the law annexes such a condition without the express agreement of the parties, as it would be hard to oblige him to sue for every little debt; and a greater hardship, that he might not be able to find who was his guest. But an innkeeper, although he has a lien on the goods, has none on the *person* of his guest, and cannot therefore detain him for any reckoning due, nor has he any right to take any of his clothes off his person as security for the same. (*Sunbolf* v. *Alford*, 3 *Mee. & W.* 248.)

In trover for a horse in an innkeeper's hands, denial is no evidence of conversion, unless the plaintiff tender what the horse has eaten out: and the jury is to judge if sufficient were tendered. (*Bull. N. P.* 45; 2 *Show.* 161.)

But a horse committed to an innkeeper may be detained only for his own meat, and not for the meat of the guest, or of any other horse: for the chattels in such case are only in the custody of the law for the debt that arises from the *thing itself*, and not for any *other debt* due from the same party: for the law is open for all such debts, and doth not admit private persons to take reprisals. (*Bac. Abr. Inns, D.*; 14 *Vin. Abr.* 438; 1 *Bulstr.* 237; *Rosse* v. *Bramstead*, 2 *Rol.* 438.) But the cases relied on for the correctness of this last proposition do not seem to support it, and the lien of an innkeeper appears to extend to all the goods of his guest which the guest has at the inn for all his expenses incurred there. (See *Story on Bailments*, 311, *Am. edit.* 1840.)

It should seem, however, that an innkeeper may detain the goods of the guest for his bill, although there be no distinct charge for lodging and taking care of them. And in *Proctor* v. *Nicholson*, 7 *Car. & P.* 87, it was held that an innkeeper has a lien on the goods of his guest for board and lodging and wine supplied to such guest, by the guest's order, whatever may be the amount, provided the guest be possessed of his reason and not an infant. Also that he has a lien for money lent to his guest, if it was agreed between them at the time of the loans that the guest's goods should be a security for the sum lent.

The innkeeper may detain a horse for his food though it be left with him against its real owner's consent, if the innkeeper receive it without knowing that fact, and this, though the horse were stolen; for the innkeeper is not obliged to consider who is the *owner*, but only whether he who brings him is his guest or not. (See *Shipwith* v. ———, 1 *Bulstr.* 170; *Robinson* v. *Walter*, 1 *Rol. Rep.* 449; *York* v. *Grindstone*, 1 *Salk.* 368; *York* v. *Greenhaugh*, 2 *Ld. Raym.* 866.) In *Johnson* v. *Hill*, 3 *Stark.* 172, where A. under the colour of a legal proceeding, having wrongfully seized the horse of B., took it to an inn, where it was kept for several days. The landlord refused to deliver up the horse to B. upon a demand made soon after the delivery to him, but a few days afterwards offered to give up the horse to B. on being paid ten shil-

lings for the keep. The chief justice was of opinion that if the landlord knew at the time the horse was delivered into his custody, that A. was not the owner of the property, but a mere wrong doer, he made himself a party to the wrongful act of A., and could not insist on any recompence for keeping the horse; and this being left to the jury, they found for B. the plaintiff. But he has no lien on a horse placed in his stable for the amount of its keep, unless it be placed there by *a guest*. And if a person be stopped with a horse under suspicious circumstances, and the horse be placed at any inn by the police, the innkeeper has no lien on the horse for its keep; and if an auctioneer, by the direction of the innkeeper, sell the horse for its keep, he is liable to be sued in trover by the owners of the horse. (*Binns* v. *Pigot*, 9 *C. & P.* 208.)

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He may detain the guest's horse for the amount due in respect of it, whether in the stable or at pasture. (*York* v. *Grindstone*, 1 *Salk.* 388; *Newton* v. *Trigg*, 1 *Show.* 268; 2 *Rol. Abr.* 85.)

But if an innkeeper previously agree to give the guest credit for his entertainment he cannot detain his horse or goods, as the innkeeper then relies on the personal responsibility of his guest. (*Jones* v. *Thurlow*, 8 *Mod.* 172.)

The innkeeper is entitled to feed the horse during the time of its detention, and to charge the amount in account for which he detains it; and even where a man desired the innkeeper to let his horse have no more food, it was held liable to a detainer notwithstanding. (*Gilbert* v. *Berkeley*, *Skin.* 648, *pl.* 6; *Holt*, 366.)

If a horse committed to an innkeeper be detained by him for his meat, and the owner take him away, the innkeeper must make fresh pursuit after him, and retake him; otherwise the custody of him is lost, for he cannot retake him at any other time; for if a distress be rescued, and the party upon fresh pursuit do not retake it, the distress is lost. (2 *Rol. Rep.* 238.)

But if a horse be committed to an hostler, who detains him for his meat, and afterwards the owner agree that he shall detain him till he be satisfied; here he hath not only the custody of him as a distress, but also the property in him as a pledge; and if the owner take it from him, he may not only retake it upon fresh pursuit, but wherever he meets it; because he had a property by such agreement, and a man that hath a property may retake his own wherever he meets it. (2 *Rol. Rep.* 238.)

If the horse be once taken out with the consent of the innkeeper, he loses his lien thereon for the keep up to that time. (*Jones* v. *Pearl*, *Stra.* 556.)

The 11 & 12 Will. III. c. 15, s. 2, which prevented the innkeeper from *detaining* the goods for his bill, and allowing him only to bring his action in case of his selling ale, &c., in unmarked pots, or refusing to give his bill in writing, &c., appears to be repealed by the 5 Geo. IV. c. 74, s. 23.

Goods detained not to be used or sold.

An innkeeper who detains a horse for his meat cannot use him except for keeping him in health, or sell him, because he detains him as in custody of the law; and by consequence the detention must be in the nature of a distress, which cannot be used by the distrainer. (See *Bac. Abr. Inns*, D.) But it is said by *Popham*, C. J., (*Yel.* 67,) that if a man bring his horse to an inn, and leave him there in the stable without any special agreement as to what he is to pay, the innkeeper is not bound to deliver the horse until the owner has defrayed his charge for the horse, but he may justify the detainer of the horse for his food and keeping, and after the horse has eat as much as he is worth, the innkeeper, upon a reasonable appraisement, may sell him, and it is a good sale in law. But if there be a special agreement that the owner of the horse shall pay a certain sum for the keep; in that case, although the horse eat out double his price, the innkeeper cannot sell him. (*Sed vid. Judson* v. *Etheridge*, 1 *C. & M.* 743; and *Chase* v. *Westmore*, 5 *M. & Sel.* 180.)

Except by custom in London and Exeter.

But by the custom of London and Exeter, if a man commit a horse to an hostler, and he eat out the price of his head, the hostler may take him as his own, upon the reasonable appraisement of four of his neighbours; which was, it seems, a custom arising from the abundance of traffic with strangers, that could not be known, to charge them with the action. But the innkeeper hath no power to sell the horse, by the general custom of the realm. (*Bac. Abr. Inns*, D.; *Jones* v. *Thurlow*, 8 *Mod.* 172.)

17. *Innkeepers' rights.*

So in the case of *Jones* v. *Pearle*, (1 *Stra.* 557.) In trover for three horses, the defendant pleaded that he kept a public inn at Glastonbury, and that the plaintiff was a carrier, and used to set up his horses there; and 36*l.* being due to him for keeping the horses, which was more than they were worth, he detained and sold them, as well he might: but on demurrer, judgment was given for the plaintiff, an innkeeper having no power to sell horses, except by special custom, as in the city of London; and, besides, when the horses had been once out, the power of detaining them for what was due before did not subsist at their coming in again.

(3.) Remedy by action.

(3.) *Remedy for Remuneration by Action.*]—The innkeeper may sustain an action of *assumpsit* or debt for the amount of his bill, and this notwithstanding he detains the goods as a lien. (*Watbroke* v. *Griffiths*, *Mod.* 876; *Yelv.* 67.)

If several persons dine together at a tavern they are *primâ facie* jointly liable for the whole bill, and not merely each for his own share; but each of the officers of a regimental mess is only separately liable for his own share. (3 *Campb.* 51, 53, 168; 2 *Campb.* 640.)

XVIII. Privileges and Disqualification of Innkeepers.

Under Turnpike Acts.

No trustee or commissioner of the turnpike roads may act while he keeps a victualling house or other house of public entertainment, or sells wine, cider, beer, ale, spirituous or other strong liquors by retail, under a penalty of 50*l.* for every offence. (3 Geo. IV. c. 126, s. 64; *post*, "*Highways*," "*Turnpike*," Vol. III.)

No person selling wine, ale, spirituous liquors, or provisions by retail, shall be capable of holding any place of profit under any trustees or commissioners of any turnpike road. (3 Geo. IV. c. 126, s. 75.)

Constable.

The 3 Geo. IV. c. 77, s. 19, which prohibited innkeepers from being constables, &c. is now expired; but it is said, per *Holt*, C. J. (*Anon.* 6 *Mod.* 42,) that no alehouse keeper should be a constable; (and see *Rex* v. *Rice*, 1 *Ld. Raym.* 138.)

Sheriff's officer.

If a person licensed under the 1 Will. IV. c. 64, or 4 & 5 Will. IV. c. 85, or 3 & 4 Vict. c. 61, *ante*, 63, become a sheriff's officer, &c. he will forfeit his license.

XIX. Forms, *List of.*

(1.) Forms relative to the Beer and Cider License under 11 Geo. IV. & 1 Will. IV. c. 64, &c., for Beer Houses.

Application for a License to retail Beer and Cider in London, under 11 Geo. IV. & 1 Will. IV. c. 64; or 4 & 5 Will. IV. c. 85, (No. 1.)—the like to retail Beer and Cider out of London, (No. 2.)—Overseer's Certificate, (No. 3.)

License to sell Beer and Cider by retail, on those Acts, *not* to be consumed on the premises, (No. 4.)

Certificate under 4 & 5 Will. IV. c. 85, of six inhabitants in order to procure a License to sell Beer and Cider to be drunk on the premises, (No. 5.)

License under same Act to sell Beer and Cider to be drunk or consumed on the premises, (No. 6.)

General Form of Information for an Offence under the Acts, (No. 7.)

General Form of Summons on such Information, (No. 8.)

General Form of Conviction, (No. 9.)

Information or Conviction on 1 Will. IV. c. 64, s. 6; and 4 & 5 Will. IV. c. 85, s. 18, for not putting up a descriptive Board, (No. 10.)—the like on 4 & 5 Will. IV. c. 85, s. 17, for selling Beer, &c. without a License, the Beer not being to be drunk on the premises where sold, (No. 11.)—the like for selling Wine and Spirits in a House licensed only to sell Beer, &c. (No. 12.)—the

like on 1 Will. IV. c. 64, s. 12, for selling Beer, &c. otherwise than in the Standard Measures, (No. 13.)—the like on 1 Will. IV. c. 64, s. 13, for permitting Drunkenness or Disorderly Conduct in a licensed house, (No. 14.)—the like where party guilty of a like Third Offence, and the Magistrates adjudge the Offender disqualified from selling Beer for two years, &c. (No. 15.)—the like for an Offence against Letter of License, as suffering Gaming, &c. (No. 16.)—the like on 1 Will. IV. c. 64, s. 13, for selling adulterated Beer, (No. 17.)—the like for mixing Drugs in Beer, (No. 18.)—the like for adulterating Beer, (No. 19.)—the like for selling Beer within the prohibited hours elsewhere than in London, Westminster, and the Metropolitan boroughs, (No. 20.)—the like for selling Beer in London, Westminster, or the Metropolitan boroughs, within the prohibited hours, (No. 21.)—the like against a Witness on Stat. 1 Will. IV. c. 64, s. 20; or 4 & 5 Will. IV. c. 85, for not appearing to give Evidence, (No. 22.)

Notice, &c. of Appeal, (No. 23.)

Recognizance on Appeal against Conviction, (No. 24.)—the like to bind Informer to appear at Sessions on the Appeal, (No. 25.)

Warrant of Distress, (No. 26.)—Warrant of Commitment, (No. 27.)

(2.) Forms relative to the Wine, Spirit, and Beer, &c. License under 9 Geo. IV. c. 61, for Inns and Public Houses.

Precept to High Constable to order Petty Constables to give Notice of Meeting for licensing Public Houses under 9 Geo. IV. c. 61, s. 2, (No. 28.)

High Constable's Order to Petty Constables to give notice of Licensing Meeting under like Act, sect. 2, (No. 29.)

Notice of intended Application for a License to sell Liquors by retail, under like Act, sect. 10, (No. 30.)

Notice of intended Application to Transfer such License, on like Act, sect. 14, (No. 31.)

License to keep Inn and sell Wines, &c. on like Act, sect. 13, (No. 32.)

License granted at a Special Meeting in case of Death, on the like Act, sect. 14, (No. 33.)

General Form of Information and Summons for an Offence under like Act, (No. 34.)

General Form of Conviction for an Offence under like Act, (No. 35.)

Conviction on like Act, sect. 18, for selling Wine or Spirits by retail without a License, (No. 36.)

Conviction on like Act, sect. 18, of a licensed Publican for selling an exciseable Liquor in Premises not being those licensed, (No. 37.)

Conviction on like Act, sect. 19, of a licensed Person for not using the Standard Measures, (No. 38.)

Conviction on like Act, sect. 21, for a First or Second Offence against the tenor of Publican's License, (No. 39.)

Notice of Appeal, Recognizance thereon, Warrant of Distress and Commitment, (No. 40.)

(3.) Miscellaneous.

Information for Drunkenness on 21 J. c. 7, (No. 41.)—Summons thereon, (No. 42.)—Conviction for Drunkenness on Justice's own view, (No. 43.)

Warrant to Churchwardens (if they are not present at the Conviction, or the Offender makes default by not appearing) to receive the penalty for Drunkenness by stat. 21 J. c. 7, (No. 44.)—the like to levy the Penalty of Drunkenness on Nonpayment, (No. 45.)

Certificate by Constable of Want of Distress, (No. 46.)

Commitment to the Stocks for Drunkenness on Inability to pay the Penalty, on stat. 21 J. c. 7, (No. 47.)

Indictment for selling Ale, &c. on a Sunday, (No. 48.)

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19. *Forms as to Beer Houses.*

(1.) Forms relative to the Beer and Cider License, &c. under 11 Geo. IV. & 1 Will. IV. c. 64; 4 & 5 Will. IV. c. 85; and 3 & 4 Vict. c. 61, for Beer Houses.

(1.) Application for a license to retail beer and cider in London.

To her Majesty's Honourable Commissioners of Excise, or to such persons as the said Commissioners have authorised and employed to grant Licenses for selling Beer, [Cider and Perry,] by retail.

I, John Styles, [state the Christian and surname of the applicant,] *now residing at , in the parish of , in the county of , being a householder and duly qualified in that behalf, being desirous of selling beer, ale, and porter,* [or if cider and perry also, add those words accordingly,] *by retail, under the provisions of an act made and passed in the first year of the reign of his late Majesty, to enable the general sale of beer and cider by retail in England, do hereby apply to you for, and request you to furnish me, within ten days after this application, with a license to enable me to sell beer, ale, and porter,* [or if cider and perry also say so,] *by retail, in the house or premises situate at* [here describe the house or premises wherein the beer, &c. is to be sold, specifying the situation of it, and the name, if any], *and I propose the following person* [or "*persons,*" if the applicant, instead of one surety in 20*l.* offers two sureties of 10*l.* each,] *as my surety, according to the said statute, namely, John Doe,* [state his Christian and surname, and his trade or occupation,] *now residing at , in the parish of , in the county of , and who will, together with myself, execute a bond and pay the license duty according to the said statute. Given under my hand, this day of , &c.* *J. S.*

(2.) The like, out of London.

To the Collectors and Supervisors of Excise for the Collection or District of .

I, John Styles, &c. [here state the nature of the application, as in the preceding form.]

(3.) Overseer's certificate under 3 & 4 Vict. c. 61, s. 2. (*ante*, 66.)

I, the undersigned, an overseer of the poor of the parish [or "*township*"] *of , in the county of , do hereby certify, that , dwelling in , in the said parish of , is the real resident, holder, and occupier of the said house;* and that the true rent or annual value at which such house with the premises occupied therewith is rated in one rating to the poor-rates of the said parish* [or "*township*"] *of , according to the last sum or rate made and allowed in such parish* [or "*township*"] *of , for the relief of the poor, bearing date the day of ,* 1840, *is pounds.*

[Or if the house has been erected or occupied since the last rate, proceed as above as far as *, and then as follows:] *And that the said house has not yet been rated, and the rent or annual value thereof is £ , which sum is not less than that at which the said house, with the premises occupied therewith, will be rated in one sum to the relief of the poor in the next rate to be made and allowed; and I further certify that the said has claimed to be rated in respect of the said house and premises.*

Dated this day of , 184 . { *Overseer of the poor of the parish* [or "*township*"] *of .*

(4.) License to sell beer and cider by retail on 11 Geo. 4 & 1 Will. 4, c. 64, and 4 & 5 Will. 4, c. 85, *not* be consumed on the premises.

WE, the undersigned, being of the commissioners of the excise [or "*I, the undersigned, being a person authorised and employed by the commissioners of excise to grant licenses for selling beer, ale, and porter,* [or "*cider and perry,*" as the case may require,] *by retail,* [or "*being a collector or supervisor of excise for the collection or district of ,*"] *do hereby authorise and empower A. L., now being a householder, and dwelling at , in the parish of , within the limits of the chief office of excise,* [or "*within the limits of the said collection or district,*"] *to sell beer, ale, and porter,* [or "*cider and perry,*"] *by retail, in the dwelling-house of the said A. L., and in the premises thereunto belonging, the said A. L. having duly entered into a bond with D. S. of , and E. S. of , as his surety,* [or "*sureties,*"] *and having deposited a certificate signed by the six persons, viz. G. H., I. J. &c.* [here set out their names and residences,] *and by C. D. the overseer of the said parish* [or "*township,*" &c.] *pursuant to the statute in such case made: Provided and upon condition that he or she* [*does not sell any beer, ale, or porter made otherwise than from malt and hops,*] [omit these words in licenses to retail cider and perry;] *nor mix, or cause to be mixed, any drugs or other pernicious ingredients in any beer, ale, or porter,* [or "*in any cider or perry,*"] *nor fraudulently dilute, deteriorate, or adulterate any beer, ale, or porter,* [or "*any cider or perry;*"] *nor sell any beer, ale, or porter,* [or "*any*

cider or perry,"] knowing the same to have been fraudulently diluted, deteriorated, or adulterated; nor use, in selling any beer, ale, or porter, [or "*any cider or perry,"*] *any measures which are not of the legal standard; nor wilfully or knowingly permit any drunkenness or any violent or quarrelsome or other disorderly conduct in his* [or "*her*"] *house or premises; nor knowingly suffer any unlawful games or any gaming whatsoever therein; nor knowingly permit or suffer persons of notoriously bad character to assemble and meet together therein, but to maintain good order and rule therein;(a)* [*and all provisions for billetting officers and soldiers in victualling houses, contained in any act for punishing mutiny and desertion, and for the better payment of the army and their quarters, are to extend and apply to the house and premises mentioned in this license (b);*] *and this license shall continue in force from the day of next until the day of then next ensuing, and no longer; provided, and upon condition, that the said A. L. shall not in the meantime become a sheriff's officer, or officer for executing the process of any court of justice, nor shall in the meantime cease to be a householder; and this license shall cease and determine, and shall become void, in case of any of the conditions or regulations contained therein shall be transgressed, or shall not be observed by the said A. L. Given under our hands and seals,* [or "*my hand and seal,*"] *this day of , one thousand eight hundred and , at .*

19. *Forms as to Beer Houses.*

(5.) Certificate under 4 & 5 Will. 4, c. 85, of six inhabitants, in order to procure a license to sell beer and cider to be consumed on the premises (c).

WE, the undersigned, being the inhabitants of the parish [or "*township,*" as the case may be,] *of , and respectively rated to the poor at not less than six pounds per annum, and none of us being maltsters, common brewers, or persons licensed to sell spirituous liquors, or being licensed to sell beer or cider by retail, do hereby certify that A. B. dwelling in street,* [here specify the street, lane, &c.] *in the said parish* [or "*township,*" &c.] *is a person of good character.* [Here insert the day of signing the certificate.]

(Signed) *E. F.*, *G. H.*, *I. K.*, *L. M.*, *N. O.*, *P. Q.* [Here state the residence of each of the persons signing.]

I do hereby certify that all the above-mentioned persons whose names are subscribed to this certificate, are inhabitants of the parish [or "*township,*" &c.] *of , rated to six pounds to the relief of the poor of the said parish.* *C. D.*

Overseer of the parish [or "*township,*" &c.]

[Date.]

(6.) License under same act to sell beer and cider to be drunk or consumed on the premises.(d)

WE, the undersigned, being of the commissioners of excise [or "*I, the undersigned, being a person authorised and employed by the commissioners of excise to grant licenses for selling beer, ale, and porter,* [or "*cider and perry,*" as the case may require,] *by retail,* [or "*being a collector or supervisor of excise for the collection or district of ,"*] *do hereby authorise and empower A. B., now being a householder, and dwelling in a house in* [here specify street, &c.] *in the parish* [or "*township,*" &c.] *of within the limits of the chief office of excise* [or "*within the limits of the said collection or district,"*] *to sell beer, ale, and porter* [or "*cider and perry,"*] *by retail, in order that it may be consumed in the said dwelling-house of the said A. B., and in the premises thereunto belonging, the said A. B. having duly entered*

(a) The form given in the schedule of the act contains a clause prohibiting the sale of beer between certain hours therein named, which is omitted in the copy of the license here given. The section of the act under which that clause was inserted has been repealed by the 3 & 4 Vict. c. 61, s. 14, and other provisions substituted; (*ante*, 72;) and the form of license now used by the excise does not appear to contain any such prohibition. It leaves, therefore, the offence to be punished under the 3 & 4 Vict. c. 61, s. 15, (*ante*, 72.)

(b) It would seem that since the 4 & 5 Will. IV. c. 85, s. 5, *ante*, 114, this provision as to the billetting of soldiers is to be omitted in the license to sell beer or cider *not* to be drunk or consumed on the premises.

(c) The act gives this form, see *ante*, 65.

(d) The 4 & 5 Will. IV. c. 85, gives this form, (see *ante*, 68.) The clause in the license prohibiting the sale of beer within certain hours, is here also omitted for the reasons stated in note (a), *supra*.

19. *Forms as to Beer Houses.* *into a bond with D. S. of , and E. S. of , as his* [or "*her*"] *surety,* [or "*sureties,*"] *and having deposited a certificate, signed by six persons, videlicet,* [here set out the names and residences of the persons signing the certificate,] *and by C. D. the overseer of the said parish,* [or "*township,*" &c.] *according to the statute in such case made: Provided and upon condition that the said A. B. do not sell any beer, ale, or porter made otherwise than from malt and hops,* [omit these words in licenses to retail cider and perry,] *nor mix or cause to be mixed any drugs or other pernicious ingredients in any beer, ale, or porter,* [or "*in any cider or perry,*"] *nor fraudulently dilute, deteriorate, or adulterate any beer, ale, or porter,* [or "*any cider or perry,*"] *nor sell any beer, ale, or porter,* [or "*any cider or perry,*"] *knowing the same to have been fraudulently diluted, deteriorated, or adulterated, nor use, in selling any beer, ale, or porter,* [or "*any cider or perry,*"] *any measures which are not of the legal standard, or wilfully or knowingly permit any drunkenness, or any violent, or quarrelsome, or other disorderly conduct in his* [or "*her*"] *house or premises, nor knowingly suffer any unlawful games or any gaming whatsoever therein, nor knowingly permit or suffer persons of notoriously bad character to assemble and meet together therein, but do maintain good order and rule therein; and all provisions for billetting officers and soldiers in victualling houses contained in any act for punishing mutiny and desertion, and for the better payment of the army and their quarters, are to extend and apply to the house and premises mentioned in this license; and this license shall continue in force from the day of next until the day of then next ensuing, and no longer; provided and upon condition, that the said A. B. shall not in the mean time become a sheriff's officer or officer for executing the process of any court of justice; nor shall the said A. B. in the mean time cease to be rated to the relief of the poor in respect to the said house and premises; and this license shall cease and determine and shall become void in case any of the conditions or regulations contained therein shall be transgressed, or shall not be observed by the said A. B. Given under our hands and seals,* [or "*my hand and seal,*"] *this day of , one thousand eight hundred and , at .*

(7.) General form of information for an offence under 1 Will. 4, c. 64, or 4 & 5 Will. 4, c. 85, or 3 & 4 Vict. c. 61.

—— } *BE it remembered, that on this day of , in the year , E. F.*
to wit. } *of , personally came before me J. P. Esquire, one of her Majesty's justices of the peace in and for the said county, and informed me that,* [here state the offence as in the following forms,] *whereby the said A. B. has forfeited the sum of , the same being his first* [or "*second,*" or "*third*"] *offence against the provisions of the statutes to permit the general sale of beer and cider by retail in England, and hereupon the said E. F. prayeth that the said A. B. may be convicted of the said offence, and that the said penalty* [or "*penalty and forfeiture*"] *may be awarded accordingly, with costs, according to the said statute, and that the said A. B. may be summoned before two of her Majesty's justices in petty sessions for the , to answer the said information and make his defence thereto. Before me, J. P., &c.*

E. F.

(8.) General form of summons on such information (a).

County of } *TO A. O. of the* [*parish*] *of , in the said county, and also to the*
—— } *constable of the said* [*parish*] *of , and all others whom it may concern:*

WHEREAS an information hath been this day exhibited by E. F. of , in the county of before me J. P. Esquire, one of her Majesty's justices of the peace acting in and for the said county, setting forth that: [here copy the information, stating the offender throughout in the second person, and the prayer of the information in the past tense, and conclude thus:] *these are therefore to summon and require you the said A. B. to appear before me and such other of her Majesty's justices of the peace for the said county in petty sessions as may be then and there present, on the day of next ensuing, at the hour of in the forenoon of the same day, at , in the said county of , to answer the matter of complaint contained in the said information, and to show cause, if any you have, why you should not be convicted of the said offence charged in the said information; and I do authorise you the said constable to serve this my summons, and to require you to attend me at the time and place last above-mentioned, then and there to make a return to me of the exe-*

(a) By 4 & 5 Will. IV. c. 85, s. 22, *ante*, 77, it must be served by some constable, special constable, police or other officer. See other forms, *post*, "*Conviction.*"

cution of this summons. Herein fail you not. Given under my hand and seal, at in the said county, the day of , in the year of our Lord 1843.

J. P. (L. S.)

19. *Forms as to Beer Houses.*

The 11 Geo. IV. & 1 Will. IV. c. 64, s. 25, gives the following general form of conviction to be used for offences or penalties under that act, and enacts that it shall be sufficient without particularly stating the case or facts in evidence. (See the enactment, *ante.*) It may also be adopted for an offence against the 4 & 5 Will. IV. c. 85, or the 3 & 4 Vict. c. 61.

(9.) General form of conviction.

—— } *BE it remembered, that on this day of , in the year , A. B.*
to wit. } *of was duly convicted before us, C. D. and E. F., two of her Majesty's justices of the peace in petty sessions for the of , for that:* [here state the offence, and the time and place when committed:] *whereby the said A. B. has forfeited the sum of , this being adjudged to be the first* [or "*second,*" or "*third,*"] *offence* [as the case shall happen to be,] *against the provisions of an act to permit the general sale of beer and cider by retail in England, besides the costs of this conviction, which we the said justices do hereby assess at the sum of , pursuant to the statute in such case made and provided. Given under our hands and seals, the day and year above written.*

[State the formal parts of the information, as *ante*, (No. 7,) or of the conviction, as *supra*. State the offence thus:] *for that the said A. B. being licensed to sell beer, ale, and porter,* [or "*cider and perry,*" if the fact,] *by retail, in the dwelling-house of the said A. B. in street, in the parish of , in the county of , and in the premises thereunto belonging,* [and if the fact, add "*in order that it might be consumed in the said dwelling-house and in the premises thereunto belonging,*"] *under the provisions of an act to permit the general sale of beer and cider by retail in England, made and passed in the first year of the reign of our Lord the late King, William the Fourth,* [*and also under the provisions of an act made and passed in the fifth year of the same reign, to amend that act passed in the first year of the reign aforesaid,*] *on , at , whilst he continued so licensed as aforesaid, did not preserve or keep up, painted in letters three inches or more in length, in white upon a black ground, or in black upon a white ground, publicly visible and legible, upon a board placed over the door of the house or premises situate at , in which the said A. B. was so licensed to sell beer, ale, and porter* [or "*cider and perry,*"] *by retail, the christian and surname of the said A. B. the person mentioned in such license, at full length, together with the words "licensed to sell beer* [or "*cider*"] *by retail, not to be drunk on the premises,*" [or according to the fact whether the license be so, "*licensed to sell beer* [or '*cider*'] *by retail to be drunk on the premises,*"] *according to the said statutes, contrary to the form of the said statutes, whereby, &c.* [conclude, if an information, as in general form of information, *ante*, (No. 7,) or, if a conviction, as in form, *infra.*]

(10.) Information or conviction on 1 Will. 4, c. 64, s. 6, and 4 & 5 Will. 4, c. 85, s. 18, for not putting up a descriptive board.

[For the formal parts of the information or conviction, see *post*, "*Excise,*" Convictions for Offences against," Vol. II. State the offence thus:] *that the said A. B. not being duly licensed to sell beer* [or "*cider,*" or "*perry,*"] *as the keeper of a common inn, alehouse, or victualling house, did, to wit, on , at , in a certain house and premises, situate in street, in the parish of , in the county aforesaid, sell to one G. H.* [or "*to a certain person unknown,*"] *certain beer* [or "*cider*" or "*perry,*"] *to wit, one quart of beer,* [or "*cider*" or "*perry,*" as the case is,] *by retail, not to be drunk or consumed in or upon the said house or premises,* [or "*did sell certain beer,*" [or "*cider*"] *by retail, to wit, one quart, &c. to be consumed in or upon the said house and premises*] *the said A. B. not then having an excise retail license in force, authorising him so to do, contrary to the form of the statute in such case made and provided, whereby, &c.* [conclude as usual, 20*l.* penalty, and 5*l.* penalty in addition, by 3 & 4 Vict. c. 61, s. 13, *ante*, 75.]

(11.) Information or conviction on 4 & 5 Will. 4, c. 85, s. 17, for selling beer, &c. without a license, the beer not being to be drunk on the premises where sold, *ante*, 74.

[For the formal parts of the information or conviction, see *post*, "*Excise,*" Convictions for Offences against," Vol. II. State the offence thus:] *that the said A. B. being at the time of the committing the offence hereinafter mentioned, duly licensed under the provisions of the statute in such case made and provided, to sell beer* [or "*cider*" or "*perry,*"] *by retail, and not being duly licensed as the keeper of a common inn, ale-*

(12.) The like, for selling wine and spirits in a house licensed only to sell beer, &c. *ante*, 75.

19. *Forms as to Beer Houses.*

house and victualling house, in a certain house and premises at , did, to wit, on , there suffer certain wine and spirits, to wit, one bottle of wine and one pint of spirits, to be brought into the said house and premises, to be drunk and consumed therein [or "*did then and there suffer certain wine and spirits, to wit, &c. to be drunk and consumed in his said house and premises by*" *&c.* or "*did receive into*" or "*keep,*" or "*have*" *in his possession in a certain cellar entered for storing*" or "*retailing beer,*" or "*cider,*"] *certain wine* [or "*spirits,*" *&c.*] *to wit, &c. without being licensed so to do, contrary to the form of the statutes in that case made and provided, whereby, &c.* [conclude as usual. If under 3 & 4 Vict. c. 61, s. 10, *ante*, 76, the license is to be adjudged void.]

(13.) Information or conviction for selling beer, &c. otherwise than in standard measures, *ante*, 73.

[State the formal part of the information, as *ante*, (No. 7,) or of the conviction, as *ante*, (No. 9.) State the offence thus:] *that within thirty days now last past, to wit, on &c. at &c. the said A. B. being a person licensed under the provisions of an act passed in the first year of the reign of our lord the late King William the Fourth, to permit the general sale of beer and cider by retail in England* [if licensed also under the 4 & 5 Will. IV. c. 85, see the preceding form,] *to sell beer* [or "*cider and perry,*" if the fact,] *by retail, did sell and dispose of to one G. H.* [or "*a certain person unknown,*"] *by retail, a certain quantity of beer, being a quantity not less than half a pint, to wit* [*one pint of ale*], *in a pint measure and vessel not sized according to the standard, contrary to the form of the statute in such case made and provided, whereby the said illegal measure hath become forfeited, and whereby, &c.* [conclude, if an information, as in general form of information, *ante*, (No. 7,) or if a conviction, as in conviction, *ante*, (No. 9.) (*a*)]

(14.) Information or conviction for permitting drunkenness or disorderly conduct in a licensed house, *ante*, 73.

[State the formal parts of the information, as *ante*, (No. 7,) or of the conviction, as *ante*, (No. 9.) State the offence, thus:] *that the said A. B. being a seller of beer* [or "*cider and perry,*" if the fact,] *by retail, and being licensed under the provisions of an act passed in the first year of the reign of our lord the late king, William the Fourth, to permit the general sale of beer and cider by retail in England,* [or if licensed under the 4 & 5 Will. IV. c. 85, see form, *supra*, No. 12,] *to wit, on at , did permit a certain person, to wit, one G. H.* [or "*a certain person unknown,*"] *to be guilty of drunkenness* [*and disorderly conduct*] *in a certain house and premises, situate at , being the house and premises mentioned in such license, and wherein the said A. B. was so licensed to sell beer* [or "*cider and perry,*"] *as aforesaid, contrary to the form of the statute in such case made and provided; whereby, &c.* [conclude, if an information, as in general form of information, *ante*, (No. 7,) or if a conviction, as in conviction, *ante*, (No. 9.) (*b*)]

(15.) The like, where party guilty of a like *third* offence, and magistrate adjudged the offender disqualified from selling beer for two years, &c.

[Proceed as in the above form, but after stating the forfeiture of the penalty and costs, and adjudication thereof, state the adjudication as to the disqualification of the offender from selling beer thus:] *and we the said J. P. and I. O. do hereby further adjudge that the said A. B. shall be disqualified from selling beer, ale, and porter* [or "*cider*" or "*perry*" as the case is,] *by retail, for the space of two years next ensuing this conviction; and also* [if the justices think fit] *we do hereby further adjudge, that no beer, ale, or porter* [or "*cider*" or "*perry,*" as the case may be,] *shall be sold by retail by any person or persons in the house or premises situate at, &c., being the house and premises mentioned in the said license of the said A. B. Given under our hands and seals the day and year first above written.*

(16.) Information or conviction on 1 Will. 4, c. 64,

[State the formal parts of the information, as *ante*, (No. 7,) or of the conviction, as *ante*, (No. 9.) State the offence thus:] *that the said A. B. being a seller of beer*

(*a*) It is to be remembered that no person forfeits his license for a *first* offence against the tenor of his license, and no license is forfeited for any offence unless so adjudged. (3 & 4 Vict. c. 61, s. 17, *ante*, 71.)

(*b*) The act, it will be seen, enacts also, that any person concerned in the breach of the conditions of the license, shall be deemed guilty of disorderly conduct. It is not, it should seem, necessary, however, to set out the nature of the breach in a conviction for such offence, the above form would suffice. But as this may admit of some doubt, it would be as well perhaps to insert the particulars of the breach of the license, as in form, *post*, No. 16.

[or "*cider and perry*"] *by retail, having a license under the provisions of an act passed in the first year of the reign of our lord the late king, William the Fourth, to permit the general sale of beer and cider by retail in England,* [or if licensed under the 4 & 5 Will. IV. c. 85, see form, *supra*, No. 12], *to wit, on* *at* , *did transgress and neglect* [or "*was a party in transgressing and neglecting,*" or "*did allow to be transgressed and neglected*"] *the conditions and provisions specified in such license in the house and premises situate at* , *licensed and specified in and by such license, that is to say, by then and there knowingly suffering certain unlawful games* [or "*gaming,*"] *to wit, an unlawful game of* rouge et noir, *and an unlawful game called hazard, to be played in the said house and premises* [state any other offence against the tenor of the license in this way,] *against the tenor of the said license and against the form of the statute in such case made and provided, whereby, &c.* [conclude, if an information, as in general form of information, *ante*, (No. 7,) or if a conviction, as in conviction, *ante*, (No. 9.)]

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s. 13, for an offence against tenor of license, *ante*, 73.

[State the formal parts of the information, as *ante*, (No. 7,) or of the conviction, as *ante*, (No. 9.) State the offence thus:] *that the said A. B. being a seller of beer, ale, and porter* [or "*cider and perry*"] *by retail, having a license under the provisions of an act passed in the first year of the reign of our lord the late king, William the Fourth, to permit the general sale of beer and cider by retail in England* [or if licensed under the 4 & 5 Will. IV. c. 85, see form, *supra*, No. 12,] *to wit, on* *at* *did knowingly sell, to wit, to one G. H.* [or "*to a certain person unknown*"] *certain beer, to wit,* [*one pint of ale,*] *made otherwise than from malt and hops, that is to say, made of, &c.* [here set out generally what it was made of, but if it cannot be ascertained what it was made of, omit this averment,] *contrary to the form of the statute in such case made and provided, whereby &c.* [conclude, if an information, as in general form of information, *ante*, (No. 7,) or if a conviction, as in conviction, *ante*, (No. 9.)]

(17.) Information or conviction for selling adulterated beer, *ante*, 74.

[State the formal parts of the information, as *ante*, (No. 7,) or of the conviction, as *ante*, (No. 9.) State the offence thus:] *that the said A. B. being a seller of beer, ale, and porter* [or "*cider and perry*"] *by retail, having a license under the provisions of an act passed in the first year of the reign of our lord the late king, William the Fourth, to permit the general sale of beer and cider by retail in England* [or if licensed under the 4 & 5 Will. IV. c. 85, see form, *supra*, (No. 12,)] *to wit, on* *at* *did mix and cause to be mixed divers drugs and other pernicious ingredients, to wit,* [here set out the ingredients shortly, perhaps the precise description of them might be omitted altogether,] *with a certain beer, to wit* [*one barrel of ale,*] *and did then and there in the house and premises of the said A. B. situate at* , *mentioned in and licensed by the said license, sell a certain quantity, to wit,* [*one pint*] *of the said beer so mixed with the said drugs and ingredients, to one G. H.* [or "*to a certain person unknown,*"] *contrary to the form of the statute in such case made and provided, whereby &c.* [conclude, if an information, as in general form of information, *ante*, (No. 7,) or if a conviction, as in conviction, *ante*, (No. 9.)]

(18.) The like, for mixing drugs in beer.

[State the formal parts of the information, as *ante*, (No. 7,) or of the conviction, as *ante*, (No. 9.) State the offence thus:] *that the said A. B. being a seller of beer, ale, and porter* [or "*cider and perry*"] *by retail, having a license under the provisions of an act passed in the first year of the reign of our lord the late king, William the Fourth, to permit the general sale of beer and cider by retail in England,* [or if licensed under the 4 & 5 Will. IV. c. 85, see the form, No. 12,] *to wit, on* *at* , *did fraudulently dilute and adulterate with* *certain beer, to wit,* [*one barrel of porter,*] *and did then and there, in the house and premises of the said A. B., situate at, &c. mentioned in and licensed by the said license, sell a certain quantity, to wit,* [*one pint*] *of the said beer, so diluted and adulterated, to one G. H.* [or "*to a certain person unknown,*"] *contrary to the form of the statute in such case made and provided, whereby, &c.* [conclude, if an information, as in general form, *ante*, (No. 7,) or if a conviction, as in form, *ante*, (No. 9.)]

(19.) The like, for adulterating beer.

[State the formal parts of the information, as *ante*, (No. 7,) or of the conviction, as *ante*, (No. 9.) State the offence thus:] *That one* , *of the parish of* *in the said county of* , *being at the time of committing the offence hereinafter-*

(20.) Information or conviction on 3 & 4 Vict. c. 61, c. 15, for selling

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beer, &c. after the hour appointed for closing the house elsewhere than in London and Westminster, the metropolitan boroughs, &c. &c. *ante*, 72.

mentioned a person licensed to sell beer, ale, and porter, [or "*cider and perry,*"] *by retail, under the provisions of the statutes to permit the general sale of beer and cider by retail in England in such case made and provided, did at the parish of aforesaid, in the county of aforesaid, unlawfully have and keep his house, commonly called and known by name and sign of , situate in the said parish of in the division of in the said county of , being the house mentioned in his license, open for the sale of beer* [or "*cider*] *by retail,* [or "*did sell and retail beer,*" or "*cider,*"] *to wit, pints thereof, at his said house,* [or "*did supply beer*" or "*cider,*"] *to be drunk and consumed by A. B. &c.* [or "*divers persons unknown,*"] *at his said house, after ten of the clock in the evening of a certain day in the week, to wit, Monday, the day of in the year aforesaid, to wit, from the hour of eleven of the clock to half-past eleven of the clock, in the evening of the said day, the said parish of and said house of the said not being within the cities of London or Westminster, or within the boundaries of any of the boroughs of Marylebone, Finsbury, the Tower Hamlets, Lambeth, or Southwark, as defined by an act passed in the session of parliament held in the second and third years of the reign of his late Majesty King William the Fourth, intituled,* "An Act to settle and describe the Divisions of Counties, and the Limits of Cities and Boroughs in England and Wales, in so far as respects the Election of Members to serve in Parliament," *and not being within the bills of mortality, and the said house of the said not being within any city, cinque port, town corporate, parish or place, the population of which, according to the last parliamentary census, exceeds two thousand five hundred persons, and not being within one mile measured by the nearest public street or path, according to the statute in such case made and provided, from any polling place used at the last election for any town having the like population and returning a member or members to serve in parliament, contrary to the form of the statute in such case made and provided, &c.* [conclude, if an information, as in general form of information, *ante*, (No. 7,) or if a conviction, as in conviction, *ante*, (No. 9.)]

(21.) The like, for selling beer, &c. in London or Westminster, or within the boundaries of the metropolitan boroughs, &c. at improper hours, &c., *ante*, 72.

[State the formal parts of the information, as *ante*, (No. 7,) or of the conviction, as *ante*, (No. 9.) State the offence thus:] *that one of the parish of in the city of London* [or "*Westminster,*"] *being at the time of the committing the offence hereinafter mentioned a person licensed to sell beer, ale, and porter,* [or "*cider and perry,*"] *by retail, under the provisions of the statutes to permit the general sale of beer and cider by retail in England in such case made and provided, did at the parish of in the city of London* [or "*Westminster*"] *unlawfully have and keep his house, commonly known by the name and sign of , situate* [as aforesaid,] *being the house mentioned in his said license, open for the sale of beer* [or "*cider*"] *by retail,* [or, "*did sell and retail beer*" or "*cider,*" *to wit, pints thereof, at his said house,* [or *did suffer beer* or "*cider*" *to be drunk and consumed by A. B.* or "*divers persons unknown,*" *at his said house,*] *before the hour of five o'clock in the morning,* [or "*after the hour of twelve of the clock at night*"] *of a certain day in the week, to wit, Monday, the day of in the year aforesaid, to wit, from the hour of of the clock to of the clock on the said day, contrary to the form of the statute in such case made and provided, whereby, &c.* [conclude, if an information, as in general form of information, *ante*, (No. 7,) or if a conviction, as in conviction, *ante*, (No. 9.)]

(22.) Information or conviction against a witness for not appearing to give evidence, *ante*, 77.

[State the formal parts of the information, as *ante*, (No. 7,) or of the conviction, as *ante*, (No. 9.) State the offence thus:] *that A. W. of in the said county, labourer, was on the day of instant, duly summoned as a witness to give evidence before J. P. and K. P. Esquires, two of her Majesty's justices of the peace in petty sessions, acting in and for the said county,* [or as the case may be,] *at in the said county, on the day of aforesaid, at the hour of* [*twelve in the forenoon*] *of the same day, on the part of one A. B.* [*the complainant, or the person accused,*] *touching a complaint against B. A. of in the said county, alehouse-keeper, victualler, and retailer of beer and ale,* [or "*cider and perry*" [as the case may be,] *for, &c.* [here state the alleged offence concisely,] *contrary to the form of the statute in such case made and provided; but that the said A. W. did wilfully neglect and refuse to appear at such time and place as aforesaid for the purpose aforesaid, and did not assign nor did there appear any reasonable excuse for such his neglect and refusal, whereby and for which neglect and refusal he hath forfeited a sum not exceeding ten pounds, to be awarded on conviction as may be thought fit.* [conclude, if an information, as *ante*, (No. 7,) or if a conviction, as *ante*, No. 9.)]

The forms relative to appeals in general will be found, *post*, title "*Appeal*," Vol. I., and may be readily adapted to an appeal under the 1 Will. IV. c. 64; or 4 & 5 Will. IV. c. 85, which only lies against a conviction for a third offence. See the 16th section of the 1 Will. IV. c. 64, *ante*, 78.

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(23.) Notice, &c. of appeal.

To and , justices of the peace acting in and for the Western division of , in the county of , and such other justices of the peace acting in and for the said division in the said county, as were present at a petty sessions held at , in and for the division aforesaid, in the county aforesaid, on the day of , A. D. .

Whereas by an order made by you or some of you on the said day of , at the said petty sessions of her Majesty's justices of the peace acting in and for the said division in the county aforesaid, holden at aforesaid, you or some of you did under colour of an Act passed in the fifth year of the reign of his late Majesty King William the Fourth, intituled, "An Act to amend an Act passed in the first year of the reign of his present Majesty, to permit the general Sale of Beer and Cider by Retail in England," *order, fix, and appoint, that in the working days of the week the hours of opening all such houses and premises in which beer and cider should be sold under the said Act within the town of W., and parishes of B., C., D., H., N. S., S., and W. F., within the Western division of aforesaid, in the county aforesaid, should be six o'clock in the morning from the 10th day of October then next until the 25th day of March following; and five o'clock in the morning from the 25th day of March then next until the 9th day of October then next following; and that the hour of closing the same should be nine o'clock at night from the said 10th day of October then next until the said 25th day of March following; and ten o'clock at night from the said 26th day of March then next until the said 9th day of October thence next following. And this is to give you, and each and every of you, notice, that I, A. B. residing at the town of W. in the parish of B. in the county aforesaid, retail brewer, and having a house and premises situate at W. aforesaid, licensed to sell beer under the said Act, and selling beer by retail therein, being a party aggrieved by the said order, do intend to appeal against such order to the justices of the peace in the next quarter sessions assembled and to be holden in and for the said county at . And take notice that I am a party aggrieved by the said order, amongst other reasons, on account of the short space of time during which I am thereby allowed to keep open my aforesaid house and premises, so that thereby I have many less opportunities for selling my beer and my sale and profits are greatly diminished. Dated this day of , A. D. 18 .*

Yours, &c.
A. B. of

(24.) Recognizance on appeal against conviction, *ante*, 79.

County of } BE it remembered, that on the day of , in the year of the } reign of our sovereign Lady Victoria, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, B. A. of in the said county, alehouse keeper, [or "*victualler*," as the case may be,] *C. D. of , in the county of , yeoman, and I. D. of the same place, yeoman, personally came before us, J. P. and K. P., Esquires, two of the justices of our said lady the queen assigned to keep the peace of the said county and acting in petty sessions for , and acknowledged themselves to owe to our said lady the queen, that is to say, the said B. A. the sum of pounds, and the said C. D. and I. D. each the sum of pounds separately, of good and lawful money of Great Britain, to be made and levied of their goods and chattels, lands and tenements respectively, to the use of our said lady the queen, her heirs and successors, if the said B. A. shall make default in the condition hereon indorsed,* [or "*hereunder written.*"]

Whereas the said B. A. was this day duly convicted before us the justices aforesaid, of having on, &c. [state the offence shortly from the conviction,] *being for his third offence, whereby and for which offence he the said B. A. hath forfeited the sum of pounds: Now the condition of the above* [or "*within*"] *written recognisance is such, that if the said B. A. shall duly prosecute an appeal against the said conviction at the next general* [or "*quarter*"] *sessions of the peace to be holden at , in and for the said* [county] *of aforesaid, and in case the said B. A. shall forthwith abide the judgment of the court thereupon, and pay such or cause to be paid the costs*

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as by the said court shall be awarded, then the said recognizance to be void, or else remain in full force.

Taken and acknowledged the day and year first above [or "*within*"] *written before us,* J. P. K. P.

(25.) Recognizance to bind informer to appear at sessions on an appeal, *ante*, 79.

County of } *BE it remembered, that on the day of , in the year of the reign of our sovereign Lady Victoria, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, A. I. of , in the county of , labourer, came before us, J. P. and J. O., Esquires, two of Her Majesty's justices of the peace for the said county of , and acknowledged to owe to our said lady the queen the sum of of lawful money of Great Britain, to be levied of his goods and chattels, lands and tenements, to the use of our said lady the queen, her heirs and successors, if the said A. I. shall make default in the condition following:*

Whereas the above bound A. I. on the day of instant, came before me, J. P. one of the said justices, and gave me to understand and be informed that one A. O. [here follow the words of the information,] *whereby he has forfeited the sum of , being for his third offence: Now the condition of this recognizance is such, that if the above bound A. I. shall appear at the next general quarter sessions* [or "*next general sessions*"] *of the peace to be holden at in and for the said county,* [*riding, city, liberty, town corporate,* or *place,* as the case may be,] *then and there to give evidence against the said A. O. so complained of and informed against, and not to depart without leave of the court, then this recognizance to be void.*

Acknowledged before us, the day and year first above written, J. P. J. O.

(26.) Warrant of distress under 1 Will. 4, c. 61, or 4 & 5 Will. 4, c. 85.

The form of the warrant of distress in pursuance of the 21st section of the 1 Will. IV. c. 64, *ante*, 81, may be collected from the above forms of informations, and the general form of a warrant of distress, *post*, title, "*Distress*," Vol. II.

(27.) Warrant of commitment under same acts.

The form of the warrant of commitment in pursuance of the 21st section of the 1 Will. IV. c. 64, *ante*, 81, may be collected from the above forms of informations, and the general form of a warrant of commitment, *ante*, 9, see the 27th section of the 1 Will. IV. c. 64, providing for the validity of the commitment, though informal, *ante*, 78.

(2.) Forms relative to the Wine, Spirit and Beer, &c. License, under 9 Geo. IV. c. 61.

(28.) Precept to the high constable to order petty constables to give notice of meeting for licensing public houses under 9 Geo. 4, c. 61, s. 2. (a)

County of } *TO A. B., Gentleman, High Constable of the division* [or "*hundred &c.*"] *of within the said county.*

We the majority of justices present at a petty session of the justices in the division of , in the county aforesaid, [or "*liberty of, &c.*" according to the fact,] *held this day in pursuance of the statute in that case made and provided, do hereby appoint the day of , at the hour of of the clock of the forenoon of that day, at , for holding a special sessions of justices, called the general licensing meeting for the said division* [or "*hundred, &c.*"] *for granting licenses for keeping inns, alehouses, and victualling-houses, to sell exciseable liquors by retail, to be drunk or consumed upon the premises of the applicant in the said division,* [or "*hundred*"]; *and we do hereby require you, within five days after receipt hereof, to order the constables within your constablewick to affix on the church door in their respective districts a notice of the day, hour and place at which such meeting is to be held as aforesaid, and to give or leave a copy of such notice at the dwellinghouse of every justice of the said division,* [or "*hundred, &c.*"] *and of every innkeeper who has given notice of his intention to keep an inn and apply for an ale license within their respective districts. Dated this day of*

A. B., C. D., E. F., G. H., &c.

[the signatures of the majority of justices.]

(a) The form of a precept to the high constable to give notice of an adjourned meeting under the 5th section, may be readily framed from this. See *ante*, 89.

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(29.) High constable's order to petty constables to give notice of licensing meeting, under 9 Geo. 4, c. 61, s. 2. (a)

County of } *BY virtue of a precept from her Majesty's justices of the peace*
hundred [or "*division*"] *of* } *acting within the said hundred* [or "*division*"] *to me directed; you are hereby required, on sight hereof, to affix on the church door within your district a notice that a special session of justices, called the general licensing meeting, will be holden on the day of next, at the hour of of the clock of the forenoon of the same day at for granting licenses for keeping inns, alehouses, and victualling-houses, to sell exciseable liquors by retail, to be drunk or consumed upon the premises therein to be specified; and also to leave a copy of such notice at the dwelling house of every justice of the peace of the said division* [or "*hundred*"] *in your district, and also at the dwelling-house of every innkeeper or person who has given notice of his intention to keep an inn and to apply for an ale license within your district.*

(30.) Notice of intended application for a license to sell liquors by retail in an inn under 9 Geo. 4, c. 61. (b)

TO the Overseers of the Poor, and the constable of the ["*parish*"] *of , and to all whom it may concern.*

I A. B. [state the trade or occupation,] *now residing at , in the parish of in the county of , and for six months last past having resided at , in the parish of* [or "*of ,*"] *do hereby give notice, that* [if application is intended to be made to a special session, here state the cause for such application] *it is my intention to apply at the general annual licensing meeting* [or "*at the special session*"] *to be holden at , on the day of next ensuing, for a license to sell exciseable liquors by retail, to be drunk or consumed in the house or premises thereunto belonging, situate at* [here describe the house intended to be opened, specifying the situation of it, the person of whom rented, the present or late occupier, whether kept or used as an inn, alehouse, or victualling-house, within the three years preceding; and if so, by whom and under what sign:] *and which I intend to keep as an inn, alehouse, or victualling-house.*

Given under my hand this day of , one thousand eight hundred and .

N.B.—A copy of this notice to be served upon one of the overseers of the poor and upon one of the constables or other peace officers of the parish in which is situate the house intended to be opened.

(31.) Notice of intended application for permission to transfer such license under 9 Geo. 4, c. 61, s. 14. (c)

TO the Overseers of the Poor and the Constables of the ["*parish*"] *of , in the county of , and to all whom it may concern.*

I A. B. [or "*we the executors, &c. &c. of the late A. B.*"] *victualler, being authorised by virtue of the license granted to me,* [or "*him,*" or "*her,*"] *at the general annual licensing meeting* [or "*special session*"] *held at , on the day of , one thousand eight hundred and , to sell exciseable liquors by retail, to be drunk or consumed in the house or premises thereunto belonging, situate at* [here describe the situation of the house] *and commonly known by the sign of the , do hereby give notice, that it is my* [or *our*] *intention to apply at the special session to be holden at , in the county of , on the day of , one thousand eight hundred and , for permission to transfer the above-mentioned license to C. D.* [state his trade or occupation] *now residing at , in the parish of , in the county of , and for six months last past having resided at , [or "in the several parishes of ,"] in the county of , [or "counties of ,"] that the said C. D. intending to keep as an inn, alehouse, or victualling-house, the said house so as aforesaid kept by me* [or "*us*"] *may sell exciseable liquors by retail, to be drunk or consumed in the said house or premises thereunto belonging.*

Given under my hand this day of , one thousand eight hundred and

N.B.—A copy of this notice to be served upon one of the overseers of the poor, and upon one of the constables or other peace officers of the parish in which is situate the house kept by the person whose notice it is.

(32.) Form of license to keep an inn, &c. under 9 Geo. 4, c. 61, *ante*, 90.

At the general annual licensing meeting [or "*an adjournment of the general annual licensing meeting,*" or "*at a special petty session,*"] *of her Majesty's justices of the*

(a) The form of the high constable's order to petty sessions to give notice of an adjourned sitting under the 5th section, may be readily framed from this.

(b) This form is prescribed by the act.

(c) The act gives this form. See *ante*, 92.

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peace, acting for the division [or "*liberty, &c.*" as the case may be,] *of* , *in the county of* , *holden at* , *on the* *day of* , *in the year one thousand eight hundred and* , *for the purpose of granting licenses to persons keeping inns, alehouses, and victualling-houses, to sell exciseable liquors by retail, to be drunk or consumed on the premises, we, being* *of her Majesty's justices of the peace acting for the said county,* [or *liberty, &c. &c.*" as the case may be,] *and being the majority of those assembled at the said session, do hereby authorise and empower A. L. now dwelling at* , *in the parish of* , *and keeping* [or "*intending to keep*"] *an inn, alehouse or victualling-house, at the sign of the* , *in the* *of* , *in the division and county aforesaid, to sell by retail therein, and in the premises thereunto belonging, all such exciseable liquors as the said A. L. shall be licensed and empowered to sell under the authority and permission of any excise license, and to permit all such liquors to be drunk or consumed in his said house or in the premises thereunto belonging; provided that he* [or "*she*"] *do not fraudulently dilute or adulterate the same, or sell the same knowing them to have been fraudulently diluted or adulterated; and do not use in selling thereof any weights or measures that are not of the legal standard; and do not wilfully or knowingly permit drunkenness or other disorderly conduct in his* [or *her*] *house or premises; and do not knowingly suffer any unlawful games or any gaming whatsoever therein; and do not knowingly permit or suffer persons of notoriously bad character to assemble and meet together therein; and do not keep open his or her house, except for the reception of travellers, nor permit or suffer any beer or other exciseable liquor to be conveyed from or out of his* [or *her*] *premises during the usual hours of the morning and afternoon divine service in the church or chapel of the parish or place in which his* [or *her*] *house is situated, on Sundays, Christmas-day, or Good Friday, but do maintain good order and rule therein; and this license shall continue in force from the* *day of* *next until the* *day of* *then next ensuing, and no longer: provided that the said A. L. shall not in the mean time become a sheriff's officer, or other officer executing the process of any court of justice, in either of which cases this license shall be void. Given under our hands and seals on the day and at the place first above written.*

(33.) License granted at a special meeting, in case of death, &c. under 9 Geo. 4, c. 61, s. 14, *ante*, 92.

At a special meeting of her Majesty's justices of the peace acting in and for the division of the hundred of [or "*liberty, &c.*" according to the fact] *in the county of* , *holden at* , *within and for the said division* [or "*liberty*"] *on the* *day of* *one thousand eight hundred and* , *for the purpose of authorising and empowering persons to open or continue open, in certain cases, common inns, alehouses, or victualling-houses.*

It having been duly made to appear that at the last general annual licensing meeting [or "*an adjournment of the last general annual licensing meeting,*" or "*at a special session*"] *holden within the said division, for the purpose of licensing persons to keep common inns, alehouses, or victualling-houses within the said divison,* [or "*liberty, &c.*"] *A. B. of* , [in cases of death add "*since dead,*"] *was authorised and empowered, at the sign of the* , *in the parish of* , *in the division* [or *liberty*"] *and county aforesaid, to keep a common inn, alehouse, or victualling-house, and to sell certain exciseable liquors under such authority and permission; and also that the said A.B. died on or about the* *day of* [or "*hath removed from the said house,*" or "*hath yielded up the possession of the said house to C. D.*" or "*house hath become unoccupied,*" as the case may be.]

We being [number] *of her Majesty's justices of the peace acting in and for the said division and county, assembled at the said special meeting, and being the majority there assembled, do authorise and empower the said C. D. (he having produced the certificate required by law) to continue open the said house as an alehouse or victualling-house, and to utter and sell therein, and in the premises thereunto belonging, and not elsewhere, victuals and all such exciseable liquors as the said A. B. hath been* [in case of death "*was*"] *licensed and empowered to sell under the authority and permission of such excise license granted and assigned as aforesaid, to sell by retail therein, and in the premises thereunto belonging, all such exciseable liquors as the said A. B. shall be licensed and empowered to sell under the authority and permission of any excise license, and to permit all such liquors to be drunk or consumed in his said house or in the premises thereunto belonging, and that the said A. B. hath been* [in case of death "*was*"] *duly licensed and empowered. Provided that the said C. D. do not fraudulently dilute or adulterate the same, or sell the same knowing them to have been fraudulently diluted or adulterated; and do not use in selling thereof any weights or measures that are not of the legal standard; and do not wilfully or knowingly permit drunkenness or other*

disorderly conduct in his [or her] house or premises; and do not knowingly suffer any unlawful games or any gaming whatsoever therein; and do not knowingly permit or suffer persons of notoriously bad character to assemble and meet together therein; and do not keep open his or her house except for the reception of travellers, nor permit nor suffer beer or other exciseable liquor to be conveyed from or out of his [or her] premises, during the usual hours of the morning and afternoon divine service in the church or chapel of the parish or place in which his [or her] house is situated, on Sundays, Christmas-day, or Good Friday, but do maintain good order and rule therein; and this license shall continue in force from the day of next until the day of then next ensuing, and no longer: provided that the said C. D. shall not in the meantime become a sheriff's officer, or officer executing the process of any court of justice, in either of which cases this license shall be void. Given under our hands and seals, on the day and at the place first above written.

19. *Forms as to Public Houses.*

The general form of an information or summons for an offence against the 1 Will. IV. c. 64, *ante*, 126, may be adopted for an offence against the 9 Geo. IV. c. 61, *mutatis mutandis*.

(34.) General form of information and summons for an offence under 9 Geo. 4, c. 61.

The 32d section of the 9 Geo. IV. c. 61, prescribes a general form of conviction for an offence against that act, and the same should therefore be adopted. See the form, *ante*, 98.

(35.) General form of conviction on like act.

} BE it remembered, that on this day of , in the year of our
to wit. } Lord , A.B. of the parish of , in the county of , was duly convicted before C. D. and E. F. two of her Majesty's justices of the peace for the said county of , for that he the said A. B. on &c., at &c., did sell to one G. H. a certain exciseable liquor called [gin] by retail, that is to say, [one pint of gin] at and for the price of [one shilling and sixpence,] to be drunk and consumed in his house, situate in the parish aforesaid, in the county aforesaid, without being duly licensed so to do, contrary to the form of the statute in such case made and provided; whereby the said A. B. has forfeited the sum of [not exceeding 20*l.* nor less than 5*l.*] *pounds, this being adjudged to be the* [*first*] *offence of the said A. B. against the provisions of an act to regulate the granting of licenses to keepers of inns, alehouses, and victualling-houses in England, besides the costs of this conviction, which we C. D. and E. F., the justices aforesaid, do hereby assess at the sum of shillings, pursuant to the statute in such case made and provided. Given under our hands and seals on the day and year first above written.*

(36.) Conviction on 9 Geo. 4, c. 61, s. 18, for selling wine and spirits, &c. by retail, not being licensed, *ante*, 94.

} BE it remembered, that on this day of , in the year of our Lord
to wit. } , A. B. was duly convicted before us C. D. and E. F. two of her Majesty's justices of the peace for the county of , for that he the said A. B. being duly licensed by a certain license to sell exciseable liquors in a certain victualling-house, at the sign of the , in the parish of , in the county of , specified in the said license, did, on &c., at &c., sell to one G. H. a certain exciseable liquor called [gin] by retail, that is to say, [one pint of gin] at and for the price of [one shilling and sixpence,] to be drunk and consumed in his house, situate in the parish aforesaid, not being the house or premises specified in such his license, or any part or portion thereof, contrary to the form of the statute in such case made and provided; whereby the said G. H. has forfeited the sum of [not more than 20*l.* nor less than 5*l.*] *pounds, this being adjudged to be the* [*first*] *offence against the provisions of an act to regulate the granting of licenses to keepers of inns, alehouses, and victualling-houses in England, besides the costs of this conviction, which we the said C. D. and E. F. the said justices, do hereby assess at the sum of shillings, pursuant to the statute in such case made and provided. Given under our hands and seals on the day and year first above written.*

(37.) Conviction on like act of a licensed publican for selling an exciseable liquor in premises not being those licensed, *ante*, 94.

} BE it remembered, that on this day of , in the year of our Lord
to wit. } , A. B. of , victualler, was duly convicted before C. D. and

(38.) Conviction on like act, s. 19, of a licensed per-

19. *Forms as to Public Houses.*

son for not using the standard measures, *ante*, 95.

E. F. two of her Majesty's justices of the peace for the county of , acting for the division of , for that he the said A. B. being duly licensed under the act made and passed in the ninth year of the reign of his late Majesty King George the Fourth, to regulate the granting of licenses to keepers of inns, alehouses, and victualling-houses in England, to sell exciseable liquors by retail, to be drunk or consumed in his house or premises, situate, to wit, in the parish of , in the county aforesaid, to wit, on, &c., at, &c., aforesaid, on being then and there required by one E. F. to sell and dispose of to him a certain quantity of an exciseable liquor, to wit [one pint of gin] (not being a quantity less than half a pint) by retail therein, by a pint measure sized according to the standard, for a certain price, to wit, [the sum of one shilling and sixpence] did sell and dispose of to the said E. F. the said quantity of a [pint of gin] by a [pint] measure not sized according to the standard, contrary to the form of the said statute, and whereby the said A. B. hath forfeited the said illegal pint measure, and also the sum of shillings [not exceeding 40*s.*] *this being adjudged, &c.* [Conclude as in form (No. 37.)]

(39.) Conviction on like act, s. 21, of a licensed publican, for a first or second offence against the tenor of his license. (*a*)

BE it remembered, that on this day of , in the year , A. B. of , victualler, was duly convicted before C. D. and E. F. two of her Majesty's justices of the peace for the county of , acting for the [*division*] *of , for that he the said A. B. being licensed under the statute made and passed in the ninth year of the reign of his late Majesty King George the Fourth, to regulate the granting of licenses to keepers of inns, alehouses, and victualling houses in England, to keep an inn, alehouse, or victualling house at the sign of the , in the parish of , in the* [*division*] *aforesaid of the county aforesaid, did, on, &c. at, &c.* [here state the offence, which may be thus, "*knowingly suffer certain unlawful games, that is to say, a certain unlawful game called* rouge et noir *and a certain unlawful game called* hazard *to be played in the house so licensed aforesaid*"] *against the tenor of the license so to him granted as aforesaid, and against the provisions of the said act relative to the maintenance of good order and rule; whereby the said A. B. has forfeited the sum of , this being adjudged to be the first* [or "*second*," as the case may be] *offence of the said A. B. against the said provisions of the said act to regulate the granting of licenses to keepers of inns, alehouses, and victualling houses in England, besides the costs of this conviction, which we, C. D. and E. F., the said justices, do hereby assess at the sum of* [*twenty*] *shillings, pursuant to the statute in such case made and provided. Given, &c.*

(40.) Notice of appeal. Recognizance. Warrant of distress. Commitment, &c.

The forms of notice of appeal, recognizance thereon, warrant of distress and commitment, &c. may be readily framed by those directed, *ante*, (Nos. 23, 24, 25, 26, 27.)

(3.) Miscellaneous Forms.

(41.) Information on drunkenness; on 21 J. c. 7. (*b*)

County of } *THE information of A. I. of , in the county aforesaid, (yeoman), exhibited before me, J. P. Esquire, one of her Majesty's justices of the peace for the said county, the day of , in the year , who on his oath saith,*

That A. O. of , in the county aforesaid, labourer, on the day of , in the year aforesaid, at the parish of in the said county, was drunk, contrary to the statute in such case made and provided: and thereupon he the said A. I. prayeth that he the said A. O. may forfeit the sum of 5s. to the use of the poor of the said parish, as by the said statute is required.

Before me, *A. I.*

J. P.

(*a*) See forms on 1 Will. IV. c. 64, *ante*, (Nos. 14, 15, 16); see the form of license, *ante*, (No. 32.)

(*b*) As to the offence, see *ante*, p. 112.

19. *Miscellaneous Forms.*

County of } To the Constable of

FORASMUCH as information upon oath hath been made before me, J. P. Esquire, one of her Majesty's justices of the peace for the said county, that A. O. of , in the county aforesaid, labourer, on the day of , in the year , at the parish of , in the county aforesaid, was drunk, contrary to the statute in such case made and provided: These are therefore to require you to summon the said A. O. to appear before me, at , in the said county, on , the day of , to answer unto the said information, and to show cause why the penalty of 5s. should not be levied on the goods of him the said A. O. for the said offence, and be you then and there to certify what you shall have done in the premises. Given under my hand and seal, the day of , in the year .

(42.) Summons thereon.

County of } BE it remembered, that on the day of , in the year of our Lord , at the parish of , in the county of , I, J. P. Esquire, one of the justices of our Lady the Queen, assigned to keep the peace in and for the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, personally saw one A. O. of the parish of aforesaid, labourer, drunk, contrary to the form of the statute in that case made and provided: Whereupon it is considered and adjudged by me the said justice, that the said A. O. be convicted, and he is by me accordingly hereby convicted of the offence of being drunk, upon my own view as aforesaid, according to the form of the statute in that case made and provided: And I do hereby adjudge that the said A. O. for the said offence hath forfeited the sum of 5s. to be paid and distributed as the law directs. In witness whereof I the said justice to this present conviction have set my hand and seal, the day and year above written.

(43.) Conviction for drunkenness on justice's own view. (*a*)

County of } To the Churchwardens of the parish of in the said county.

FORASMUCH as A. O. of , in the county aforesaid, labourer, is convicted before me, J. P. Esquire, one of her Majesty's justices of the peace for the said county, for that he the said A. O. on the day of , in the year , at the parish of , in the said county, was drunk, contrary to the statute in such case made and provided; whereby he hath forfeited the sum of 5s. to the use of the poor of the said parish: These are therefore to require you to demand and receive of and from him the said A. O. the said sum of 5s., to be by you accounted for to the use aforesaid: And if he shall refuse or neglect to pay the same, by the space of one week after such demand made, that then you certify to me such refusal or neglect, to the end that such proceeding may be had thereupon as to justice doth appertain. Given under my hand and seal, the day of , in the year .

(44.) Warrant to churchwardens (if they are not present at the conviction, or the offender makes default by not appearing) to receive the penalty for drunkenness; by stat. 21 J. c 7.

County of } To the Constable of , in the said county.

WHEREAS A. O. of , in the parish of , in the county aforesaid, labourer, was, on the day of , convicted before me , one of her Majesty's justices of the peace for the said county, for that he the said A. O. was drunk, on the day of , at aforesaid, in the parish and county aforesaid, by which he hath forfeited the sum of 5s. And whereas I the said did issue my warrant on the day of , to the churchwardens of the parish of aforesaid, to demand and receive the said sum of 5s. of and from the said A. O.: And whereas it duly appears to me, as well on the oath of C. W., churchwarden of the parish of aforesaid, as otherwise, that they the said churchwardens did, on the day of , demand the said sum of 5s. of and from the said A. O., but that he the said A. O. hath neglected to pay the same as aforesaid, and that the same is not yet paid: These are therefore to command you forthwith to levy the said sum by distraining the goods of him the said A. O. And if within the space of [six] days next after such distress by you taken, the said sum,

(45.) Warrant to levy the penalty of drunkenness, on non-payment; by stat. 21 J. c. 7. (*b*)

(*a*) For the general form of convictions, see *post*, title "*Conviction*," Vol. I. Where the justice convicts on his own view, there is no occasion for any information or summons.

(*b*) See general form of warrant, *post*, title "*Distress*," *under justices' warrant*, Vol. II.

19. *Miscellaneous Forms.*

together with reasonable charges for taking and keeping the said distress, shall not be paid, that then you do sell the said goods so by you distrained as aforesaid, and out of the money arising by such sale, that you do pay the said sum of 5s. to the churchwardens of the said parish, for the use of the poor of the said parish, rendering to him the said A. O. the overplus upon demand, the necessary charges of taking, keeping, and selling the said distress being first deducted. And if the said A. O. be not able to pay the said sum of 5s. and sufficient distress cannot be found whereon to levy the said sum, that you certify the same to me, together with the return of this warrant. Given under my hand and seal, this day of

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(46.) Certificate by constable of want of distress.

County of } A. C. constable of , in the said county, maketh oath this day } of , in the year , before me the justice within mentioned, that he hath made diligent search for, but doth not know of, nor can find any goods of the within-mentioned A. O. whereon to levy the said sum of 5s.

Before me the said *A. C.*
justice, J. P.

County of } To the Constable of in the said county.

(47.) Commitment to the stocks for drunkenness on inability to pay the penalty; on stat. 21 J. c. 7.

WHEREAS A. O. of in the said county, labourer, was on the day of convicted before me , one of her Majesty's justices of the peace for the said county, for that he the said A. O. was on the day of at the parish of in the said county, drunk at aforesaid, in the parish of , in the said county; whereby he hath forfeited the sum of 5s. And whereas it duly appears to me that the said A. O. is not able to pay the said sum of 5s., these are therefore to require you, in her Majesty's name, to set him the said A. O. in the stocks, there to remain for the space of six hours. Given under my hand and seal, the day of

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(48.) Indictment for selling ale on a Sunday.

—— (venue) THE jurors for our Lady the Queen upon their oath present, that A. B. late of the parish of , in the county of , labourer, on the day of , in the year of the reign of our Lady the now Queen Victoria, being a common Sabbath breaker and profaner of the Lord's day, on, &c. and on divers other days respectively, being the Lord's day, and between that day and the day of the taking of the said inquisition, during the time of divine service on each of the said respective days, to wit, at the hour of twelve on each of those days at the parish aforesaid, in the county aforesaid, in the dwelling-house of him the said A. B. there situate, being a common tippling-house, did openly sell and utter and cause to be sold and uttered ale and beer and other liquors to divers idle and ill-disposed persons, whose names to the jurors aforesaid are as yet unknown, and that the said A. B. on the said, &c. and on divers other days, during the time of divine service on each respective day, at, &c., in his said dwelling-house, did unlawfully and wilfully permit and suffer divers idle and ill-disposed persons, whose names to the jurors aforesaid are as yet unknown, to remain and continue drinking and tippling, to the common nuisance of her Majesty's liege subjects, to the evil example of all others, and against the peace of our said Lady the Queen, her crown and dignity.

Alias Dictus.

THE term *alias dictus* is used for the term "otherwise" in describing a defendant in an indictment or information where he has gone by two or more different names. Though usual, it is not necessary thus to describe the defendant. What comes under the alias dictus is not traversable. (See further, *post*, "*Indictment*," Vol. III.)

Alibi.

THIS term is used to express that defence in a criminal prosecution where the party accused, in order to prove that he could not have committed the crime charged upon him, offers evidence that he was in a different place at the time of its commission.

Aliens. (a)

I. *General Observations as to*, 139.

II. *The Registration of, and Expulsion from, and Detention in this Country*, 140.

III. *Trial and Disqualification of, as Jurors*, 142.

I. General Observations as to.

Who are.

AN alien, generally speaking, is one born in a foreign country, out of the allegiance of the king. (4 *Bla. Com.* 372.) (*b*)

(*a*) As to aliens in general see 1 Chit. Com. Law, 131 to 168; Tucker's Remarks on the Naturalization Bill.

(*b*) Natural-born subjects are persons born within the allegiance, power, or protection of the crown of England, which terms embrace not only persons born within the dominions of his Majesty or of his homagers, and the children of subjects in the *service* of the King abroad, and the King's children, and the heirs of the crown, all of whom are natural-born subjects by the *common law*, but also, under various statutes (viz. 7 Ann. c. 5; 4 Geo. II. c. 21; 13 Geo. III. c. 27,) all persons, though born abroad, whose *fathers*, or *grandfathers* by the *father's* side, were natural born subjects at common law, unless the father or paternal grandfather, through whom the claim is made, was at the time of the birth of such children liable, in case of his return into this country, to the penalties of treason or felony, or was in the actual service of any foreign prince then at enmity with the crown of England, excepting always, for the benefit both of the common law and of the statutes, those artificers and manufacturers who are declared aliens by 5 Geo. I. c. 27; see 1 Chit. Com. Law, 117, 119, 130. Artificers, however, may now go abroad, 5 Geo. IV. c. 97.

Persons born in transmarine territories belonging to the King of England in any other right than that of the *English crown*, as, for instance, the Hanoverians and persons doing service to the King as officers of such transmarine territories, are not natural-born subjects, see *Craw* v. *Ramsey*, *Vaughan*, 286.

A child born out of the allegiance of the crown of England is not entitled to be deemed a natural-born subject unless the father be at the time of the birth of the child not a subject only but a subject by birth. Therefore children born in the United States of America since the recognition of their independence, of parents born there before that time, and continuing to reside there afterwards, are aliens, and cannot inherit lands here. *Doe* d. *Thomas* v. *Acklam*, 2 *Barn. & Cres.* 779; 4 *D. & R.* 394, *S. C.*

But children born in America since the recognition of their independence, of parents who resided there before, but who were natural-born British subjects, and at the time of the separation of the two countries adhered to the British government, are not aliens, and are capable of inheriting lands here. (*Doe* d. *Auchmuty* v. *Mulcaster*, 5 *B. & C.* 771; 8 *D. & R.* 593, *S. C.*; and see *Doe d. Birtwistle* v. *Vardill*, 8 *D. & R.* 185. As to who is an American citizen, see *Rex* v. *Bruce*, 2 *C. & J.* 436; and see further, *Doe* d. *Stansbury* v. *Arkwright*, 5 *C. & P.* 575; *Sutton* v. *Sutton*, 1 *Russ. & M.* 663.)

1. *Observations as to.*

Jealousy against.

The common law of this country has always been jealous of foreigners; from the Conquest till upwards of 200 years afterwards, it does not appear that strangers were permitted to reside in England even on account of commerce beyond a limited time, except by a special warrant, for they were considered only as sojourners coming to a fair or market, and were obliged to employ their landlords as brokers to buy and sell their commodities; and we find that one stranger was often arrested for the debt or punished for the misdemeanor of another, as if all strangers were to be looked upon as a people with whom the English were in a state of perpetual war, and therefore might make reprisals on the first they could lay hands on. (*Tucker's Remarks on Naturalization Bill*, 2, 3, 13, 15; 2 *Inst.* 204; *Rymer's Fœdera*, Vols. I. II. III. IV.; *Anderson's History of Commerce*, 237, 242)

The privileges and disabilities of aliens, which will be here noticed, are—As respects the registration of them, their expulsion from and detention in this kingdom; and—As respects their offences and trial, and qualifications as jurors and witnesses.

II. Regulations as to Registration of Aliens, and their Expulsion from and Detention in this Country.

6 Will. 4, c. 11.

7 Geo. 4, c. 51, repealed.

By stat. 6 Will. IV. c. 11, intituled, "*An Act for the Registration of Aliens, and to repeal an Act passed in the Seventh Year of the Reign of his late Majesty for that purpose,*" [19th May, 1836,] reciting, "Whereas in the seventh year of the reign of his late majesty an act was passed, intituled 'An Act for the Registration of Aliens:' and whereas it is expedient that the said act should be repealed, and that provisions in respect of aliens should be made in lieu of the regulations therein contained: it is therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that the said act shall be and is hereby repealed."

Masters of vessels arriving from foreign parts to declare what aliens are on board or have landed from their vessels.

Sect. 2. "The master of every vessel which, after the commencement of this act, shall arrive in this realm from foreign parts, shall immediately on his arrival declare in writing, to the chief officer of the customs at the port of arrival, whether there is, to the best of his knowledge, any alien on board his vessel, and whether any alien hath, to his knowledge, landed therefrom at any place within this realm, and shall in his said declaration specify the number of aliens (if any) on board his vessel, or who have, to his knowledge, landed therefrom, and their names, rank, occupation, and description, as far as he shall be informed thereof; and if the master of any such vessel shall refuse or neglect to make such declaration, or shall wilfully make a false declaration, he shall for every such offence forfeit the sum of twenty pounds, and the further sum of ten pounds for each alien who shall have been on board at the time of the arrival of such vessel, or who shall have, to his knowledge, landed therefrom within this realm, whom such master shall wilfully have refused or neglected to declare; and in case such master shall neglect or refuse forthwith to pay such penalty, it shall be lawful for any officer of the customs, and he is hereby required, to detain such vessel until the same shall be paid: provided always, that nothing hereinbefore contained shall extend to any mariner actually employed in the navigation of such vessel during the time that such mariner shall remain so actually employed."

Penalty for omission of declaration.

Not to extend to foreign mariners navigating the vessel.

Alien on arrival from abroad to declare his name, description, &c. and produce his passport.

Sect. 3. "Every alien who shall after the commencement of this act arrive in any part of the United Kingdom from foreign parts, shall immediately after such arrival present and show to the chief officer of the customs at the port of debarkation, for his inspection, any passport which may be in his or her possession, and declare in writing to such chief officer, or verbally make to him a declaration, to be by him reduced into writing, of the day and place of his or her landing, and of his or her name, and shall also declare to what country he or she belongs, and is subject, and the country and place from whence he or she shall then have come; which declaration shall be made in

or reduced into such form as shall be approved by one of his majesty's principal secretaries of state; and if any such alien coming into this realm shall neglect or refuse to present and show any passport which may be in his or her possession, or if he or she shall neglect or refuse to make such declaration, he or she shall forfeit the sum of two pounds."

2. *Registration of, &c.*

6 Will. 4, c. 11.

Sect. 4. "The officer of the customs to whom such passport shall be shown and declaration made, shall immediately register such declaration in a book to be kept by him for that purpose (in which book certificates shall be printed in blank, and counterparts thereof, in such form as shall be approved by one of his majesty's principal secretaries of state), and shall insert therein the several particulars by this act required in proper columns, in both parts thereof, and shall deliver one part thereof to the alien who shall have made such declaration."

Officer of customs to register the declaration, and deliver a certificate to the alien.

Sect. 5. "The chief officer of the customs in every port shall within two days transmit a true copy of the declaration of every master of a vessel, and a true copy of every such certificate, if in Great Britain, to one of his majesty's principal secretaries of state, and if such alien shall have arrived from any foreign country in Ireland, he shall transmit a true copy of such declaration and of such certificate to the chief secretary for Ireland."

Officer of customs to transmit declaration, &c. to secretary of state.

Certificate of alien departing the realm to be transmitted to secretary of state.

Sect. 6. "Any alien about to depart from this realm shall, before his or her embarkation, deliver any certificate which he or she shall have received under the provisions of this act to the chief officer of the customs at the port of departure, who shall insert therein that such alien hath departed this realm, and shall forthwith transmit the same to one of his majesty's principal secretaries of state, or to the chief secretary for Ireland, as the case may be, in the like manner as hereinbefore is directed in respect to the certificate given to an alien on his or her arrival in this realm."

Sect. 7. "If any certificate issued to any alien by virtue of this act shall be lost, mislaid, or destroyed, and such alien shall produce to one of his majesty's justices of the peace proof thereof, and shall make it appear to the satisfaction of such justice that he or she hath duly conformed with this act, it shall be lawful for such justice, and he is hereby required to testify the same under his hand, and such alien shall thereupon be entitled to receive from one of his majesty's principal secretaries of state, or from the chief secretary for Ireland, as the case may be, a fresh certificate, which shall be of the like force and effect as the certificate so lost, mislaid, or destroyed."

New certificates to be issued in lieu of such as are lost.

Sect. 8. "All certificates hereinbefore required to be given shall be given without fee or reward whatsoever, and every person who shall take any fee or reward of any alien or other person, for any certificate, or any other matter or thing done under this act, shall forfeit for every such offence the sum of twenty pounds; and every officer of the customs who shall refuse or neglect to make such entry as aforesaid, or grant any certificate thereon, in pursuance of the provisions of this act, or shall knowingly make any false entry, or neglect to transmit the copy thereof, or to transmit any declaration of the master of a vessel, or any declaration of departure, in manner directed by this act, shall forfeit for every such offence the sum of twenty pounds."

Certificate to be granted without fee. Penalty.

Sect. 9. "If any person shall wilfully make or transmit any false declaration, or shall wilfully forge, counterfeit, or alter, or cause to be forged, counterfeited, or altered, or shall utter, knowing the same to be forged, counterfeited, or altered, any declaration or certificate hereby directed, or shall obtain any such certificate under any other name or description than the true name and description of the alien intended to be named and described, without disclosing to the person granting such certificate, the true name and description of such alien, or shall falsely pretend to be the person intended to be named and described in any such certificate, every person so offending shall, upon conviction thereof before two justices, either forfeit any sum not exceeding one hundred pounds, or be imprisoned for any time not exceeding three calendar months, at the discretion of such justices."

Penalty for forging certificates, &c.

Sect. 10. "All offences against this act shall be prosecuted within six calendar months after the offence committed; and all such offences shall be prosecuted before two or more justices of the peace of the place where the

Prosecution of offences.

2. *Registration of, &c.*

6 Will. 4, c. 11.

offence shall be committed, who are required, in default of payment of any pecuniary penalty, to commit the offender to the common gaol for any time not exceeding one calendar month, unless the penalty shall be sooner paid, where such penalty shall not exceed the sum of twenty pounds, and forthwith to report to one of his Majesty's principal secretaries of state, or to chief secretary for Ireland, as the case may require, the conviction of every offender under this act, and the punishment to which he is adjudged; and no writ of certiorari or of advocation or suspension shall be allowed to remove the proceedings of any justices touching the cases aforesaid, or to supersede or suspend execution or other proceeding thereupon."

Not to affect foreign ministers or their servants; nor aliens who have been resident three years, and obtained certificate thereof; nor aliens under fourteen years of age.

Sect. 11. "Provided always, and be it further enacted, that nothing in this act contained shall affect any foreign ambassador or other public minister duly authorised, nor any domestic servant of any such foreign ambassador or public minister, registered as such according to law, or being actually attendant upon such ambassador or minister; nor any alien who shall have been continually residing within this realm for three years next before the passing of this act, or who shall hereafter at any time complete such residence of three years, and who shall have obtained from one of his Majesty's principal secretaries of state, or from the chief secretary for Ireland, a certificate thereof: nor any alien in respect of any act done or omitted to be done, who shall be under the age of fourteen years at the time when such act was so done or omitted to be done: provided always, that if any question shall arise whether any person alleged to be an alien, and to be subject to the provisions of this act, is an alien or not, or is or is not subject to the said provisions or any of them, the proof that such person is, or by law is to be deemed to be, a natural-born subject of his majesty, or a denizen of this kingdom, or a naturalized subject, or that such person, if an alien, is not subject to the provisions of this act or any of them, by reason of any exception contained in this act or otherwise, shall lie on the person so alleged to be an alien and to be subject to the provisions of this act."

Commencement of act.

Sect. 12. "This act shall commence and take effect from and after the first day of July in the present year."

III. Offences and Trial and Disqualification of, as Jurors, &c.

Offences by, in this country.

Aliens and denizens committing offences here are subject to the same laws and punishments as natural-born subjects; and it is no answer to an indictment, that the act charged against them is not an offence in their own country. (*Reg.* v. *Esop*, 7 *C. & P.* 456.) But such a circumstance would be taken into consideration in mitigation of punishment An alien *residing* here may be indicted for high treason if he aid even his own countrymen in acts of hostility to this country (1 *Hawk.* c. 17, s. 5.) But aliens who in an hostile manner invade this kingdom, whether their king is at war or peace with it, and whether they come by themselves or in company with English traitors, cannot be punished as traitors, but must be dealt with by martial law. (1 *Hawk.* c. 17, s. 6; 3 *Inst.* 11.)

Offence abroad.

In *R.* v. *Depardo*, (1 *Taunt.* 26; *R. & R. C. C.* 134, S. C.) it was held, that a manslaughter committed in *China* by an alien enemy who had been a prisoner of war, and was then acting as a mariner on board an *English* merchant ship, on an *Englishman*, cannot be tried here under an admiralty commission issued in pursuance of the 33 Hen. VIII. c. 23, and 43 Geo. III. c. 11, s. 6. (*Ante*, 51.) The prisoner in that case was tried at the Old Bailey Sessions, October, 1807, under a special commission issued by virtue of the statutes 33 Hen. VIII. c. 23, and 43 Geo. III. c. 113, s. 6, upon an indictment which charged that he the said Antonio Depardo on the 30th of November, 47 Geo. III. &c. with force and arms at Canton in China, in parts beyond the sea without England, in and upon one William Burne in the peace, &c. feloniously did make an assault, &c., and with a certain knife, of the value, &c., then and there feloniously did strike, stab and thrust, giving to the said William Burne, then and there, &c. one mortal wound, &c. of which

said mortal wound he the said William Burne on the said 30th of November, 47 Geo. III. aforesaid, in Canton in China aforesaid, in part beyond the sea without England, did die; and so the jurors, &c. did say that the said Antonio Depardo him the said William Burne in manner and form aforesaid did kill and slay, against the peace, &c. It appeared in evidence that Antonio Depardo was a Spaniard, and had been a prisoner of war on board the Blenheim, and that whilst abroad he volunteered on board a ship called the Alnwick Castle, an Indiaman then lying at the Prince of Wales's Island, (which is under the dominion of his Majesty,) and received the usual bounty. The prisoner who had served about three months on board the Indiaman received on the day before he committed the offence charged in the indictment a part of his pay. The deceased was an Englishman, and a mariner serving on board the same ship as the prisoner. At the time of committing the offence the Alnwick Castle was lying near Canton, in a part of the Canton river, about one-third of a mile in width, within the tideway, at the distance of about eighty miles from the sea. The prisoner went on shore with others of the crew, and there mortally wounded the deceased, who was afterwards carried on board the ship, where he died the following day. The prisoner was found guilty, but the learned judge entertaining some doubts whether the prisoner was liable to be tried here under the statutes 33 Hen. VIII. c. 23, and 43 Geo. III. c. 113, s. 6, reserved the case for the opinion of the judges. In Michaelmas term, 1807, this case was argued before the judges by *Burrough* for the prisoner, and *Abbott* for the crown. No judgment was given, but the prisoner was discharged. 3. *Offences, &c. Jurors.*

A person who steals goods in France cannot be tried in England for the offence, though he be found in possession of the stolen property here. (*Rex* v. *Madge*, 9 *Car. & P.* 29.)

Aliens and denizens, besides the ordinary species of jury, are entitled, except in treason, to demand another description of jury, which by the humanity of the law is given them, viz. a *jury de medietate linguæ*. (4 *Bla. Com.* 352.) In this respect the 6 Geo. IV. c. 50, s. 47, enacts that "in all inquests that are taken against aliens, half the jury shall be aliens, if so many are to be found within the town or place where the trial is had, and if not, so many as the sheriff is able to procure, and the alien juror need not produce any freehold or other qualification required by the act in other cases." If an alien neglect to claim this advantage before the jury are sworn, he can take no exception in any subsequent stage of the proceedings. (*The Abbot of Westminster* v. *The Executors of Clerke*, 1 *Dyer*, 28 a; *Rex* v. *D'Eon*, 1 *Bla. Rep.* 517. See further 1 *Chit. C. L.* 525; *post*, title "*Jurors*," Vol. III.) Jury on trial of.

The 6 Geo. IV. c. 50, s. 3, provides, "That no man not being a natural-born subject of the king is or shall be qualified to serve on juries or inquests, except only in the cases thereinafter expressly provided for," (viz. of *juries de medietate linguæ*, sect. 47, *infra*.) Disqualification of, as jurors.

An alien may be a witness. (2 *Hawk.* c. 46, s. 28; *post*, "*Evidence*," Vol. II.) Witness.

The 14 & 15 Hen. VIII. c. 2, prohibits an alien from taking an apprentice. (See *post*, "*Apprentices*.") Apprentice.

Allegiance.

ALLEGIANCE is the natural, and lawful, and faithful obedience which every subject owes to his prince. It is either perpetual where one is a subject born, or where one hath the right of a subject by naturalization, &c. or it is temporary by reason of residence in the king's dominions. To subjects born it is an incident inseparable, and as soon as born they owe by birthright obedience to their sovereign, and it cannot be confined to any kingdom, but follows the subject wherever he goeth. The subjects are hence called liege What.

Allegiance.

people and are bound by this allegiance to go with the king to his wars as well within as without the kingdom. (See 1 *Bl. Com.* 366, &c.; 1 *Inst.* 129; 2 *Inst.* 741; *Calvin's case*, 7 *Co.* 4; *Toml. Dict.* '*Allegiance.*' See *post* "*Treason*," Vol. V.)

Oath of allegiance.

By the common law all persons above the age of twelve years were required to take the oath of allegiance in courts-leet, and there are several statutes requiring such oath to be taken. (See *post*, "*Oaths*," Vol. V.; "*Leet*," Vol. III.)

Almanac.

What, and effect of, in evidence.

THE almanac is part of the law of the land, having been established by different statutes, and the courts must take judicial notice of it; (*Reg.* v. *Dyer*, 6 *Mod.* 41; *Brough* v. *Perkins*, *id.* 81; 1 *Leon.* 242; *Brough* v. *Parkings*, 2 *Ld. Raym.* 994; *Page* v. *Fawcett*, *Cro. Eliz.* 227;) and will be good evidence to prove when a particular day happened. (*Id.*)

The almanac to go by in such cases is that annexed to the Common Prayer Book, in which it is incorporated. (*Brough* v. *Perkins*, 6 *Mod.* 81; see further, *post*, "*Time*," Vol. VI.)

Stamp duties as to, repealed.

The 4 & 5 Will. IV. c. 57, repeals the stamp duties as to almanacs or calendars, or any book or pamphlet serving the purpose of an almanac or calendar.

Alteration *of Proceedings*, see *post*, "*Amendment*."

Ambassadors.

What.

AN Ambassador is a person sent by one sovereign to another with authority, and letters of credence, to treat on affairs of state. (4 *Inst.* 143.)

Protection of.

Ambassadors may, by a precaution, be warned not to come to the place where sent, and if they then do it they shall be taken for enemies; but being once admitted even with enemies in arms they shall have the protection of the laws of nations and be preserved as princes. (*Moll.* 146.) If a banished man be sent as an *ambassador* to the place from whence he is banished he may not be detained or molested there. (4 *Inst.* 153.)

But if he be not received or admitted as ambassador he has no privilege as such, and an ambassador may be refused in respect of him by whom sent, or in respect of the person sent, as if he is notoriously flagitious, or if he be disagreeable to the state to which he is sent. An ambassador ought not however to be refused without cause. See *Grotius and Molloy*, cited *Com. Dig.* title *Ambassador*.

Offences by

If a foreign *ambassador* commits any crime here, which is *contra jus gentium*, as treason, felony, &c. or any other crime against the law of nations, he loseth the privilege of an *ambassador*, and is subject to punishment as a private alien; and he need not be remanded to his sovereign but of curtesy. (*Danv. Abr.* 327.) But if a thing be only *malum prohibitum* by an act of parliament, private law, or custom of the realm, and it is not *contra jus gentium*, an *ambassador* shall not be bound by them; (4 *Inst.* 153;) and it is said *ambassadors* may be excused of practices against the state where they reside (except it be in point of conspiracy, which is against the law of nations,) because it doth not appear whether they have it *in mandatis*, and then they are excused by necessity of obedience. (*Bac. Max.* 26; *Toml. Dict.* '*Ambassador*,' *by Granger*; 1 *Bla. Com.* 253.)

The killing an *ambassador* has been adjudged high treason. (3 *Inst.* 8.) *Ambassadors.*

Some *ambassadors* are allowed by concession to have jurisdiction over their own families, and their houses permitted to be sanctuaries; but where persons who have greatly offended fly to their houses, after demand and refusal to deliver them up, they may be taken from thence. (4 *Inst.* 162.) Killing of. Privilege of.

See the exception in the alien act as to ambassadors, &c. *ante*, 142.

As to the other privileges of ambassadors from arrest in civil suit, see 1 *Bla. Com.* 253; *Tidd*, 9th edit. 191, 535; 1 *Arch. Pract. by Chit.* 5th edit. 82; 1 *Chit. Stat.* title *Ambassadors*; 1 *Chit. Com. Law*, 69.

Ambiguity, *Evidence to explain, post*, "*Evidence*," Vol. II.
When indictment bad for, post, "*Indictment*," Vol. III.

Amendment.

OF *Proceedings in General.*]—Whatever at common law may be amended in *civil* cases, may be also amended in *criminal* cases. (*Reg* v. *Tutchin*, 1 *Salk.* 51.) In general. At common law.

With respect to *judicial* acts or papers there can be no doubt that they are amendable for any mistake therein, at any time before they become matters of *record*, and that of common right and not by virtue of any statute. (*Anon.* 1 *Salk.* 47; *Bondfield* v. *Milner*, 2 *Burr.* 1099.) Thus the Court may alter their own judgment any time in the *same term* in which it is passed, and either pass another or remedy a defect in the former. (*R.* v. *Price*, 6 *East*, 328; *R.* v. *Justices of Leicestershire*, 1 *M. & Sel.* 442; *R.* v. *Hoskins*, 2 *Lord Raym.* 968.) Judicial acts.

And the justices at sessions may amend their judgment during the same sessions, because in consideration of law their sitting is but one day; but not at any subsequent period, unless they professedly adjourn, which they may do. (*South Cadbury* v. *Bradden*, 2 *Salk.* 606; *Bac. Abr. Court of Sessions.*) At sessions.

But no amendment can be made by any authority when once the term or session is over, and the judgment solemnly entered on the record. Even when judgment on appeal has been pronounced erroneously by a mistake of the chairman, the justices cannot rectify it afterwards, even with the assent of the whole number who were present, nor can the Court of Queen's Bench assist them. A clear illustration of this principle arose out of the decision of an appeal against an order of removal at the Berks Easter Sessions, 1828. The majority of the justices voted for confirming the order, in which opinion the chairman concurred; but in pronouncing the judgment of the Court he, by mistake, delivered it thus, "The order is quashed," which was entered accordingly by the clerk of the peace. This mistake, which was in the mere pronouncing of the judgment, was not discovered till a subsequent part of the same day, when the sessions had regularly closed. Mr. *Shepherd* afterwards moved the Court of Queen's Bench on the affidavit of the justices themselves, for a *mandamus* to rehear the appeal, or to correct the judgment by the chairman's notes; but the Court of Queen's Bench held that they had no power to interfere, and the judgment remained as entered. (*Talfourd's Dickenson's Sessions*, 434, and note; *R.* v. *Walcot*, 4 *Mod.* 395.)

In a late case, however, the Court of Queen's Bench granted a *mandamus* to justices to amend the record of a game conviction, by setting out the evidence on which it was founded as near as possible in the words used by the witness. (*R.* v. *Warnford*, 2 *D. & R. Mag. Ca.* 511; and see *R.* v. *Allen*, cited *id.*)

Mere *ministerial* acts may at any time be amended; (*Faulkner's case*, 1 Ministerial acts.

In general.

Saund. 249, 50, c. n. 1; *Philips* v. *Smith*, 1 *Stra.* 136;) and any matter not of record may be amended by the record, if a mistake has arisen in the former. (*R.* v. *Hayes*, 2 *Ld. Raym.* 1519; *R.* v. *Ellames*, *Rep. temp. Hardw.* 43; 1 *Barnard.* 31.)

By statute. Of defects in form in judgments or orders of Justices.

By the 5 Geo. II. c. 15, "On all appeals to the sessions against the judgments or orders of any justices of the peace, the sessions shall cause *any defect of form* that shall be found in any such judgments or orders to be rectified and amended without any costs to the parties concerned, and after such amendment shall proceed to hear, examine, and consider the truth and merits of all matters concerning such judgments or orders, and examine proofs relating thereto, and make such determinations as if there had not been any defect or want of form."

Upon this statute it has been holden, that if an order of removal be defective on the face of it—in any matter of *substance*—as if it omit the statement that the removal is upon the complaint of the parish officers; or omit the statement that the pauper was actually chargeable; or omit to show the jurisdiction of the removing justices; the sessions cannot amend, even by facts proved before them, and the order must be quashed. (*R.* v. *Great Bedwin*, *Burr. Set. Ca.* 163.) But the substitution of the name of one parish for the other, obviously by the mistake of the clerk, as where an order, after an adjudication that the settlement was Huggershall, directed the pauper to be carried to Harrow, has been holden amendable within the statute; and therefore the sessions, in the case alluded to, amended the order, and confirmed it according to the obvious intention of the magistrates. (*R.* v. *Harrow on the Hill*, 2 *Bott*, 706.) And in a late case, where an order of removal was directed to the churchwardens and overseers of the parish of L., and it appeared that L. was a vill and had no churchwardens, it was held that the defect was mere matter of form, and might be amended by the justices under the above act. (*R.* v. *Inhabitants of Amlwch*, 3 *D. & R. Mag. Cas.* 303.)

Other statutes allow amendments in some cases, though after the proceedings to be amended have become matters of record, as the 7 Geo. IV. c. 64, s. 19, *ante*, 3; 9 Geo. IV. c. 15, *infra*.

By justices.

Sometimes statutes allow justices of the peace to amend proceedings drawn up by them, though this is rarely so. A justice may draw up his conviction in a more formal way than that in which he had at first shaped it, before he returns it to the sessions, or on certiorari, (*Gray* v. *Cookson*, 16 *East*, 21,) but this is not allowed in case of an order, (*R.* v. *Cheshire*, 5 *B. & Ad.* 439,) or a warrant of commitment, (*Hutchinson* v. *Lowndes*, 4 *B. & Ad.* 118.) But it seems questionable whether any such difference as that alluded to now exists between a conviction and an order. (*Reg.* v. *Radnorshire, Justices of*, 9 *Dowl.* 90.)

A party convicted in a penalty under an act against smuggling (3 & 4 Will. IV. c. 53) was committed to gaol by warrant of the convicting justices till he should pay the forfeiture. The act (s. 90) empowers justices to amend any such conviction or warrant of commitment, whether before or after conviction. Four days after the committal, the warrant (which was defective in point of law) was withdrawn from the gaoler's possession, and another substituted; it did not appear by whom. The second warrant was of the same date, and signed and sealed by the same justices as the first, and did not materially vary from it, except that in the recital of the conviction certain cordage was said to be adapted for "slinging" casks, instead of "slinging or *sinking*;" and the name of the place at which the party was said to have been detained for his offence was altered. The above facts, and copies of the warrants, being returned on certiorari and habeas corpus: held, that the Court could not presume, either from the facts returned or from the warrants, that the second warrant was substituted by the justices as an amendment of the first, in pursuance of the authority given them by the act. The prisoner was discharged. (*In the matter of Elmy and Sawyer*, 1 *Adol. & Ell.* 843.)

It would appear that a justice of the peace may draw up a corrected record of a summary conviction, after he has returned one record of it to the quarter

sessions; but he cannot do so in a case where the first conviction has been brought up by certiorari, and quashed. Where a prisoner has been brought up by a writ of habeas corpus, and discharged, on the ground of the insufficiency of the conviction, as appearing by the recital in the warrant of commitment, the conviction itself not having been brought up by the crown, and the certiorari having been taken away from the prisoner by statute, such proceeding is equivalent to a quashing of the first conviction, and a justice of the peace cannot afterwards draw up another formal one. (*Chaney* v. *Payne*, 1 *Ad. & Ell.* (N.S.) 712.) *In general.*

The 7 Geo. IV. c. 48, s. 17, allows amendments by justices of the peace of any information, conviction, or warrant of commitment for any offence under that act which relates to the excise and customs, *post*, "*Excise*," Vol. II. Excise.

As to amendments of poor rates, *post*, "*Poor*," Vol. IV. Poor rates.

Of Indictments.]—Indictments stand upon the same principles with respect to amendment as those to which all pleadings are subject at common law. (*Wilkes's case*, 4 *Burr.* 2569; 6 *Mod.* 268; 1 *Hawk.* c. 5, s. 97.)(*a*) And as the indictment is the finding of a jury upon oath, it cannot be amended by the Court, unless under the 7 Geo. IV. c. 64, s. 19, *ante*, 3, or under Lord *Tenterden's* act, 9 Geo. IV. c. 15, without the concurrence of the grand inquest, by whom it is presented, and this before they are discharged. (*Id.*) Indictments.

To this rule, however, there is an exception in the case of indictments removed from London, because by the charters of that city only the substance of the record can be removed from it, and the original remains a certain guide for the amendment. (*Anon.* 1 *Keb.* 252; 2 *Hawk.* c. 25, s. 97; *Bac. Ab. Indictment*, (11).) And it is the common practice for the grand jury to consent at the time they are sworn that the Court should amend matters of form, altering no matters of substance; and mere informalities may, therefore, be amended by the Court before the commencement of the trial (*id.*); though it was formerly the practice to award process to the grand jury to come into Court and amend them. (*Id. Cro. C. C.* 44.)

As to the amendment of indictments in cases of pleas in *abatement*, under the 7 Geo. IV. c. 64, s. 19, see *ante*, 3. On pleas in abatement.

The 9 Geo IV. c. 15, entitled, "*An Act to prevent a Failure of Justice by reason of Variances between Records and Writings produced in Evidence in support thereof*," after reciting that "great expense is often incurred, and delay or failure of justice takes place at trials, by reason of variances between writing produced in evidence and the recital or setting forth thereof upon the record on which the trial is had, *in matters not material to the merits of the case*, and such record cannot now in any case be amended at the trial, and in some cases cannot be amended at any time," enacts, "that it shall and may be lawful for every *Court* of record holding plea in civil actions, any judge sitting at *nisi prius*, and any Court of oyer and terminer and general gaol delivery in England, Wales, the town of Berwick-upon-Tweed, and Ireland, *if such Court or judge shall see fit so to do*, to cause the record on which any trial may be pending before any such judge or Court in any civil action, or in any *indictment or information for any misdemeanor*, when any variance shall appear between any matter *in writing or in print*, produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular, by some officer of the Court, on payment of such costs (if any) to the other party as such judge or Court shall think reasonable; and thereupon the trial shall proceed as if no such variance had appeared; and in case such trial shall be had at *nisi prius*, the On variances in writings by 9 Geo. 4, c. 15. In indictments for misdemeanors.

(*a*) By the express provision of the statutes of amendment (14 Edw. III. c. 6, and 8 Hen. VI. c. 12,) cases of *treason* and *felony* are excepted from their operation. It has been considered that the exception extends virtually to all *criminal prosecutions*, and that the proceedings in such cases are amendable according to the rules and practice of the common law only. See the cases above cited. But this seems questionable. (See *Rex* v. *Hockenhall*, 3 *Mod.* 167; and see 1 *Stark. C. L.* 254.)

Of Indictments.

order for the amendment shall be indorsed on the postea and returned together with the record; and thereupon the papers, rolls, and other records of the court from which such record issued shall be amended accordingly."

To what criminal cases that act applies.

As it has been held that the Court of quarter session is not, according to technical acceptation, a Court of oyer and terminer, (1 *Hale*, 165,) it seems that this act gives no power of amendment to the sessions, and that on a variance at the sessions the defendant must still be acquitted. (*Talfourd's Dickenson's Sessions*, 353.)

The act, it will be seen, does not apply to indictments for *felony*.

The act applies to those cases only in which a *written* instrument is professed to be set out, (*Ryder* v. *Malbon*, 3 *C. & P.* 594; *Webb* v. *Hill*, 3 *C. & P.* 485,) and only to verbal defects in such instruments, and not to omissions by which the substance of the instrument is changed. (*Rutherford* v. *Evans*, 4 *C. & P.* 79; *Jelf* v. *Oriel*; 4 *C. & P.* 22, 24; *M. & M.* 253.) The date of a bill has been amended under this act, (*Barting* v. *Scott*, 4 *C. & P.* 24,) and where a judgment was stated to be record of the wrong Court. (*Briant* v. *Eicke*, *Moo. & M.* 357.) But where an indictment for perjury, assigned on an affidavit made for the purpose of setting aside a judgment, alleged that the judgment was entered up, "in or as of Trinity Term, 5 Will. IV." and on an examined copy of the record being produced, it appeared that the day on which judgment was signed was entered on the margin according to the new rules; this was considered a fatal variance, and an amendment was refused. (*Rex* v. *Cooke*, 7 *C. & P.* 359.) In another case, on a charge of perjury, alleged to have been committed before commissioners for the examination of witnesses in Chancery suit, the indictment averred that four commissioners named in the commission were commanded to examine the witnesses; but the commission when produced appeared to authorise the commissioners, "or any two or three" of them, to examine the witnesses. The variance was held fatal, and an amendment refused. (*Reg.* v. *Hewins*, 9 *C. & P.* 786.) It has been said that amendments under the act should be made very sparingly in criminal cases. (*Rex* v. *Cooke*, 7 *C. & P.* 550.)

Mistakes in caption, &c. of indictment.

A mistake in the caption of an indictment may be amended at any time, it being a mere ministerial act. (See 1 *Ch. C. L.* 335.) But where a rule has been obtained calling on a town-clerk to show cause, why the caption of an indictment which had been removed into the Queen's Bench should not be amended by the insertion of the names of all the grand jurors, so that it might appear that twenty-eight instead of twenty-three jurors had been sworn, the town-clerk having sworn that he had no minutes whereupon to make the amendment: the rule was discharged, there being nothing safe to amend by. (*Rex* v. *Marsh*, 1 *Jur.* 38.) The entry roll and record of nisi prius have been altered to make them agree with the amended caption after the term in which the *certiorari* was returned, and even after a general verdict of guilty. (*Rex* v. *Darley*, 4 *East*, 175.) If the original indictment be right, and the clerk enters it on the wrong plea roll, it may be amended. (*Reg.* v. *Tutchin*, 6 *Mod.* 281; *Tufton's case*, *Cro. Car.* 144.)

Inquisitions.

The caption of an inquisition cannot be amended after it is filed; (2 *Hawk.* c. 25, s. 97; but see 1 *Stark. C. L.* 261;) and as to amending coroners' inquisitions, see *Rex* v. *Evett*, 6 *B. & Cres.* 247; 9 *D. & R.* 237, S.C.; *post*, "*Coroner*," Vol. II.

Criminal informations.

Of Criminal Informations.]—Criminal informations, which are not found upon the oath of a jury, may be amended by the Court, and even by a single judge at chambers, at any time before trial; (*Rex* v. *Wilkes*, 4 *Burr.* 2527; *Rex* v. *Lewis*, 12 *Mod.* 229; *Rex* v. *Charlesworth*, 2 *Stra.* 871; *Rex* v. *Holland*, 4 *T. R.* 457; 1 *Ch. C. L.* 298, 868;) and a mere clerical error in the caption, and not the body of the information, may be rectified even after verdict. (*Rex* v. *Hockenhall*, 3 *Mod.* 169; *supra.*) And the reason assigned for this difference between indictments and informations is, that the latter are originally framed by an officer of the crown, while the former are the accusations of a number of men sworn to inquire and to decide according to evidence. (*Rex* v. *Wilkes*, 4 *Burr.* 2569.)

The amendment may be extensive and material. (*Rex* v. *Pewterus, Rep. t. Hardw.* 203; *Rex* v. *Green, id.* 209; 3 *Anst.* 714.) *Of Informations, &c.*

As to the amendment of informations on pleas in abatement, see *ante*, 3, and as to the amendment of on variances in written instruments, *ante*, 147.

When the amendment is made before a judge at his chambers, the prosecutor must apply for a summons to show cause why the alteration should not be effected. (4 *Burr.* 2528.) On this the judge will issue a summons in the cause, directed to the defendant's clerk in Court, agent, attorney, or solicitor, requiring him to attend him at his house or chambers, and show cause why the specific amendment should not be made. (*Id.*) But though he is thus desired to attend, his consent is not requisite. And the judge will proceed to make an order that the information be amended, by making the proper alteration in the part it is thought proper to alter. (4 *Burr.* 2528.) (*a*)

An information *in rem* may be amended by the Crown after plea pleaded, by adding additional counts, although a recognizance has been entered into by the bail to pay the costs occasioned by the claim, such recognizance having been entered into before the information filed. (*Att.-Gen.* v. *Smith*, 5 *Mee. & W.* 372.) Information *in rem.*

Of Pleas.]—Pleas are amendable at common law before they are filed upon record; (*Rex* v. *Knowles*, 1 *Salk.* 47; *Com. Dig. Amendment*, (2 C. 1);) but when once they are entered on the roll, they can only be altered by virtue of some legislative provision. (*Rex* v. *Knowles*, 1 *Salk.* 47; *Bondfield* v. *Milner*, 2 *Burr.* 1099.) Pleas in abatement to an indictment for a misdemeanor are not amendable. (*Rex* v. *Cooke*, 2 *B. & Cres.* 871; 4 *D. & R.* 592, S. C.) Pleas.

Of Issues, Continuances, &c.]—Evident misprisions in mere matters of form, either in the joining of issue or setting out the process, are amendable at common law. (1 *Stark. C. L.* 245.) A discontinuance, however, is not amendable in any criminal prosecution, and a *distringas corpora juratorum*, tested on the 24th, when the *venire facias* was returnable on the 23rd, was held to be such a discontinuance that even in a civil case it could not have been cured by the 8 *Hen.* VI. c. 12. (*Rex* v. *Tutchin*, 6 *Mod.* 269; 1 *Ld. Raym.* 1061; *Deacon, C. Dig.* 33.) Issues, continuances, &c.

Of Verdicts, &c.]—A verdict may be corrected from the notes of the judge or clerk of assize or minutes signed by the jury. (*Gibson's case, Douglas*, 375; *Rex* v. *Hazel*, 1 *Leach*, 368; *Rex* v. *Hayes*, 2 *Stra.* 344.) And it has been lately decided that though a verdict of "*not guilty*" be recorded, yet if it appear promptly that it is not according to the intention of the jury, it may be vacated and set right. (*Rex* v. *Parkin*, 1 *R. & M.* 45.) But if there be no notes of the judge, &c. or other document to amend by, the amendment will not be allowed. (*Reg.* v. *Virrier*, 12 *Ad. & Ell.* 317.) Verdict, &c.

Any omission in the *sentence* passed upon the defendant may be remedied by the judge going again into Court during the assizes and then passing the proper judgment. for the sentence may be amended or altered at any time during the continuance of the same assizes. (*Rex* v. *Fletcher, Russ. & R. C. C.* 58.) Judgment.

A *judgment* once *recorded* cannot, as we have seen, *ante*, 145, be amended.

Of Return to Habeas Corpus.]—The Court may, in its discretion, allow the return to a writ of *habeas corpus* to be amended after it has been returned. (*Reg.* v. *Batcheldor, re Canadian Prisoners*, 1 *Per. & D.* 516, and see *Re Clarke*, 6 *Jurist*, 757.) Habeas corpus.

(*a*) See form of rule to show cause why the return to a writ of *certiorari* and caption of indictment should not be amended, 4 *Chit. C. L.* 196; also a form of rule absolute for amending the caption, *id.* 197.

Amends, *Tender of*, see "*Justices of Peace*," Vol. III.

Amercement, see "*Fines, &c.*" "*Leet*," Vol. III.

Amicable Contest, see *post*, "*Assault;*" "*Fighting*," Vol. III.

Amicus Curiæ.

IF a judge is doubtful or mistaken in matter of law, a stander-by may inform the Court as *amicus curiæ*. (2 *Co. Inst.* 178.) Any one as *amicus curiæ* may move to quash a bad indictment. (*Comb.* 13.) It seems the party himself should be present. (2 *Show.* 297.)

Anatomy, see *post*, "*Bodies, Dead;*" "*Physicians, &c.*" Vol. V.

Anchors, see "*Ships*," Vol. V.; "*Wreck*," Vol. VI.

Ancient Maps and Ancient Deeds, *Proofs by*, see "*Evidence*," Vol. II.

Angling, see "*Fish*," Vol. III.

Animals.

STEALING of, see *post*, "*Larceny*," Vol. III.; Maiming of, *post*, "*Cattle*," Vol. I.; Cruelty to, *post*, "*Cattle*," Vol. I.; Keeping of Dangerous Animals, *post*, "*Dogs*," Vol. II.; "*Homicide*," Vol. III.; "*Nuisance*," Vol. V.

Annuity. (a)

What.

AN Annuity, in its general meaning, is an annual payment of a certain sum of money granted to another for life, for years, or in fee, to be received of the grantor or his heirs, so that no freehold be charged therewith, whereof a man shall never have assize or other action, but a writ of annuity. (*Terms de la Ley*, 44; *Co. Lit.* 144 b.) In an annuity the principal is gone for ever, and is satisfied by periodical payments. (*Winter* v. *Moulsley*, 2 *B. & Ald.* 806.)

Regulations as to.

To guard against the fraudulent and oppressive practices of usurious money lenders exercised on young heirs and other necessitous persons entitled to property in expectancy, the legislature found it necessary to interpose by the 17 Geo. III. c. 26, now repealed by the 53 Geo. III. c. 141; and since the latter act, the 3 Geo. IV. c. 92, and 7 Geo. IV. c. 75, have been passed,

(a) As to annuities in general see *Hunt on Annuities; Com. Dig. Annuity;* stat. 33 Geo. III. c. 14, as to the Royal Exchange Assurance Annuity Company; and 39 Geo. III. c. 83, as to the Globe Insurance Company.

explaining and furthering the provisions thereof. (See 1 *Chit. Col. Stat.* p. 22.)

53 *Geo.* 3, c. 141.

The 53 Geo. III. c. 141, s. 8, enacts, "That all contracts for the purchase of any annuity or rent-charge with any person being under the age of twenty-one years shall be and remain utterly void, any attempt to confirm the same after such person shall have attained the age of twenty-one years notwithstanding. And that if any person shall either in person, by letter, agent, or otherwise howsoever, procure, engage, solicit, or ask any person being under the age of twenty-one years to grant or attempt to grant any annuity or rent-charge, or to execute any bond, deed, or other instrument for securing the same, or shall advance or procure or treat for any money to be advanced to any person under the age of twenty-one years, upon consideration of any annuity or rent-charge to be secured or granted by such infant after he or she shall have attained his or her age of twenty-one years, or shall induce or solicit or procure any infant, upon any treaty or transaction for money advanced or to be advanced, to make oath or to give his or her word of honour or solemn promise that he or she will not plead infancy, or make any other defence against the demand of any such annuity or rent-charge, or the repayment of the money advanced to him or her when under age, or that when he or she comes of age he or she will confirm or ratify or in any way substantiate any annuity or rent-charge; every such person shall be guilty of a misdemeanor, and being thereof lawfully convicted in any court of excise, oyer and terminer or general gaol delivery, shall and may be punished for the said offence by fine, imprisonment, or other corporal punishment as the Court shall think fit to award."

Contracts for purchase of annuities by persons under age void.

Endeavouring to induce infants to grant annuities.

Misdemeanor.

The 9th section of the same act enacts, "That all and every solicitors and solicitor, scriveners and scrivener, brokers and broker, and other persons or person, who from and after the passing of this act shall ask, demand, accept or receive directly or indirectly any sum or sums of money, or any other kind of gratuity or reward, for the soliciting or procuring the loan, and for the brokerage of any money that shall be actually and *bonâ fide* advanced and paid as and for the price or consideration of any such annuity or rent-charge, over and above the sum of ten shillings for every one hundred pounds so actually and *bonâ fide* advanced and paid, shall be deemed and adjudged guilty of a misdemeanor; and being convicted of such offence in any court of assize, oyer and terminer or general gaol delivery, shall and may for every such offence be punished by fine and imprisonment, or one of them, at the discretion of the Court; and that the person or persons who shall have paid or given any sum or sums of money, gratuity, or reward, shall be deemed a competent witness or witnesses to prove the same."

Acting as solicitors, &c. in such cases.

Misdemeanor.

Witnesses.

On an indictment under this latter section, it is not necessary to prove that the defendant took the exact sum laid in the indictment, though it be not laid under a videlicet. (*Rex* v. *Gillham*, 6 *T. R.* 265; 1 *Esp.* 285; see form of indictment, *id.*

Indictment for, &c.

On the trial of such an indictment it must be left to the jury to consider, whether the excess of 10*s.* in the £100 were really taken as a fair charge for drawing the writings, &c. or whether it was not so taken as a device to avoid the statute. (*Rex* v. *Gillham*, 6 *T. R.* 265.)

By stat. 29 Geo. III. c. 41, s. 27, and other acts respecting life annuities, oath of an annuitant's life may be made before a justice of the peace, who shall give a certificate thereof without fee or stamp duty, in order to entitle such person to receive his annuity.

Oath, &c. of annuitant's life.

By sect. 2 of stat. 56 Geo. III. c. 53, passed to amend the acts of 48 Geo. III. c. 142; 49 Geo. III. c. 64; and 52 Geo. III. c. 129, for enabling the commissioners for the reduction of the national debt to grant life annuities, it is enacted, "That in case any person who shall have been named as a nominee, on the continuance of whose life any annuity is to depend, shall after his or her nomination become resident in any kingdom or state in Europe in amity with his Majesty, or if he or she shall become resident in any other kingdom, state, or place beyond the seas, then and in every such case a certificate that such nominee was living on the day specified therein, (being some day after any annuity depending upon his or her life shall have

Certificates of lives of nominee abroad required.

56 *Geo.* 3, c. 53.

become due,) granted under the hand and seal of the chief magistrate of any city, town, or place, or any other magistrate acting at the time as such, or for and in the place of any such chief magistrate where such nominee may be then living, shall be deemed sufficient and effectual for proving the continuance of the life of such nominee, and for the purpose of enabling the person entitled to the annuity dependent upon the life of such nominee to receive the same; provided no British minister, or consul, or governor, or person acting as such, shall be resident in such city, town, or place, although a British minister, or consul, or governor, or person acting as such may be resident in the kingdom, state, or settlement wherein such nominee shall be then living."

Identity to be verified by affidavit, &c.

Sect. 3. "To every such certificate as aforesaid there shall be affixed an affidavit or solemn affirmation made before any justice of the peace or magistrate in England or Scotland respectively, or if in Ireland before one of the barons of the exchequer there, by the person or persons entitled to the said annuity, or by the person applying to receive the same on his, her, or their behalf, that the matters contained in such certificate are, to the best of his or her belief, true; and that the person described or certified therein is the nominee or one of the nominees on whose life or lives the annuity whereof such half-yearly or other payment shall be claimed doth depend."

Answer in Chancery, *Proof of*, see "*Evidence*," Vol. II.

Apothecary, see "*Physicians*," &c. Vol. V.

Apparel, see *post* "*Assault*."

Appeal.

What.

THE term *Appeal* is used in two senses:

To sessions, &c.

First, it signifies a complaint and removal to a superior court of the judgment of an inferior one, being in the nature of a writ of error, and in this sense it is used when applied to the removal of orders or convictions of justices out of sessions to the judgment of the court of sessions. In this sense it differs from the remedy by *certiorari*, not being, as the latter is, a common law right for the purpose of obtaining the judgment of a superior tribunal, but a qualified right given only by the special provisions of a statute.

Appeals of murder, &c.

Secondly, it signifies an accusation by a private individual against another for some heinous offence, demanding punishment on account of the particular injury suffered, rather than for the offence against the public.

This latter mode of appeal had fallen entirely into disuse until the case of *Ashford* v. *Thornton*, in 1818, 1 *Barn. & Ald.* 405, where full information may be gained on the subject. This case occasioned the passing of the 59 Geo. III. c. 46, which abolishes all appeals of treason, murder, felony or other offences.

Abolished.

We will now notice the *general* law and practice relative to appeals in the first sense under the following order. As to appeals in *particular* cases, see the various titles throughout this work.

I. *When it lies in general, and parties to*, 153.

II. *When Justices to inform Party of his Right to*, 154.

III. *To what Sessions*, 154.

IV. *Preliminary Steps; as 1st, Notice of*, 159; *2d, Recognizance, &c.* 163; *3d, Entering of Petition and Order for Hearing*, 163; *4th, Effect of not taking such Steps*, 163.

V. *Hearing and Trial*, 165; *Judgment*, 167; *and Adjournment*, 172.

VI. *Entering and Respiting of, and Notice of Trial after same*, 173.

VII. *Costs*, 175.

VIII. *Forms*, 176.

I. When it lies in general, and Parties to.

Only lies when given by statute.

An *appeal*, as we have already seen, *ante*, p. 152, is not, like a *certiorari*, a common law right; it lies only where it is expressly given by statute. (*R.* v. *Cashiobury*, 3 *Dowl. & Ryl. Mag. Ca.* 485; *R.* v. *Hanson*, 4 *Barn. & Ald.* 521; *R.* v. *Justices of Oxfordshire*, 1 *Maule & Selw.* 448.) On the other hand, a *certiorari* always lies unless expressly taken away. (*Id.*)

Must be expressly given.

The right of appeal must be given by express enactment, and cannot be extended by an equitable construction to cases not distinctly enumerated in the statute. (*R.* v. *Justices of Surrey*, 2 *T. R.* 509; *R.* v. *Stock*, 8 *Ad. & E.* 405; 3 *N. & P.* 420, S. C.; *R.* v. *Recorder of Ipswich*, 8 *Dowl.* 103; *R.* v. *Justices of Warwickshire*, 2 *Jurist*, 543, *Q. B.*; *R.* v. *Justices of Yorkshire, West Riding*, 1 *Ad. & E.* (*N. S.*) 325; 4 *Per. & D.* 688, S. C.; *Paley on Conv. by Dowling*, 268, 269.)

But a right of appeal given generally by a statute cannot be defeated by inference; therefore, where an appeal was given against any matter not declared by a statute final and conclusive, and it was enacted that certain accounts should not be *binding* unless allowed by justices; an appeal was held to lie against such allowance. (*R.* v. *Justices of Cumberland*, 1 *Dowl. & Ryl. Mag. Ca.* 240; 1 *B. & Cres.* 64, S. C.)

As to the right of appeal under a subsequent statute, making the enactments of prior statutes applicable thereto, see *R.* v. *Liverpool* (*Mayor*), 3 *D. & R.* 275; *R.* v. *Stock, supra*; and *R.* v. *Justices of Yorkshire, West Riding, supra*; and *post*, "*Excise*," Vol. II.)

Sometimes expressly excluded.

In some cases the legislature has expressly excluded the right of appeal, and it has been held, that if an order of commitment be excepted out of the appeal clause, as there must be a conviction apparent in the commitment, the conviction is not the subject of appeal. (*R.* v. *Justices of Staffordshire*, 12 *East*, 572.)

In the recent amendments of the criminal law, a power of appeal is given when on summary conviction the sum adjudged to be paid shall exceed 5*l.*, or the imprisonment adjudged shall exceed one calendar month, or the conviction take place before one justice. (See the 7 & 8 Geo. IV. c. 30, s. 38, *post*, "*Malicious Injuries to Property*," Vol. V.; and the 7 & 8 Geo. IV. c. 29, s. 72, *post*, "*Larceny*," Vol. III.)

For *particular* cases in which the right of appeal is given, see the various titles throughout this work.

Who appellant.

The party to whom the right of appeal is given, is termed the appellant.

Who respondent.

The statute giving the right of appeal sometimes points out the party who is to be the respondent: when this is not the case, the party to whom the statute directs the notice of appeal to be given, is usually the respondent. (*Post*, 161.)

Who a "party aggrieved."

If a statute gives a right of appeal to a "person who shall think himself aggrieved," those words mean a person who is *immediately* aggrieved by the act done, and not to one who is *consequentially* aggrieved. (See *R.* v. *Justices of Middlesex*, 3 *B. & Adol.* 938; *post*, 161.)

If trustees are enabled by a local act to sue or be sued in the name of one of them, he may appeal under the words "party grieved," though not personally aggrieved; and notice of appeal and recognizance may be given and entered into by him only. (*R.* v. *Justices of Surrey*, 5 *Ad. & E.* 701, *n.*)

3. *To what Sessions.*

II. When Justices to inform Party of his Right of Appeal.

When justices to inform party of his right of appeal.

In general there is no enactment requiring any information, by justices or others, to be given to a party of his right to appeal, and he is bound to know the law in this respect, or else lose the benefit of it.

Where a statute in general terms requires the justices to make known to a party his right to appeal, it is necessary that they should inform him of the steps he should adopt towards enforcing his right; as of his giving them a notice in writing, as well as entering into a recognizance. (See per Lord *Kenyon, R.* v. *Leeds*, 1 *T. R.* 583.)

But the necessity for this minute information may be waived, as in *R.* v. *Justices of West Riding of Yorkshire*, 3 *M. & Sel.* 493, where a defendant had been convicted by two justices for an offence against the 17 Geo. III. c. 56, s. 14; by section 20 of which the justices are bound to make known to the defendant, at the time of conviction, his right to appeal at the next general quarter sessions, and it appearing from the return to a *mandamus* that the justices had in fact made known to the defendant his right to appeal, whereupon he waved any intention of appealing by replying to them that he thought he had better pay the penalty: the Court held, that the justices need not have gone on to inform him of the necessary steps to be taken in order to appeal. And Lord *Ellenborough*, C. J., said, "How could it be necessary for the convicting magistrate to proceed after the party had signified to them that he did not mean to appeal? The argument is founded upon a supposed necessity of engrafting the observance of all the provisions of the statute as they apply to another state of things, as was the case in *R.* v. *Justices of Leeds*, 4 *T. R.* 583, into this case, where the same reason for their observance does not exist. All that the statute positively requires is, that the justices shall make known to the person convicted his right to appeal—they did so; and if he had thereupon gone on to signify his intention to appeal, *non liquet*, that they would not also have proceeded to make known to him the further steps that were to be taken by him; but why should they do so nugatory an act as to inform him what he must do to appeal, and to enforce his right, after he had declined appealing and waved his right." (See 7 & 8 Geo. IV. c. 29, s. 72; *id.* c. 30, s. 38.)

III. To what Sessions.

To what sessions appeal to be made.

The statute in general points out the sessions to which the appeal is to be made. The appeal usually given by the legislature is not to the next *general sessions*, if there be such sessions holden distinct from the quarter sessions, but to the next *quarter* sessions. (*R.* v. *Justices of London*, 15 *East*, 632.)

As to place.

As to Place.]—An appeal from a conviction by justices of a particular franchise must be to the sessions held for that franchise, and not to the general quarter sessions for the county. In the case of a conviction under 22 Car. II. c. 1, s. 6, which directs an appeal "to the judgment of the justices of peace in the next quarter sessions;" it was held, that an appeal from the conviction of corporation magistrates must be to the sessions of the borough. (*South Moulton case, Skin.* 122; *Burr.* 592, S. C.) As to appeals against orders of removal of the poor, *post*, see title "*Poor*," Vol. IV.; and *Talfourd's Duck. Sessions*, 632.

When no time fixed.

As to Time.]—If there be no time pointed out by the statute as to when the appeal must be made, it must be made in a *reasonable* time. (*R.* v. *Justices of Oxfordshire*, 1 *Maule & Sel* 418; *R.* v. *Justices of Gloucestershire*, 3 *M. & Sel.* 127; *R.* v. *Justices of Herts*, 3 *M. & Sel.* 459; *post*, 160.)

To next sessions.

The time for the appeal is in general limited to the *next* sessions after the conviction or act to be appealed against, or else to the sessions which shall be held after so many days from the conviction or act done.

3. *To what Sessions.*

From what time such session is to be reckoned.

Many difficult questions have arisen as to what time the term *next* session is to be calculated from—generally speaking, it means the next *practicable session* after the principal act done; (see *R.* v. *Justices of Essex*, 1 *B. & Ald.* 210; *R.* v. *Hendon*, 2 *D. & R.* 249; 1 *D. & R. Mag. Ca.* 245, S. C.; *R.* v. *Justices of Sussex*, 15 *East*, 206; *R.* v. *Thackwell*, 6 *D. & R.* 61; 4 *B. & C.* 62; 3 *D. & R. Mag. Ca.* 121, S. C.; *R.* v. *Justices of Suffolk*, 8 *Dowl.* 618; *R.* v. *Justices of Cornwall*, 6 *Ad. & Ell.* 894; *R.* v. *Justices of Cheshire*, 1 *Dowl. N. S.* 570;) but as no fixed rule can be well laid down, it is best to refer to the following decisions thereon.

Against a "judgment."

Under a statutory provision, giving an appeal from a conviction to the next quarter sessions, the sessions *next after the conviction* are intended, and not the sessions next after the execution or levying of the penalty. (*Roper* v. *Hyde*, 1 *Term Rep.* 414.) This case arose on an appeal against a conviction on the (now repealed) 24 Geo. III. c. 31, for not entering horses liable to duty. *Et per Ashhurst*, J., "The words of the act are decisive, for it says, 'If any person shall find himself aggrieved by the *judgment* of any such justice, &c., he may appeal to the justices at the *next* general quarter sessions;' therefore the plaintiff should have appealed to the sessions next after the judgment." *Et per Buller*, J. "The cases relative to appeals against orders of removal are very distinguishable from the present. All orders of removal are *ex parte* proceedings, and the other party cannot know any thing of them till the actual *removal*, but this conviction is more like a judgment of this Court than an order of removal. The grievance to the party is the *judgment*, and not the *execution*. A writ of error will lie before execution, and an appeal is in the nature of a writ of error; it complains of the judgment. If a contrary construction prevailed, it would be such a snare to magistrates that they could never be safe, for the justices do not issue their warrants of execution till they know whether an appeal will be brought or not; and they could never know when the party found himself aggrieved, if he were not to appeal to the next sessions after the conviction." (*Id.*)

Against a conviction.

Where an appeal was given within three months after *conviction*, the party has three months to signify his intention of appealing, and is not bound to appeal to the sessions which occurred within that time. The statute does not require the appeal to be lodged within this time, for that could not in some instances be done, as more than three months often intervene between the Epiphany and Easter Sessions. (*R.* v. *Middlesex*, 6 *M. & Sel.* 279.)

Against "cause of complaint."

The time from whence the right to appeal commences, where the act limits it after the "*cause of complaint*" arises, may be collected from the following decision:—By the late General Highway Act, 13 Geo. III. c. 78, s. 80, an appeal was given upon giving notice "within six days after the cause of the complaint arises." In *R.* v. *Devon*, 1 *M. & Sel.* 411, it was determined that the levy under, and not the signing of, the warrant of distress, was "the cause of complaint;" and therefore where a person assessed under this act had refused to pay, and a warrant of distress was signed and granted by two justices on the 4th of December, which was executed on the 12th, and the party thereupon gave notice of appeal within six days after the 12th of *December*, the sessions dismissed the appeal. But Lord *Ellenborough* ruled, upon a motion for a mandamus, that the party had appealed in time, it being within six days after he was actually damnified: "It is not necessary he should appeal on the warrant, for *non liquet*, that it would be proceeded upon."

The appeal clause in the Turnpike Act, 4 Geo. IV. c. 95, s. 87, (now repealed,) is very similar; and where, under this statute, the justices made an order on the surveyor of a township to perform certain statute duty on a turnpike road, and to pay to the turnpike surveyor part of the composition, it was held that the order of the magistrates was not complete until the surveyor of the township was in possession of the order, and that the *cause of complaint* arose when the order *was served;* and the notice of appeal being given within six days after the service, a mandamus was issued to compel the sessions to hear it. *Bayley*, J., observed, "That parties are often present in Court when rules are pronounced, but they are not bound to take notice of them until they are *served*. The surveyor may or may not be present when

3. *To what Sessions.*

this order is made, and it is desirable that the practice should be uniform when he attends and when not. If he does not attend, he cannot state the *matter* of appeal as required till he is served with the order." (*R.* v. *Lancashire Justices*, 8 *B. & C.* 595; 2 *Man. & R.* 519, S. C.)

Again, in further illustration of this: on an appeal under an act for the inclosure of certain lands in Middlesex, passed with a clause giving an appeal in the usual terms, "within six months from the time when *the cause of complaint* shall have arisen," the commissioner, at a meeting under the act, holden on the 18th of June, 1818, showed the map to the present appellant, with *the allotment marked out upon it*, which he, the commissioner, had assigned to him, the appellant. The latter raised some objections to it, and desired the commissioner to reconsider it. He did so, but did not think fit to make any alteration, and having received no further application, on the 28th of August following sent a formal notice to the appellant that the land remained allotted to him according to the map exhibited to him on the 18th of June previous, and on the same day the said allotment was accordingly *staked* out by command of the said commissioner. According to the particular act, as well as the General Act of Inclosure, no allotment ought to be *made* till the roads have been *set out*, and the roads in this case could not be *staked out* till the end of July, because the crops were on the ground. The appeal was lodged on the 9th of January, and respited till the 29th of April, when it was opposed on the ground of not having been lodged *in time*, i. e. within six months from the *cause of complaint arising*; and the justices dismissed the appeal on this ground: but on motion for a mandamus to compel the justices to enter continuances and hear the appeal, the Court of Queen's Bench thought "there was no actual setting out of the allotment in this case, according to the true construction of the act, till something was actually done founded upon the plan," and made the rule absolute. (*R.* v. *Justices of Middlesex, Talfourd's Dick. Sess.* 637; and 1 *Chit. R.* 367. And see *R.* v. *Nockolds*, 3 *Nev. & M.* 334; 1 *Ad. & Ell.* 245, S. C.)

Against "thing done."

In a private inclosure act power was given to the commissioners to set out land in a certain proportion in lieu of tithes to the vicar, with the following clause of appeal—"and if any persons shall think themselves aggrieved by *any thing done* in pursuance of this act, they may appeal to any general quarter session of the peace for the county, &c. within six calendar months *after such cause of complaint shall have arisen.*" The commissioners made an allotment upon the map, which the vicar inspected in November, 1812, and appointed an agent, who attended a subsequent meeting, when an alteration was made, which such *agent approved*, and it was understood at the meeting, where such agent so concurred, that all objections were reconciled, and the allotments definitively settled. In November, 1813, the commissioners *gave notice* that all tithes were to cease from the 29th of September last preceding. The vicar, being dissatisfied, *entered an appeal* against the commissioners' allotment at the Epiphany sessions, 1814, being within six calendar months from *the date of the notice* of the commissioners above-mentioned; this came on to be heard at the following Easter session, but was dismissed as being out of time. The question was, from what period the "grievance commenced." The Court of Queen's Bench were of opinion, that *the notice of the commissioners of the time from which the tithes were to cease* was the commencement of the vicar's grievance, and therefore that the appeal being within six months from *that* period was in time. (*R.* v. *Justices of Gloucetershire*, 3 *M. & Sel.* 127; *Talfourd's Dick. Sessions*, 639; and see *R.* v. *Nockolds*, 3 *Nev. & M.* 334, 1 *Ad. & Ell.* 245.) See further as to what is a "thing done" in pursuance of an act, *Smith* v. *Shaw*, 10 *Barn. & C.* 277; *Reg.* v. *Kelk*, 1 *Ad. & Ell. N. S.* 660.

Against any "act done."

By the 3 Geo. IV. c. 33, s. 7, (which related to remedies against the hundred, but now repealed by 7 & 8 Geo. IV. c. 27,) any person aggrieved by any *act done* under that act might appeal, &c. Where a party so grieved applied to the proper sessions, and they, after *hearing the case and evidence*, dismissed the complaint, not on the merits, but on a supposed want of jurisdiction, the court held that this was an *act done*, against which an appeal would lie. But the opinion was founded on the peculiar provisions and lan-

guage of that act, and must not be considered as a precedent in any other case. (*R.* v. *Tucker*, 5 *D. & R.* 534; 3 *B. & C.* 544; see also *Blakemore*, v. *Glamorgan Canal Company*, 3 *Y. & J.* 60.)

3. *To what Sessions.*

Where by a local act the management of the parish poor was vested in the churchwardens, overseers, governors and directors of the poor, and an appeal to them was given to any person thinking himself aggrieved by any thing to be done by virtue of the act, and if the appellant should be not satisfied with their *determination*, then an appeal was given to the quarter sessions, and a parishioner having applied for relief against a rate to the churchwardens, overseers, governors, and directors, they, at a meeting, resolved to take no further notice of his application; it was held, as they had not come to any *determination* on the subject-matter of his complaint, the parishioner could not appeal to the quarter sessions, but that he ought to have first applied for a mandamus to compel the churchwardens, overseers, governors, and directors to hear the appeal. (*R.* v. *Justices of Kent*, 9 *B. & C.* 283.)

Against "a determination."

By 13 Geo. III. c. 78, s. 19, (now repealed,) an appeal was given against orders of justices for stopping up roads, "to the parties aggrieved by any *such orders or proceedings* had," &c. and the question was, the precise period from which the grievance was to be estimated, and whether the *terminus à quo* for an appeal was to be reckoned from the time of the order or from the time of the actual stoppage in consequence of that order. The Court of Queen's Bench held, that an appeal to the session after the actual obstruction of the road was too late, the parties aggrieved having had notice of the order in sufficient time to have appealed to a previous session. (*R.* v. *Justices of Pembrokeshire*, 2 *East's R.* 213; see also *R.* v. *Justices of Buckinghamshire*, 3 *M. & Sel.* 230.)

Against "order or proceeding" had.

Again, in another case decided under the above act: two justices in a special session, the 20th of June, made an order for a public footway to be diverted and turned. On the 4th of July they made another order for the old footway to be stopped up. Appeal at the next *Michaelmas* quarter session, the Midsummer quarter session having been holden on the 11th of July. The justices dismissed the appeal, conceiving that the time within which it was to be made was to be reckoned *from the* date of the *first* order, which was for diverting the *way*. But it was contended, in support of the motion for a mandamus to compel the justices to hear the appeal, that the grievance commenced only at the time of the order for *stopping up the old footway*, not from that of the order for making the new one, and of that opinion was the Court of Queen's Bench. (*R.* v. *Justices of Herts*, 3 *M. & Sel.* 459; *Talfourd's Dick. Sessions*, 637.)

The *next* sessions for appealing against an overseer's accounts, are the next practicable sessions after the accounts have been published; that is, after they have been deposited with the churchwardens and overseers for public inspection, and the fact of depositing *bonâ fide* made known. (*R.* v. *Watts*, 7 *Ad & Ell.* 461; 2 *Nev. & Per.* 367, S. C.)

Against "overseers' accounts."

We have already stated, *ante*, p. 155, that where an act directs an appeal to be to the "*next* session," it in general means the next practicable session, and in illustration of this rule the following cases may be referred to.

When the appeal is to be to the *next* practicable session.

In a case, decided before the 4 & 5 Will. IV. c. 76, where a motion was made for a *mandamus* to hear an appeal from an order of removal, Lord *Ellenborough*, C. J. said, "'*next session*,' in all cases, means next *practicable* session. In this case the distance between the respondent and appellant parishes was twenty-four miles, the appellant parish was distant from the county town thirty-seven miles, only two days intervened between the services of the notice and the day of the session being holden, and one of those was Sunday, which no man is obliged to devote to secular purposes, and without so doing in this case, there could not be sufficient time for all that was necessary to be done. As to entering an appeal for the mere purpose of *respiting*, which it is said might have been done, it is only increasing unnecessary expense. The *next subsequent* session, therefore, in this case was the *next practicable* session." (*R.* v. *Justices of Essex*, 1 *B. & Ald.* 210.)

So in a case, also decided before the passing of the 4 & 5 Will. IV. c. 76,

3. *To what Sessions.*

where an order of removal had been made by two justices on the 22d of September, but the pauper was not removed till the 5th of October. Hull, the place to which the pauper had been removed from Whitley, is sixty miles from Northallerton, where the session began on the 6th of October; at that session no appeal was entered, and at the Epiphany session following, which began on the 12th of January following, the parish charged offered an appeal; the justices refused to hear it, thinking themselves bound by the words of the statute, which says, "that persons aggrieved may appeal to the justices of the peace *at the next quarter sessions.*" On motion for a *mandamus* to receive the appeal, the court said, "that by *next session* the statute of Car. II. must have meant the *next possible session;* and that here it was impossible for the appellants to lodge their appeal at the Michaelmas session." (*R.* v. *Justices of Yorkshire, W. R., Dougl.* 183; *R.* v. *Justices of West Riding of Yorkshire,* 4 *M. & Sel.* 327.)

In a case under the 4 & 5 Will. IV. c. 76, where an order of removal was served on the 18th March. The parish to which the order was directed came to the determination to appeal against it on the 4th of April. On the 8th, the sessions were held. And by the practice of the sessions seven days' notice of appeal was required; *Williams, J.*, held, that the Midsummer sessions following were the next practicable sessions for the purpose of appealing; for the parish, under sect. 79 of the above act, on the 18th March, had twenty-one days to judge whether it would appeal against the order; within which time, viz. on the 4th April, they resolved to do so; when they were too late to give the seven days' notice for the April sessions. (*Rex* v. *Justices of Herefordshire,* 8 *Dowl.* 638. See *post,* title "*Poor,*" Vol. IV.)

Where overseers' accounts, allowed by two justices, were delivered to the successors so late that they could not appeal to the next sessions, it was holden, that an appeal to the next practicable sessions was in time, and that the justices might then respite the appeal, though the respondents objected to the delay. (*R.* v. *Thackwell and others,* 4 *B. & C.* 62; 6 *D. & R.* 61, S. C.; *R.* v. *Watts,* 7 *Ad. & E.* 461; 2 *Nev. & Per.* 367, S. C.)

Only one intervening day between the publication of a poor rate and the *next immediate* quarter session is not sufficient for an effectual notice of appeal. (*R.* v. *Justices of Sussex,* 15 *East,* 206; and *R.* v. *Justices of Dorsetshire,* 15 *East,* 200.)

Before some recent decisions it was thought necessary to enter and respite the appeal at the next sessions after the making of the order, &c., though such sessions were not the "next practicable sessions." However a more sensible rule has now been adopted; and in *R.* v. *Justices of Southampton,* (6 *M. & Sel.* 394); in *R.* v. *Justices of Devon,* (4 *Man. & R.* 148); and *R.* v. *Justices of Kent,* (3 *Man. & R.* 15; 8 *B. & C.* 639, and in notis,) it was determined that it was not necessary to enter and adjourn an appeal against an order served too late to comply with the notices required by the sessions to try the appeal. Lord *Tenterden,* C. J., observed, the entry for the mere purpose of adjournment is a useless act, and only occasions unnecessary expense; and as to inconvenience which may result from this rule, viz. that the removing parish may not know of the intention to appeal till within eight days of the following sessions, his Lordship said, if it proved an inconvenience, the sessions may require longer notices in such circumstances. (See also *R.* v. *Justices of Suffolk,* 8 *Dowl.* 618; *R.* v. *Justices of Herefordshire,* 8 *Dowl.* 638.) These cases overrule that of *R.* v. *Herefordshire,* 3 *T. R.* 504, where Lord *Kenyon* said the appeal ought to have been entered and adjourned.

IV. Preliminary Steps before Trial.

And herein of—1. The notice of appeal. 2. The recognizance. 3. The entry of the appeal; and 4. The effect of not taking necessary preliminary steps.

(1.) Notice of Appeal.

4. *Preliminary Steps. Notice.*

Notice of appeal.

When necessary.]—The statute which allows an appeal usually directs that a notice of the party's intention to appeal shall be previously given either to the justices or to the complainant, or to both; but unless expressly required, a notice of appeal does not appear absolutely necessary. (*R.* v. *Justices of Essex*, 4 *Barn. & Ald.* 276, *infra.*)

When necessary.

When the statute expressly requires a notice of appeal to be given, no practice of the sessions can do away with the necessity of such notice as prescribed by the act. (*R.* v. *Justices of Lincolnshire*, 3 *B. & C.* 548; 5 *D. & R.* 347, S. C.; *R.* v. *Justices of Staffordshire*, 4 *Ad. & El.* 842, 6 *Nev. & Man.* 477, S. C.; *R.* v. *Justices of West Riding of Yorkshire*, 4 *B. & Ad.* 685.)

When not.

It is material also to observe, that where the statute giving the appeal directs the appellant to enter into recognizances, but requires no notice, it is not necessary to give the notice required by the sessions. Thus, where an order of sessions required, "that all notices of appeal made to the court shall be given by the parties eight days before the sessions begin," and a person convicted under 55 Geo. III. c. 29, entered into the recognizance to prosecute his appeal required by the statute, which statute required no notice, it was held that the order of sessions required the eight days' notice to be given only in those cases where some notice is prescribed by the statute; and that the recognizance was equivalent to notice. *Holroyd*, J., added, "It appears, that if the conviction is made more than six days before the sessions, the party grieved *must* appeal to the next sessions. Suppose it, then, made seven days before the sessions, he must appeal to those sessions, and yet cannot give the notice prescribed by the sessions." (*R.* v. *Justices of Kent*, 6 *M. & Sel.* 258.)

Therefore on a rule for a *mandamus* to hear the appeal of a defendant against the conviction of a magistrate under the (now repealed) 50 Geo. III. c. 48, s. 4, called the Stage Coach Act, by which the defendant was convicted in a penalty for carrying more luggage than is allowed by the act; the defendant had, within fourteen days, entered into a recognizance, as required by the act, to prosecute his appeal against the conviction, and had given notice of appeal to the magistrate, but not to the informer; by the practice of the sessions for the county of *Essex*, eight days' notice of appeal is required to be given, in all cases, by the appellant to the respondent; it was objected at the sessions that the practice not having been complied with in this particular, the appellant was not entitled to be heard, and the sessions allowed the objection, and dismissed the appeal; it was contended that the entering into the recognizance before the magistrate dispensed with the necessity of giving notice of appeal. *Sed per Bailey*, J. "I am of opinion that the sessions ought to have heard this appeal. Wherever the legislature has deemed a notice of appeal to be necessary, they have in express terms prescribed such notice; but here, by the 50 Geo. III. c. 48, s. 25, it is expressly provided, 'that any party aggrieved by the conviction, who shall within fourteen days enter into a recognizance to appear at the next sessions, shall be at liberty to appeal at the next general quarter sessions of the peace to be holden for the county.' The act of parliament, therefore, does not require any notice of appeal; and inasmuch as the party convicted had entered into a recognizance to prosecute his appeal at the next sessions, the informer must have known that it was the intention of the party convicted to appeal, and any further notice was therefore unnecessary. I think therefore that this rule ought to be made absolute." The rule was accordingly made absolute. (*R.* v. *Justices of Essex*, 4 *B. & Ald.* 276; and see *R.* v. *Milnrow*, 5 *M. & Selw.* 248.)

When to be in writing.

When Notice to be in Writing.]—The statute giving the appeal, and requiring a notice of it, in general directs such notice to be in *writing*; but unless it expressly so requires it, a verbal notice is sufficient. And the term "*reasonable* notice" does not of itself require a written one. (*a*) (*Post*, 160.)

(*a*) Where by the statute the notice must be *in writing*, it seems that a *printed* notice would be sufficient. By the Statute of Frauds a memorandum in writing is

4. *Preliminary Steps Notice.*

In a case on the 49 Geo. III. c. 68, in a matter of bastardy, the reputed father had entered into the recognizance required by section 5 of that act, but had given no written notice of appeal. At the sessions he offered to prove that he had given a parol notice to the affiliating justices of his intention to appeal, and of the cause and matter of such appeal, but the sessions would not allow such notice to be proved, and dismissed the appeal. On showing cause against a rule *nisi* for a *mandamus* to the sessions to enter continuances and hear the appeal, *Bayley*, J., observed, "I am of opinion that in this case the sessions ought to have received the evidence of the parol notice of appeal which was tendered by the appellant. It may be convenient that a notice of appeal, particularly where it is a notice of the cause and matter of the appeal, should be in writing, and in many cases the statute giving the appeal requires that there should be a *written* notice: but we cannot say that a notice in writing is necessary where it is not required to be in writing by the clause in the statute which directs a notice to be given. An appeal is usually allowed by statute on certain conditions; and when one of those conditions is, that the party appealing shall give a notice of his appeal, it would be to add a further condition, if we were to hold that such notice must be in writing." Rule absolute. (*R.* v. *Justices of Salop*, 4 *B. & Ald.* 626; and see *R.* v. *Justices of Lincolnshire*, 3 *B. & Cres.* 548; 5 *Dowl. & Ryl.* 347, S. C.; *R.* v. *Justices of Yorkshire* (*re Bower*), 4 *B. & Adol.* 685; 2 *Nev. & M.* 390, S. C.; *infra.*)

Time of notice. Reasonable time.

Time of Notice.]—Where the statute requires a notice of appeal without specifying the time when such notice is to be given, it implies a *reasonable* notice. The reasonableness of such notice as to being in time is for the justices at sessions to decide on. Thus in *R.* v. *Justices of Surrey*, (1 *Dowl. & Ryl.* 160; 1 *Dowl. & Ry. Mag. Ca.* 64; 5 *B. & Ald.* 539, S. C.) the defendant was convicted on the 6th of November, 1821, under the 12 Geo. II. c. 28, for gaming, and entered into recognizances to appeal against the conviction to the next quarter sessions. It was sworn on the one side, and denied by the other, that at the time of entering into recognizances his attorney gave a verbal notice to the informer of his intention to appeal. The defendant attended in order to prosecute his appeal at the last January sessions, when there having been no notice of appeal in writing, the court refused to hear the appeal. The 5th section of the act giving the appeal states, that "persons aggrieved may appeal, giving reasonable notice to the prosecutor and entering into recognizances," &c. In support of a rule for a *mandamus* to enter continuances and hear the appeal, it was contended that the sessions were to judge what was a reasonable notice of appeal, and they were of opinion that it must be a notice in writing. *Sed per Abbott*, C. J., "We are of opinion that where a statute requires reasonable notice to be given, it does not necessarily mean that the notice should be in writing, but only that as to time or number of days it should be reasonable. Here, however, as the fact is disputed, we shall only grant a *mandamus* to the justices, commanding them to examine whether reasonable verbal notice has been given, and in that case to enter continuances and hear the appeal. The reasonableness of such notice in point of time is certainly for the justices to decide. It is not our province to decide upon affidavits whether reasonable notice was given in point of time, that is for the sessions to determine." (See also *R.* v. *Watts*, 7 *Adol. & El.* 461.)

The question as to what is a *reasonable* notice must necessarily depend on the facts of each particular case, and no general rule can be laid down as to it.

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required to be *signed* by the party to be charged; and in *Schneider* v. *Norris* it appeared that the defendant (the vendor) *wrote* the vendee's name on a blank form, on which the defendant's name was printed, and this was held to be a sufficient signing by defendant; and *Le Blanc*, J., said, if it had been *stamped* with his own name that would be sufficient. (2 *M. & Sel.* 286, see also *Saunderson* v. *Jackson*, 2 *B. & P.* 238.) The celebrated Abjuration Act was *stamped* by William III. with his name, as he was too feeble to write. (*Cox's Marlborough.*)

But although the sessions have a discretion to exercise in deciding what is a reasonable time for giving the notice, still the Court of Queen's Bench have a kind of visitatorial jurisdiction over them, in the exercise of such a discretionary power; and if they exercise such power in an improper manner, the Court of Queen's Bench will interfere. (*R.* v. *Justices of Wilts*, 10 *East*, 404.) Where the sessions dismissed an appeal without hearing it, on the ground that they had no authority to try it for want of a sufficient length of notice to the respondents according to a new rule of practice promulgated two sessions before, but then first acted upon, and which was not known to the appellant's attorney, who had given the former usual notice, the Court of Queen's Bench granted a mandamus to the sessions to enter continuances and hear the appeal. (*Id.*)

4. *Preliminary Steps. Notice.*

Sometimes the statute requires *immediate* notice to be given. Thus by the now repealed (*a*) Malicious Trespass Act, 1 Geo IV. c. 56, s. 5, an appeal is given to the party convicted "on giving *immediate* notice of such appeal," &c. Where a defendant convicted on this statute did not give notice of appeal until *seven* days after the date of the conviction, the Court held that this was not such a prompt compliance with the terms of the statute as to justify the sessions in entertaining the appeal, although the Court would not say that the word "immediate" must be construed so strictly as to require the notice to be given forthwith on conviction. (*R* v. *Justices of Huntingdonshire*, 5 *D. & R.* 588; 2 *D. & R. Mag. Ca.* 594, S. C.; and see *R.* v. *Justices of Worcester*, 7 *Dowl.* 789, *post*, 163.)

Immediate notice.

If an act of parliament requires that the person aggrieved shall give a certain number of *clear* days' notice of appeal or a certain number of days' notice of appeal *at least*, before the quarter sessions of his intention to appeal, this means a number of perfect intervening days between the act done and the first day of the sessions; (*R.* v. *Justices of Herefordshire*, 1 *Nev. & M.* 331; 3 *B. & Ald.* 581; *R.* v. *Justices of Shropshire*, *infra*, and see *Roberts* v. *Stacey*, 13 *East*, 21;) and it would seem that this is the case though the word "clear" or the words "*at least*," be not made use of in the act. (See *R.* v. *Justices of Shropshire*, 8 *Ad. & E.* 173; 1 *P. & D.* 249, S. C., *per* Littledale, J.; *Mitchell* v. *Foster*, 4 *P. & D.* 150; 9 *Dowl.* 527, S. C.;) but this must be considered questionable; (see *R.* v. *Justices of West Riding of Yorkshire*, 4 *B. & Ad.* 685; and "*Time*," Vol. VI. p. 260.)

Computation of days in notice.

The remaining points as to the time of the notice with reference to the sessions to which the appeal is to be made will be found, *ante*, p. 154 to 158.

Notice by whom, and to whom given.]—The statute points out the parties by and to whom the notice of appeal is to be given. If several have a joint grievance they may join in giving the notice. (See *R.* v. *White*, 4 *Term Rep.* 771; *R.* v. *Justices of Sussex*, 15 *East*, 206.) And where three defendants were convicted on a joint hearing, and gave a joint notice of appeal, it was held sufficient, though three separate convictions were returned to the sessions. (*R.* v. *Oxfordshire Justices*, 12 *Law J. Rep.* (*N. S.*) *M. C.* 40.)

By and to whom given.

An enclosure act gave to the party aggrieved a right of appeal for any thing done in pursuance of that act, or of the (recited) General Inclosure Act, on giving to the commissioner *and to the parties concerned ten days' notice* in writing: notice of appeal against an order ascertaining the boundaries between two townships was served on the commissioner, but not *on the lady of the manor*, who was a party materially interested in the question, because the commissioner had (as was alleged) committed a great error in ascertaining the boundaries of the parish to be inclosed, and had included within his boundary a considerable part of an adjoining manor belonging to a Mrs. S. At the sessions it was proposed to respite the hearing of the appeal which had been entered; but as the notice was insufficient, none having been given to the lady of the manor, the justices determined it could not be entered or heard. A *mandamus* being applied for to enter continuances and to hear the appeal, the Court of Queen's Bench were unanimous in opinion

"Parties concerned."

(*a*) Repealed by 7 & 8 Geo. IV. c. 27. But re-enacted in other words by the 7 & 8 Geo. IV. c. 30. See *post*, "*Malicious Injuries to Property*," Vol. III.

4. *Preliminary Steps. Notice.*

that the justices had acted right, and the *mandamus* ought not to issue. The notice of appeal was insufficient. The party who appeals is bound to give eight days' notice by the general act to the commissioner, by the local act ten days' notice to the commissioner, *and also to the parties concerned.* The latter therefore *so far* supersedes the provisions of the former, and it would be a great hardship if the *party concerned* were bound by a notice to the commissioner alone. "Party concerned" includes parties directly interested in the soil, which in this case the lady of the manor was, and therefore entitled to notice, which she had not received. (*R.* v. *Justices of Lancashire*, 1 *B. & A.* 630.)

"To justices."

Where a statute required that the notice should be given to the convicting justices, it was held that it must be given to all of them; (*R.* v. *Justices of Cheshire*, 11 *Ad. & Ell.* 139; 3 *Per. & D.* 23, n., S. C., overruling *R.* v. *Justices of Staffordshire*, 4 *Ad. & El.* 842; *R.* v. *Sillifant*, *id.* 354;) and this although at the time of giving the notice, the conviction had in fact been signed only by one justice, to whom the notice had been given; there being no proof that the conviction so signed was communicated to the appellant, before he gave the notice, so that he might have been misled thereby.

See further, *post*, 173, as to the entering and respiting.

Contents of notice. Grounds of appeal.

Contents of Notice.]—If the statute does not expressly require it, the notice need not state the grounds for the appeal; otherwise it must, and this in a specific manner, so that the objections raised may be known to the justices and parties concerned before hearing the appeal. (See *R.* v. *Justices of Westmoreland*, 10 *B. & Cres.* 226.)

Where, however, the facts which constitute the ground of appeal are more within the knowledge of the respondents than the appellants, the notice need not be so explicit. (*R.* v. *Justices of Carnarvonshire*, 1 *Gale & D.* 423.)

A notice of appeal against a conviction under the 5 Geo. IV. c. 83, s. 4, of a party as a rogue and vagabond, for obscenely exposing his person in a place of public resort, with intent to insult a female, stating as the grounds of such appeal, that the appellant was not guilty of the said offence, is sufficient, the appeal being against defendant's conviction on the merits, and not a mere matter of form. (*R.* v. *Justices of Newcastle-upon-Tyne*, 1 *B. & Ad.* 933.)

Whether the statement of the grounds of appeal contains sufficient particularity is for the sessions to determine; and where they have decided it to be insufficient to let the appellants into their case, the Court of Queen's Bench will not grant a mandamus to enter continuances and hear the appeal. (*R.* v. *The Justices of Kesteven*, 13 *Law J.* (*N. S.*) *Mag. Ca.* 78, overruling *R.* v. *The Justices of Carnarvon*, 2 *Q. B.* 325, and *R.* v. *Justices of West Riding*, *id.* 331.)

Where the grounds of appeal must, by statute, be stated in the notice, none besides those fairly included in its terms can be entered into at the sessions, or in the Court of Queen's Bench, though apparent on the face of the case sent up. (*R.* v. *Inhabitants of Stafford*, 1 *Nev. & Per.* 414, &c.)

A statute which prevents a party from going into or giving evidence, on the hearing of the appeal, of any other grounds of appeal than those set forth in his notice, extends to objections apparent upon the face of the order so appealed against. (See *R.* v. *Inhabitants of Withernwick*, 6 *Ad. & Ell.* 273; *Rex* v. *Inhabitants of Bromyard*, 8 *B. & C.* 240; 2 *Man. & Ry.* 280, S. C.)

If the appellant unnecessarily states in his notice, as causes of appeal, a fact or ground which does not exist, the court of sessions ought to adjourn the appeal, if they think the respondents have been misled by the terms of the notice, or otherwise to hear it. (*R.* v. *Justices of Newcastle-upon-Tyne*, *supra.*)

It has been decided under the 4 & 5 Will. IV. c. 76, (the Poor Law Act,) that where an appeal has been simply entered and respited at the sessions, a fresh statement of the grounds of appeal may be served. (*R.* v. *The Justices of Derbyshire*, *note* (b), *to R.* v. *Kimbolton*, 6 *Ad. & E.* 612.) But where on the hearing of an appeal against an order of removal, the bench, being equally divided, adjourned the case to the next sessions; the Court held, that the appellants could not after such adjournment serve a fresh statement of their grounds of appeal. (*R.* v. *Arlecdon* (*Inhabs. of*), 11 *Ad. & E.* 87; 3 *P. & D.* 93; *post*, "*Poor.*")

When notice given by a party aggrieved.

Where a statute gives a right of appeal against acts done in pursuance thereof to parties aggrieved by such acts, the notice of appeal must state that

the appellant is *a party aggrieved* by the act of which he complains, or state that from which it follows of necessity that he is so. (*R.* v. *Justices of West Riding of Yorkshire*, 1 *M. & R. Mag. Ca.* 215; *R.* v. *Justices of Essex*, 7 *Dowl. & Ryl.* 658; 3 *Dowl. & Ryl. Mag. Ca.* 483; 5 *B. & Cres.* 431, S. C.; *R.* v. *Blackawton*, 10 *B. & Cres.* 792; *R* v. *Bond*, 6 *Ad. & Ell.* 905.) In a notice of appeal against an order for stopping up a footway (under the now repealed 55 Geo. III. c. 68, s. 3,) it sufficiently appears that the appellant is the party aggrieved, if it be stated that he and his tenants, occupiers of a farm and lands near the said way, and who have heretofore used, and have a right to use it, and also other persons, and the public will be put to great inconvenience. (*R.* v. *Justices of West Riding of Yorkshire*, (*in the matter of Bower*,) 4 *B. & Adol.* 685; 2 *Nev. & M.* 390.)

4. *Preliminary Steps. Recognizance, &c.*

If the notice be given by or to parish officers, it seems that they may be described as churchwardens and overseers, without naming them. (*Talf. Dick. Sessions*, 645.)

When by or to parish officers.

But if the appeal is given to the holder of a particular office, the notice must state the appellant to be such holder. (*Id.*)

When to holder of an office.

As to notices of appeal in *particular* cases, see the various titles throughout this work.

See the form of the notice in general, *post*, No. 1.

Abandoning Notice.]—It seems that a notice of appeal may be abandoned, and a fresh one given, provided it is in proper time, supposing it to be the first notice. (*R.* v. *Justices of Middlesex*, 9 *Dowl.* 163; *R.* v. *Justices of West Riding of Yorkshire*, 3 *T. R.* 776; *Paley, Conv.* 285; and see *R.* v. *Justices of Cheshire*, 1 *Dowl. N. S.* 570.)

Abandoning notice.

(2.) The Recognizance.

It is required, in many cases, that the party appealing shall enter into a recognizance with sureties, conditioned to try the appeal, and to abide the judgment of the court thereon, and to pay such costs as shall be awarded. The terms in which this recognizance is to be given must depend upon the statute requiring it.

Recognizance.

It is sufficient if the recognizance be verbally acknowledged within the time fixed by the statute for entering into it, and it may be perfected afterwards. (*R.* v. *Justices of St. Alban's*, 8 *Ad. & Ell.* 932; 1 *Per. & D.* 148, S. C.)

Where the statute requires that the recognizance shall be entered into "forthwith" after notice of appeal, it must be entered into within a reasonable time after such notice. (*R.* v. *Justices of Worcester*, 7 *Dowl.* 789.)

Where the recognizance was required to be entered into as above, but was not entered into until nine days after the notice was given, and no cause was assigned for the delay; it was held, that the recognizance was entered into too late. (*Id.*)

See form of recognizance, *post*, 176, and as to recognizances in general, *post*, tit. "*Recognizance*," Vol. V.

(3.) Entering and Petition of, and Order for Hearing Appeal.

Before trial, and within the time limited by the practice of the sessions, the party appealing must enter the appeal with the clerk of the peace.

Entry and petition of appeal.

By the practice of the Middlesex sessions, a petition to the justices for the hearing of the appeal is usual, and it is also usual at such sessions to obtain an order for the hearing. But in most counties this petition and order are dispensed with, and it would seem that as an appeal is a matter of right, there can be no ground in any case to require either of them.

As to entering and respiting appeals, see *post*, 173.

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4. *Preliminary Steps before Trial.*

Effect of not taking necessary preliminary steps.

(4.) Effect of not taking necessary Preliminary Steps.

If the appeal, as is usually the case, is given only on certain conditions, such as the giving notice, entering into recognizance, or the like, the sessions cannot enter or receive the appeal, or otherwise deal with it, if such conditions have not been complied with; and if dismissed for such reason, the right of appeal is gone, and cannot be renewed at any other sessions. *R.* v. *Justices of Oxfordshire*, 1 *M. & Sel.* 446; *R.* v. *Justices of Carnarvon*, 4 *B. & Ald.* 86; *R.* v. *Lambeth*, 3 *D. & R.* 340; 2 *D. & R. Mag. Ca.* 26, S. C.; *R.* v. *Bond*, 6 *Ad. & Ell.* 905; *Paley on Conv.* 283, *by Dowl. post*, 172, 173.)

Where a conviction on 16 Geo. III. c. 30, made the 13th July, was appealed against to the next *Michaelmas* sessions, and the party entered into a proper recognizance, but neglected to give any notice of appeal, conformably to the appeal clause, which gave an appeal to the sessions next after twenty-one days from the conviction, "the appellant giving six days' notice," which last words were considered as imperative, and not merely directory, the justices at the first sessions adjourned the appeal, and at the following sessions it was dismissed on the objection of want of notice, and it was held by the Court of Queen's Bench, that the want of notice was a decisive objection to the first appeal, and that the sessions had not even authority to adjourn it on account of its never having been properly entered; for the court said, the sessions having no jurisdiction for want of notice could not acquire to themselves a jurisdiction by an act of their own; the power of adjournment is only where the sessions cannot conveniently hear the appeal after it has been *duly* entered. (*R.* v. *Justices of Oxfordshire*, 1 *M. & Sel.* 448; see *R.* v. *Justices of Lancashire*, 5 *D. & R* 347; 3 *B. & Cres.* 548, *post.*)

So where a statute gave an appeal from a conviction by a justice to any quarter sessions to be holden within six months from such conviction, on condition that the appellant should give ten days' notice of his intention to appeal, and enter into a recognizance within four days after such notice, an appeal was lodged at the first sessions after a conviction, the sessions discharged it without entering into the merits, for want of proof that the recognizance was entered into within four days of the notice given. At the following sessions, and within the six months of the conviction, a second appeal was lodged, which the court refused to hear. Upon a motion for a *mandamus* to compel the sessions to receive such second appeal, it was held, that the first judgment was conclusive, and that no second appeal could be brought against the same conviction, (on a local act, 17 Geo. III. c. 106,) for it was held, that after the appeal was lodged and adjudged by the justices at sessions to be informal, they were *functi officio*, and could not take cognizance of the second appeal. And Mr. *J. Buller* said, "The act certainly only gives a right of appealing *once*, and the parties having had one appeal are bound by that. If the question had rested solely on the *notice* of appeal for the first sessions which happened, and nothing further had been done, I should not have thought the parties bound by it, for the act gives the power of appealing within a certain time with these two requisites, *viz.* that the appellant must give ten days' notice, and within four days after enter into a recognizance. When the party, therefore, found out his mistake, he might have stopped there, but he persisted in going on with his appeal, and brought it before the court, and took their judgment upon it; the appellant jurisdiction was therefore fully exercised, and though it was originally in the option of the parties whether they would appeal to the first or second sessions which took place within the six months, yet, having made their election to appeal to the first, they must abide by the judgment there given. (*R.* v. *Justices of Yorkshire*, 3 *T. R.* 776.)

But if the statute giving the appeal only enact that the appellant shall not be heard in support of his appeal, unless he give notice of it, or the like, the sessions have jurisdiction over the appeal, though no notice have been given; (*R.* v. *Justices of Cheshire*, 8 *Ad. & Ell.* 398;) and may therefore receive and adjourn it. (*R.* v. *Inhabitants of Kimbolton*, 6 *Ad. & Ell.* 603; *post*, 172.

5. *Hearing and Trial of.*

V. Hearing and Trial. Judgment. Adjournment, &c.

(1.) Hearing and Trial.

As to the petition and order for hearing of the appeal which is adopted at some sessions, see *ante*, 163. **Practice as to hearing.**

Appeals are usually called on for hearing in the order in which they stand in the paper of the clerk of the peace, which should be that in which they are entered. This, however, appears to be mere matter of arrangement in the discretion of the Court, who may take the appeals in any order which the general convenience of the public, or particular circumstances, may seem to them to dictate. (*Talfourd's Dick. Sessions*, 649.)

In general a preference is given to *foreign* appeals.

There seems to be no general rule requiring the personal attendance of the appellant, and the necessity for this depends in a great measure upon the practice of each sessions respectively. In an appeal against a conviction on the stage coach act, 50 Geo. III. c. 48, it was resolved by the quarter sessions for the county of Essex, that the appellant must be present at the hearing of his appeal. (*R.* v. *Cracklin, Mich.* 1822.) The like practice seems to prevail at the Middlesex sessions, and the same reason which requires that the appellant should be present applies equally to the former. (*Paley, Conv. by Dowling*, 290, n. (1).) **Personal appearance of appellant and respondent.**

Where an order of justices was affirmed on appeal by the sessions, without hearing, owing to the absence of the appellant's attorney, and the sessions refused to re-open the appeal, except on the terms of payment of full costs, the Court of Queen's Bench refused to interfere by mandamus. (*R.* v. *Justices of Lancashire*, 2 *Jurist*, 468, B. C.)

The first step after the appeal is called on, is that the appellant should prove that he has performed the conditions (if any) precedent to his right of appeal; as that he has given notice of the appeal, and entered into a recognizance, or the like. (*Ante*, 158.) In default of the above proof the sessions have no jurisdiction to hear the appeal. (*Ante*, 163.) But it seems, however, that the respondent may waive proof of the above. (*R.* v. *Justices of Herts*, 4 *Barn. & Adol.* 561; see *Talfourd's Dick. Sessions*, 650.) **Proof to give sessions jurisdiction.**

Where notice of appeal was given against a poor-rate, and the respondents attended at the sessions, and prayed a respite, alleging that they had not had time to prepare their defence to the matters stated as grounds of appeal, the appellant opposed the respite, but it was granted, no notice of appeal having been proved, or expressly admitted. An order of respite was made out, embodying the grounds of appeal stated in the notice; it was held, that at the following sessions the appellant was entitled to be heard without proving any notice of appeal. (*R.* v. *The Justices of Hertfordshire*, 1 *Nev. & M.* 331; 4 *B. & Adol* 561.)

The court of sessions are to say whether reasonable notice of appeal has been given, and they are to judge what notice is reasonable where the statute does not require any particular time for such notice; but where the statute does so require it, the sessions must be concluded by the statute; (see *R.* v. *Justices of Norfolk*, 3 *Nev. & M.* 55; 5 *B. & Adol.* 990.)

If the appeal be against an order of justices, the order should be produced by the appellants, or its non-production accounted for in the usual way, and some other evidence of it be given. This is a necessary preliminary to the appeal; and if the sessions act wrong in receiving improper evidence of the order, the Court will interfere by a writ of mandamus. (*R.* v. *Justices of Sussex*, 9 *Dowl.* 125.)

The appeal having thus been regularly brought before the sessions, they should proceed to hear the same.

If the sessions improperly refuse to hear the appeal, the Court of Queen's Bench will compel them to do so by a writ of mandamus; (*R.* v. *Inhabitants of Frieston*, 5 *B. & Adol.* 597; *R.* v. *Justices of Carnarvon*, 1 *Gale & D.* 423; *R.* v. *Justices of Sussex*, 9 *Dowl.* 125; *R.* v. *Justices of Cheshire*, 8 *Dowl.* 616; **Sessions improperly dismissing appeal.**

5. *Hearing and Trial of.*

R. v. *Justices of Gloucestershire*, 1 *B. & Adol.* 1; (where one witness had been examined on the appeal before the objection as to the jurisdiction was taken;) *R.* v. *Justices of Cumberland*, 4 *Ad. & Ell.* 695; (where part of the appeal had been heard;) and see *R.* v. *Justices of Carnarvon*, 4 *B. & Ald.* 86.) And it seems that the Court of Queen's Bench will, upon granting the mandamus, take into their consideration the evidence given before the sessions. (*R.* v. *Justices of Cheshire, supra.*)

The mandamus should be applied for promptly. (*R.* v. *Justices of the West Riding*, 1 *Gale & D.* 706.)

When appeal dismissed subject to a case.

If the sessions dismiss the appeal subject to a case, which the applicants for the case do not take up to the Court of Queen's Bench, that Court will not, at the applicant's instance, grant a mandamus to enter continuances and hear the appeal. (*R.* v. *Justices of the West Riding*, 1 *Ad. & Ell.* 607; *R.* v. *Justices of Suffolk*, 6 *Ad. & Ell.* 109; 1 *Nev. & Per.* 306, S. C.; *R.* v. *Justices of Northampton*, 6 *Ad. & Ell.* 111.)

Where sessions rightly refuse to hear appeal, but for insufficient reasons.

If the sessions rightly refuse to hear the appeal, the Court of Queen's Bench will not compel them to hear it, upon the ground that they so refused for insufficient reasons. (*R.* v. *Justices of the West Riding*, 1 *Gale & D.* 630.)

Proceedings on hearing.

It may be as well here to state that in some cases the appellant cannot, by the statute giving the appeal, go into any ground of appeal not stated in his notice, (*post*, 162); but when this is not the case the appellant may be allowed to travel out of it, provided it has not misled the respondent, in which case the sessions should sometimes adjourn the appeal. (*R.* v. *Justices of Westmoreland*, 10 *B. & Cres.* 226; *ante*, 162.)

Formal objections to conviction to be stated at once.

Where the appeal is against a conviction, the clerk of the peace first reads the conviction which has been returned by the convicting justices.(*a*) If any

Sessions only to take notice of record of conviction returned by justices.

(*a*) The sessions can only take notice of the record of the conviction returned by the magistrate. Thus a conviction on 48 Geo. III. c. 74, s. 13, having been appealed against, the magistrate returned to the session a record of conviction, signed and sealed the 5th June, 1811, setting forth that the appellant on such a day was, on the complaint of *Isaac Mann*, convicted, &c. It appeared on the trial of the appeal, that at the time of the conviction an instrument bearing the same date was regularly signed and sealed by the magistrates, stating that the defendant on the same day was, on the complaint of *W. Bourne* and *Isaac Ottley*, convicted, &c. A copy of this latter instrument had been delivered by the justice's clerk to the defendant, written on the back of the information, which information thereby appeared to be that of *Isaac Mann*, and not of *W. Bourne* and *J. Ottley*, who were in fact the witnesses, and not the informers. This copy was produced by the appellant at the sessions, but the Court refused to let it be filed. They, however, took notice of it as a memorandum or *minute* of the conviction, and ordered that which was returned on parchment by the magistrate, and filed, to be quashed, because of its variance from the above minute. This order of the sessions having been removed by *certiorari*, a rule was obtained for quashing it, which in effect was to set up again the conviction returned by the magistrates. Upon argument, the Court of Queen's Bench considered the conviction returned to the session by the magistrate as the only one of which the sessions could take notice, and that, consequently, they had done wrong in quashing it on account of the manifest mistake in the copy or memorandum produced by the appellant. (*R.* v. *Allen*, 15 *East*, 333, 346.) It was said by the Court upon that occasion, that if the justice had done wrong in returning an improper conviction to the sessions, he would be punishable; but it clearly appeared that the copy delivered to the appellant was drawn up in the form he received it by mere mistake, for it was drawn up on the back of the information of the very person who was the true informer. (*R.* v. *Allen*, 15 *East*, 333, 346.) And the Court agreed, in this case, that as the defendant had chosen to stand upon the objection which he had taken, he had avoided entering into the merits of the case upon the appeal; and they therefore refused to send the case down again to be heard upon the merits. (See *Paley, Conv.* 288; *post*, 169, 171.)

If therefore the magistrate, in order to sustain the conviction, should mistake the evidence or other proceedings before him, the remedy is by motion founded on affidavit to the Court of Queen's Bench for a *mandamus* to compel the magistrate to state the whole of the evidence adduced before him correctly in his convic-

objections arise on the face of the conviction, the appellant usually begins, and he is bound to state all his objections thereto at once, in order that they may be met on the other side, for it would be endless if each objection were to be discussed and decided *seriatim*.

5. *Hearing and Trial of.*

Who to begin.

Should the objections to the form of the conviction be overruled, or none be taken *in limine*, the respondent, or his counsel, opens his case upon the merits, and calls his witnesses; and he is not confined to such witnesses as were examined below. (See *infra*.) Such witnesses may be cross-examined.

Appellant's answer.

If the Court thinks the case thus opened and proved requires an answer, the appellant then opens his case and calls his witnesses, with the like liberty of calling fresh evidence, in addition to what he may have relied upon on the hearing of the information.

Respondent's reply.

As soon as his own case is closed, the respondent has a general reply upon the whole case, if, indeed, the appellant calls witnesses; but if the appellant calls no witnesses, the case is closed by the appellant's, or his counsel's, address.

Fresh evidence on.

Both parties are at liberty to examine all competent witnesses on their behalf, without regard to whether they have been examined before or not, unless it is provided by statute, (as by the 48 Geo. III. c. 74, s. 15,) that upon the appeal the same witnesses, and no other, shall be re-examined. (*Breedon* v. *Gill*, 1 *Ld. Raym.* 219, which was a conviction on the malt act.) And this rule extends to appeals to the commissioners of appeals in matters of excise. (*R.* v. *Commissioners of Appeal in Matters of Excise*, 3 *M. & Sel.* 133; see *R.* v. *Jeffery*, 2 *D. & R.* 860; 1 *D & R. Mag. Ca.* 455; 1 *B. & C.* 604, S. C.; *Paley, Conv. by Dowling*, 290, *n.* 1; *post*, "*Excise*," Vol. II.) See as to appeals against orders of removal, *post*, "*Poor*," Vol. II.

On a case sent back to the sessions to be restated, they may receive further evidence. (*R.* v. *Blovam*, 3 *Nev. & M.* 385; 1 *Ad. & El.* 386; see *R.* v. *Justices of Suffolk*, 1 *B & Ald.* 645. See *post*, 169.)

(2.) Judgment on, and how far conclusive.

Practice as to.

When the case and proceedings are closed, the chairman collects the opinion of the justices, and pronounces that of the majority for confirming or quashing the order, conviction, or rate, which is the subject of the appeal.

Who *may* vote. Justices who made the order.

In giving this judgment, the justices who made the order (*Case of Fixham tithing*, 2 *Salk.* 407) have no right to vote.

Magistrates interested in appeal.

Also magistrates interested in the appeal have no right to vote. If they do, the Court of Queen's Bench will quash the order of sessions, though there be a statutory clause taking away the writ of certiorari. (*R.* v. *The Cheltenham Commissioners*, 1 *Ad. & El. N. S.* 467; 1 *Gale & D.* 167, S. C.; *Charte* v. *Kennington*, 2 *Str.* 1173; *R.* v. *Yarpole*, 4 *T. R.* 71; *R.* v. *Gudridge*, 5 *B. & C.* 459.)

A paving act empowered commissioners to lay rates, giving to parties aggrieved an appeal to the quarter sessions, whose order was to be final; and no order, rate, &c., was to be removed by certiorari. On appeal against a rate, the respondents objected to the admission of certain evidence; the sessions, by a majority of eleven magistrates to eight, held the evidence admissible. three of the eleven magistrates were partners in a company to which belonged certain premises assessed to the rate in the name of the occupier. The sessions quashed the rate; held that, a question in the cause having been decided by a court improperly constituted, on account of the interest of the three magistrates, the clause prohibiting certiorari did not operate; and the Court of Queen's Bench had the order of sessions brought up by certiorari, and quashed it on affidavit of the above facts; although the affidavits did not satisfy the Court that the magistrates had acted partially. (*R.* v. *Cheltenham Commissioners, supra.* See *post*, "*Certiorari*" and "*Sessions*.")

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tion, pursuant to 3 Geo. IV. c. 23. (*In the matter of Rix*, 4 *D. & R.* 352; 2 *D. & R. Mag. Ca.* 249, S. C.)

If, indeed, a magistrate wilfully misstate material evidence, he will be subject to a criminal information or indictment. (*R.* v. *Barker*, 1 *East*, 186. See *post*, "*Conviction*," and "*Justices*.")

4. Hearing and Trial of.

Lord Denman, in giving his judgment in this case, said, "A difficulty does certainly arise from the case of *R.* v. *Justices of Monmouthshire*, (8 *B. & C.* 137,) reported in Messrs. Manning and Ryland's Reports as *R.* v. *The Inhabitants of Uske;* (2 *Man. & R.* 172;) but, in comparing these reports, and looking at the account of the case in *Burn's Justice*, (vol. iv. p. 919, 28th edit. (see *post*, Vol. IV.,) which appears to be compiled from the two, it is clear that Lord Tenterden was not sanctioning the voting by a magistrate in a case where he had an interest. It seems that the party applying for the certiorari wanted to quash the order of removal. The sessions at the trial of the appeal had made an order of adjournment, two magistrates having previously voted for the respondent parish, and two for the appellants; one of the former being a rated inhabitant of the respondent parish. The party applying for the certiorari contended that this was, in law, a decision for the appellant parish, because the vote of the interested magistrate could not be considered as any vote; and that consequently the sessions had no power to adjourn the appeal after such a decision. They, therefore, proposed to quash both the order of removal and the order of adjournment. Lord Tenterden then, after protesting against a magistrate's voting where he is interested, refused to quash the order of adjournment, because, *as to that*, the Court of Queen's Bench could not sit in error on a decision of the Court below in a matter within its jurisdiction; and, as to the order of removal, there had clearly been no valid decision of the sessions against it, and this Court could not make one. Therefore neither branch of the rule which it was proposed to make on the orders being brought up could have been granted. But this is a very different thing from refusing to interfere for the purpose of preventing a decision taking effect in which an interested magistrate has participated."

But it seems that interested magistrates may vote with the consent of the parties to the appeal. (*Id.*)

See *post*, title "*Sessions*," as to the order of sessions being invalid, when the majority would have been the same way if the interested magistrates had not voted; and generally as to the effect of interested magistrates voting.

The court of Queen's Bench, in the above case of *R.* v. *The Cheltenham Commissioners*, on quashing the order of sessions, granted a rule nisi for a mandamus commanding the sessions to hear the appeal.

Chairman.

The chairman has the same right to vote as any other justice present; but he has no casting or double vote to give, in case the numbers, including his own vote, shall be equal. In case of equal division, it seems that the proper course is for the Court to order the appeal to stand adjourned till the next sessions; and it has been said, that it is the duty of the clerk of the peace so to enter it. (See *R.* v. *The Justices of Leicestershire*, 1 *M. & Sel.* 412.) But this doctrine has been disputed in a recent case of *R.* v. *Justices of Monmouthshire*, (4 *B. & C.* 844; 7 *D. & R.* 334, S. C.;) in which it was contended that, as the respondents, in case of removal, are bound to support the order, they fail to do so, when the Court does not decide with them, and consequently the order must, on equal division, be quashed. (And see *R.* v. *Inhabitants of Fladbury*, 10 *Ad. & Ell.* 706; 2 *Per. & D.* 471, S. C.) On this point the Court gave no opinion, and probably would not have disturbed the law as generally understood and acted upon, in consequence of the ingenious reasonings of the counsel, but the Court clearly held that the bench at sessions, having, on an equal division, given judgment that the order should be quashed, that judgment so given, even if erroneous, could not be reviewed by the Court of Queen's Bench, as no case had been reserved for their opinion. (*Talf. Dick. Sess.* 660, 661.)

Where a case from the quarter sessions stated, that the justices being equally divided in opinion, the chairman gave a casting vote in favour of the order, which was confirmed accordingly; that on the following day the appellant's counsel protested against the legality of the decision; that the question was then argued on both sides, and that the justices then present "determined to adhere to" the former decision; the Court of Queen's Bench held, that, although the proceeding on the first day was irregular, they could not assume that the judgment on the second day was not a judgment upon the merits. (*R.* v. *Inhabitants of Fladbury*, *supra*.)

5. *Hearing and Trial of.*

Sessions not bound to give reasons or make special entries.

The Court of Queen's Bench cannot compel the sessions by *mandamus* to give their reasons for their judgment, or make any special entries on their record. (*R.* v. *Justices of Devon*, 1 *Chit. Rep.* 34, 164; *R.* v. *Justices of Worcestershire, id.* 649; *Exparte Morgan*, 2 *Chit.* 250; *R.* v. *Commissioners of Flockwold Inclosure, id.* 251; *R.* v. *Justices of Wilts, id.* 257; *post*, "*Sessions*," Vol. V.)

See *post*, "*Poor*," Vol. IV, as to the sessions making a special entry when an order of removal is quashed for want of form, in order to prevent their judgment being conclusive upon a subsequent appeal.

Special case.

If the right to a *certiorari* is not expressly taken away, the sessions may remit a case, on proved or admitted facts, to the Court of Queen's Bench, and this is usually done on doubtful and difficult questions. (See *post*, title "*Certiorari*," and "*Sessions*," Vol. V.)

The Court refused to hear a case sent up by the quarter sessions, which concluded thus, "If the Court of Queen's Bench shall be of opinion, &c., then the order to be confirmed; but if the Court shall be of a contrary opinion, then the appeal to stand respited until the next sessions after the judgment of the Court," because the sessions had at the same time asked the Court to decide the case, and had reserved the power of afterwards deciding it themselves. (*Reg.* v. *Inhabitants of Wistow*, 1 *Gale & D.* 681.)

If the sessions quash the conviction for matter of form, subject to the opinion of the Court of Queen's Bench upon the validity of the objection, and it appears to the Court when the conviction is returned that there is no defect of form; the Court will send the case back to be heard on its merits. (*R.* v. *Ridgway*, 1 *D. & R.* 132; 1 *D. & R. Mag. Ca.* 38; 5 *B. & Ald.* 527, S. C. See the case in full, *post*, 171; and see *R.* v. *Inhabitants of Arlecdon*, 11 *Ad. & Ell.* 87; but see *ante*, 166, n.)

Where an order of justices has been quashed on appeal, subject to a case, and the Court of Queen's Bench directs the case to be restated, the sessions have no jurisdiction to hear evidence thereon, or to confirm or quash the order without a notice by one of the parties to the other of an intention to proceed at such sessions, which notice may in such a case be given by the respondents. (*R.* v. *Barnes*, 2 *Gale & D.* 233.)

Serving a copy of the rule of the Court of Queen's Bench, directing the case to be restated, will not dispense with such service of a notice. (*Id.*; see *ante*, 167.)

Where the quarter sessions have dismissed an appeal upon a point of practice subject to a case, which the applicants for the case have not brought up, the Court of Queen's Bench will not, at their instance, grant a mandamus to enter continuances and hear the appeal. (*Ante*, 166.)

Where the sessions refused to hear or respite an appeal against an order of removal, upon the ground that notice of the grounds of appeal had not been given as required by the statute, and confirmed the order subject to the opinion of the Court of Queen's Bench on a special case, &c., and subsequently, at the same sessions, upon a motion of course made by the appellants, an order was made permitting the same appeal to be entered a second time, to be tried at the next general quarter sessions of the peace; at which sessions the justices dismissed the appeal when they found out that it was the same one that they had previously dismissed, subject to a case, which had not been taken up; the Court of Queen's Bench held, upon a case reserved, that they had rightly done so. (*R.* v. *Inhabitants of Oundle*, 2 *Gale & D.* 77.)

No delegation of authority of session allowed.

The session cannot delegate the decision of an appeal to another. However, by the consent of the parties or their attornies, the sessions may hand over the consideration of the matter in dispute to third persons, or to a committee of their own body, in order to report to them; and may adopt the report, and make an order accordingly, without further exercising their own judgment. (*Talf. Dick. Sess.* 656, citing *R.* v. *Justices of Northampton, Cald. Sett. Cas.* 30; *R.* v. *Natland, Burr. Sett. Cas.* 793; (cited 5 *Tyr. R.* 1056; 2 *C. M. & R.* 377, S. C.;) *R.* v. *Harding*, 2 *Salk.* 477. See *post*, 175, and *post*, "*Sessions*.")

When decision of sessions conclusive.

The judgment of sessions upon the appeal, when they have jurisdiction,

5. *Hearing and Trial of.*

though erroneous, is conclusive, and the Court of Queen's Bench has no jurisdiction to review their judgment, *except on a case sent up for its consideration;* and therefore where the sessions, having heard the witnesses on one side, had refused to hear those on the other side, on the ground that their testimony had been prefaced by observations on the part of the advocate, contrary to their usual practice, the Court refused to grant a *mandamus* to rehear the appeal. (*R.* v. *Justices of Carnarvon*, 4 *B. & Ald.* 86.) On that occasion *Bayley*, J., said, "There is no instance, I believe, which can be found in which this Court has interfered by *mandamus* to direct the justices to rehear an appeal which they have once already heard. In this case they entered into the consideration of this appeal, and after having heard it, they have decided that the respondents ought not to be allowed to call witnesses in reply. It is possible, that in that decision they may have been wrong; but it seems to me that we are not at liberty to enter into that question, as no case has been sent up for our consideration. If we were to do so, we would constitute this Court a court of appeal from the quarter sessions, and we should have applications continually made to us to overturn their determinations, on the ground of the improper reception or rejection of evidence, and be called upon to review their judgment, although no case has been sent to us for that purpose. It is the duty of sessions to hear and decide, and if they entertain any doubts, to submit them to this Court; but where they do not desire our interference we have no jurisdiction; (and see *R.* v. *Inhabitants of Frieston*, 5 *B. & Adol.* 597, *infra;* *R.* v. *Allen*, 15 *East*, 333; *R.* v. *Justices of* ———, 1 *Ch. Rep.* 164; *R.* v. *Farrington*, 4 *D. & R.* 735; 2 *D. & R. Mag. Ca.* 365, S.C.; *R.* v. *Justices of Monmouth*, 7 *D. & R.* 334; 3 *D. & R. Mag. Ca.* 410; 4 *B. & Cres.* 844; 8 *B. & Cres.* 137, S. C.; *R.* v. *Justices of Kent*, 9 *B. & Cres.* 283; *R.* v. *All Saints, Stamford*, 1 *Jurist*, 52; *Exparte Inhabitants of Broseley*, 7 *Ad. & Ell.* 423; *R.* v. *Justices of Cheshire*, 8 *Ad. & Ell.* 398; 1 *Per. & D.* 88, S.C.; *R.* v. *Justices of West Riding*, 1 *Ad. & Ell.* (N. S.) 624; 1 *Gale & D.* 198.)

In *R.* v. *Justices of Cambridgeshire*, (1 *D. & R.* 325; 1 *D. & R. Mag. Ca.* 86, S. C.: and see *R.* v. *Pratt*, 7 *Ad. & Ell.* 27; 2 *Nev. & Per.* 102, S.C.) the defendant B. D. having been convicted of forcibly passing a turnpike-gate without paying tolls, the sessions on appeal rejected evidence to show that the gate had been unlawfully erected, and the Court of Queen's Bench refused a *mandamus* to compel the sessions to receive such evidence, the admissibility of it being exclusively a question for the justices. The Court also refused to issue a *mandamus* to the sessions to hear an original complaint, touching the conduct of the trustees in the erection of the gate, leaving the party to proceed by indictment for the nuisance, or by an action of trespass, if his passage was obstructed.

When not.

Though the decision of the sessions on the hearing of the appeal, where they have jurisdiction, is conclusive, yet, as we have seen, *ante*, 165, if the sessions improperly refuse to hear it, the Court of Queen's Bench will compel them to do so by a writ of mandamus. And so if the sessions hear an appeal where they have no jurisdiction to do so, their decision is not conclusive. (*Post* "*Sessions*," Vol. V.)

It may be as well here to mention, that in a case of malversation, the Court of Queen's Bench will set aside the judgment of the sessions; and this though there be a statute taking away the writ of certiorari. (*R.* v. *Cheltenham*, 11 *Ad. & Ell.* 467; 1 *Gale & D.* 167, S. C.; *post*, "*Certiorari*," and "*Sessions*," Vol. V.)

Practice of, when conclusive.

The Court of Queen's Bench will not interfere with the established practice of the sessions, unless it appears to be manifestly wrong or unjust. (*R.* v. *Justices of Essex*, 2 *Chit.* 385; *R.* v. *Justices of Sussex*, 6 *M. & Sel.* 57; *R.* v. *Justices of Monmouthshire*, 3 *D. P. C.* 306, *post;* see *R* v. *Justices of Bucks*, 6 *D. & R.* 142; 3 *D. & R. M. C.* 23; and *R.* v. *Justices of Yorkshire, W. R.*, 6 *Jurist*, 531, *Q. B.*, from which case it would seem that a rule of the sessions, requiring that on entry of an appeal against an order of removal the original order shall be filed, is invalid.

On appeal against an order of removal, both parties attended at sessions,

full notice of appeal having been given, and no countermand. The appellants then moved to enter the appeal, and to respite it, on the ground of a material witness being absent. The sessions refused to comply with the motion, unless on payment of the costs of the day, which it was their practice to require in such cases; and the appeal was not entered. On a motion for a *mandamus*, the Court of Queen's Bench held, that the sessions had exercised a proper discretion in refusing to respite, and that their not having entered the appeal was immaterial. (*R.* v. *Justices of Monmouthshire*, 1 *B. & Adol.* 895.)

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Where, by the practice of the sessions, *eight* days' notice of appeal was required at the first sessions against an order of removal, but *fourteen* days' notice of an *adjourned* appeal, and an appeal was dismissed for want of sufficient notice for the adjourned sessions, the Court refused to interfere with the practice. (3 *D. P. C.* 306.)

But if the sessions depart from the usual practice in refusing to hear the appeal, the Court of Queen's Bench will interfere; and in *R.* v. *Justices of Wilts*, (4 *Man. & R.* 401; 8 *B. & Cres.* 380,) on an appeal under the 17 Geo. II. c. 38, s. 4, a *mandamus* was granted on the ground that the sessions had departed from the usual practice, in refusing to hear the appeal at the second sessions after the making of the rate; and the appeal could not properly have been tried at the former sessions, when it was entered, no notice having been given, though it was not adjourned on that ground. (See *R.* v. *Justices of Gloucestershire*, 3 *D. P. C.* 298.)

By statute, parties were enabled in certain cases to appeal to the quarter sessions for a particular district, giving ten days' notice. The act said nothing as to further notice in the event of such appeal being respited, nor did it appear that there was any rule of practice on the subject at those sessions. An appeal under the statute, of which due notice had been given, was respited, and came on at a subsequent sessions, pursuant to the respite. The appellant was called upon to prove that he had given notice of trial *of the respited appeal*, and on his failing to do so, the appeal was dismissed: Held, that the sessions were wrong in requiring such notice, and that the case was one in which this Court might overrule their decision. *Mandamus* granted to hear the appeal. (*R.* v. *Justices of W. R. Yorkshire; Bower* v. *Accounts of the Commissioners of Meltham Inclosure*, 5 *B. & Adol.* 667; and see *R.* v. *Justices of Staffordshire*, 4 *Ad. & Ell.* 842; and *post*, 175.)

If conviction improperly quashed for form, the decision is not conclusive.

Where the sessions quash a conviction for matter of form only, subject to the opinion of the Court of Queen's Bench upon the validity of the objection, and it appears to the Court, when the conviction is returned by *certiorari*, that there is no defect of form, they will send the case back to be heard on the merits. See *ante*, 169. In *R.* v. *Ridgway*, 5 *B. & Ald.* 527; 1 *D. & R.* 132; 1 *D. & R. M. C.* 38, S. C., the defendant had been convicted by two justices on the stat. 39 & 40 Geo. III. c. 106, s. 4, of attending a meeting of journeymen bleachers, held for the purpose of maintaining, supporting, continuing, and carrying on a combination for the purpose of obtaining an advance of wages. On appeal the sessions quashed the conviction, subject to the opinion of the Court of Queen's Bench as to its sufficiency in point of form. The conviction having been removed by *certiorari*, and a rule *nisi* obtained for quashing the order of sessions and sending the case back to be heard on the merits; on showing cause, it was contended, that the Court had no jurisdiction to quash the order of sessions; for assuming the Court below to have come to an erroneous decision, still the defendant having been acquitted in point of form, that acquittal was conclusive in his favour, from analogy to the rule in other criminal cases, and therefore he could not be put in jeopardy a second time for the same offence. The quashing the conviction is to all intents and purposes an acquittal. This is a criminal conviction against the defendant, and the question is, whether the Court will entertain a motion which in its consequences may subject him to a second trial for the same offence. In all cases of felony, an acquittal is a bar to further proceedings against the party; and even in cases of misdemeanor, where the defendant has been acquitted in consequence of a mere clerical objection, still it has been held that no new trial can be had. In this case the defendant has been in

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fact acquitted, whether properly or not is not the question. In *R* v. *Allen*, 15 *East*, 333; *R.* v. *Redfearne*, 4 *T. R.* 273; and *R.* v. *Cook*, 3 *T. R.* 519, cases had been reserved on *facts*, and in the two latter the conviction had been affirmed by the sessions; *sed per Abbott*, C. J. "I am not aware of any case in which the point now contended for has been decided; I have a perfect recollection of cases having occurred formerly in which orders of removal have been quashed for form by the quarter sessions, subject to the opinion of this Court whether the original order was right. Where the justices have declared that they have quashed for form, then in such cases this Court has considered whether the form was incorrect; now here the justices have declared that they have quashed this conviction for form, subject to our opinion upon the matter. Is there any distinction between this case in principle and those cases to which I have alluded?"

It was then said, in the same case, that many cases of the description alluded to had occurred, but there is a main distinction between orders of removal and convictions on penal statutes. In the former, if the order of removal be irregular and is quashed for irregularity, a fresh order of removal may be made out, for as between two contending parishes an order of removal quashed for want of form would not prevent a fresh removal, and in such cases a special entry is made by the clerk of the peace that the order is quashed for form. In such cases the matter of form has been remitted for the opinion of this Court. But there is no analogy between an order of removal of a pauper and a conviction on a penal statute. No penal consequences attach to the former, and therefore there can be no harm in this Court reviewing the decision of the sessions; but a case has never yet occurred in which this Court has interfered to set the sessions right in a criminal matter where the decision of the justices was in favour of the defendant. *Sed per Abbott*, C. J. "I am clearly of opinion that we are bound, in the exercise of our judicial authority, to quash this order of sessions, if, upon the face of it, it appear to be founded on an insufficient ground; and I should be of the same opinion whether the sessions had or had not specially asked our opinion upon the question. Supposing no case to have been reserved by the sessions, but that their order and the original conviction on which it was founded had been brought before us by *certiorari*, it would be our duty to read the order, and if we saw by the terms of it that they had quashed the conviction for informality or insufficiency, then to read the conviction, and if we found it not to be informal, then to send it back for re-hearing upon the merits. No injustice can arise to the defendant by our sending this case back to the sessions, for as his appeal against the original conviction was entered within the time limited by the act, no subsequent delay can bar him from being heard on that appeal upon the merits."

The Court in that case being of opinion that there was no informality in the conviction, quashed the order of sessions, and sent the case back to be heard on the merits.

(3.) Adjournment of Hearing.

Power of.

The sessions may adjourn the hearing of the appeal if they think fit, and they have *power* so to do, though the statute directs them to *determine* the matter. (*R.* v. *Justices of Wiltshire*, 13 *East*, 352; *R.* v. *Justices of Westmoreland*, 10 *B. & Cres.* 226; *R.* v. *Inhabitants of Kimbolton*, 6 *Ad. & Ell.* 603.)

The occasion for adjourning the hearing is in the discretion of the sessions, depending on the facts of the case, except in the case presently mentioned. (*R.* v. *Justices of Staffordshire*, 2 *Dowl. N. S.* 353.) And if they refuse to adjourn it, the Court of Queen's Bench cannot compel them to do so. (*Id.*)

Adjournment only proper on *regular* appeal.

Though the power of adjournment is inherent in the sessions for their own convenience in hearing the appeal, or for any other good cause, as the absence of a witness, &c. that power can only be exercised on appeals regularly brought before them, that is to say, where all the conditions as to notice, &c. which are the acts of the party appealing, have been observed. (*Paley, Conv.* 287; *R.* v. *Inhabitants of Kimbolton*, 6 *Ad. & Ell.* 603; see the cases, *ante*, 163.)

On appeals against orders of removal under the poor laws, the 9 Geo. I. c. 7, s. 8, directs, that if it shall appear to the justices that reasonable time of notice was not given, they shall adjourn the appeal to the next quarter sessions, and then and there finally hear and determine the same. This enactment gives the justices discretionary power to decide, if reasonable notice has been given; if what they consider reasonable notice has not been given, they *must* adjourn the appeal to the next sessions. (*R.* v. *Justices of Monmouthshire*, 3 *Dowl P. C.* 306; *R.* v. *Justices of Bucks*, 3 *East*, 342; *R.* v. *Justices of Shropshire*, 7 *East*, 549; *R.* v. *Justices of Suffolk*, 8 *Dowl.* 618; *R.* v. *Inhabitants of Kimbolton*, 6 *Ad. & Ell.* 603.) The appeal can, it seems, only be adjourned once by virtue of that statute. (See further, "*Poor*," Vol. IV.)

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The appeal should not be adjourned later than to the next original sessions. (2 *Hawk.* 68; *R.* v. *Grince*, 19 *Vin.* 358; and see *Thurston* v. *Slatford*, *Lutw.* 911.)

To what sessions.

If a regular notice of appeal has been given for one sessions, and the appeal be adjourned at the instance of the appellants, after hearing counsel on both sides, it is not necessary to give a strictly regular notice of trial for the following sessions. (*R.* v. *Justices of Gloucestershire*, 3 *Dowl. P. C.* 298; and *post*, 174.)

Notice, in case of.

A rule and practice of the quarter sessions, that in all cases of appeal, not otherwise directed by law, ten days' notice in writing shall be given by appellants to respondents, and that in cases of respited appeals the like notice shall be given, unless there be any agreement between the parties to the contrary, are not applicable to the case of an appeal adjourned to the next sessions at the instance and for the accommodation of respondents; and, therefore, where an appeal having been so adjourned the justices dismissed it at the next sessions, because the appellant had not given notice of his intention to prosecute at the sessions, the Court granted a mandamus to the justices to hear the same. (*R.* v. *Justices of Lindsey*, 6 *M. & Sel.* 379.)

And where an appeal after hearing at one sessions was adjourned until the following sessions in consequence of an equal division of opinion on the bench, it was held that no fresh notice of trial was necessary for the following sessions, although by the general practice of the sessions a fresh notice of trial is required when an appeal is respited. (*R.* v. *Justices of Buckinghamshire*, 6 *D. & R.* 142; 3 *D & R. Mag. Ca.* 23, S. C.)

See *ante*, 162, as to serving a fresh statement of the grounds of appeal, after the appeal has been adjourned.

VI. Entering and Respiting Appeal, and Notice of Trial after same.

See *ante*, 165, and as to the practice of calling on appeals.

Calling on.

Before an appeal can be entered or respited the appellant must prove that he has performed the conditions precedent, if any, to his right to appeal; as that he has given notice of the appeal, or the like. (See *ante*, 158, 165.)

When appeal to be entered.

If a statute gives a party a right of appeal, but enacts that it shall not be brought, received, or heard, unless notice be given a certain number of days before the *next* sessions, and a recognizance entered into also, if the party omit to give such notice, and enter into a recognizance before those sessions, the sessions have no power to enter and respite the appeal, and a notice or recognizance for any *adjourned* sessions would not be sufficient; and this, whatever the practice of the sessions might be, the statute expressly requiring a notice and recognizance within a specified time, and for a particular sessions. (*R.* v. *Justices of Lancashire*, 3 *B. & Cres.* 548; 5 *D. & R.* 347, S. C., decided on the 49 Geo. III. c. 68, relating to bastards.)

But where the statute giving the appeal only enacts, that a party shall not be heard in support of it, unless some act be done, as the grounds of appeal served, and such act be not done; this does not prevent the sessions entering and respiting the appeal. (*R.* v. *Inhabitants of Kimbolton*, 6 *Ad. & Ell.* 603; 1 *Nev. & Per.* 606, S. C.; *ante*, 164.)

6. *Entering and Respiting.*

Where an appellant parish gave notice before *Michaelmas* sessions, that they would at those sessions enter and respite and try their appeal with effect at the following sessions, and in the mean time a negociation had taken place with the respondents as to the settlement of the pauper, but without any determination; it was held to be necessary to give a fresh notice of appeal for the following sessions, to entitle the appellant to be heard. (*R.* v. *Justices of Essex*, 2 *Chit. R.* 385.)

When such notice requisite.

The practice of the sessions is not distinctly stated, but appears to have been the foundation of the judgment. (*Talf. Dick. Sessions*, 648, n. (*u.*)

Where the sessions refused to hear or respite an appeal against an order of removal, upon the ground that notice of the grounds of appeal had not been given as required by the statute, and confirmed the order, subject to the opinion of the Court of Queen's Bench, on a special case, &c., and subsequently at the same sessions, upon a motion of course made by the appellants, an order was made, permitting the same appeal to be entered a second time, to be tried at the next general quarter sessions of the peace; at which sessions the justices dismissed the appeal, when they found out that it was the same one that they had previously dismissed, subject to a case, which had not been taken up; the Court of Queen's Bench held, upon a case reserved, that they had rightly done so. (*R.* v. *Inhabitants of Oundle*, 2 *Gale & D.* 77.)

We have seen, *ante*, 158, that where the order or conviction, &c. is made so short a time before the sessions, that it is impossible, either by reason of the insufficiency of the time for giving the notice of appeal required by the sessions or otherwise, to try the appeal at the next sessions, it is not necessary to enter and respite the appeal at such sessions, but the appellant may pass them by, and give notice for, and enter and try his appeal at the following sessions.

Practice of sessions as to entering appeal, and notice of trial after same.

The practice of the particular sessions at which the appeal is made must, as regards the entering and respiting the appeal, and giving notice of trial after the same, in all cases be conformed to, unless it be manifestly wrong or unjust.

If a statute gives a party a right of appeal on entering into a recognizance, and does not require a notice of appeal, he may enter his appeal and get it respited at the next sessions, having previously entered into such recognizance, *without notice* to the other side; but after the appeal has been respited, *the usual notice of trying it*, as required by the practice of the sessions, must be given, otherwise the sessions will be authorised in dismissing it altogether.

Thus in the case of *R.* v. *Justices of Salop*, 2 *B. & Ald.* 694, on showing cause against a rule *nisi* for a *mandamus* to the sessions to enter continuances and hear the appeal of one J. R. against the conviction of a magistrate under 52 Geo. III. c. 93, sched. L. rule 12, it appeared that the defendant had been convicted in the penalty of 10*l.* for using greyhounds for the purpose of killing a hare, not having taken out a certificate. Immediately upon his conviction he entered into the recognizance required by the act to prosecute his appeal against it at the next *January* sessions. At those sessions he accordingly entered his appeal, and it was respited by the Court. At the following sessions he again appeared for the purpose of trying the appeal, but it being objected that there had not been eight days' notice given to the convicting justice, as was required by the rule of the sessions, the sessions dismissed the appeal and confirmed the conviction. In support of the rule for the *mandamus*, *R.* v. *Justices of Leeds*, 4 *T. R.* 583, was relied on, and it was contended that the entering into the recognizance before the justice dispensed with the necessity of giving the usual notice to him of trying the appeal. But *per Abbott*, C. J., "It was, perhaps, sufficient for the party to entitle himself to enter his appeal at the *January* sessions that he had given the security required by the act, although no notice of appeal had been given by him, but when once he had entered his appeal, he was bound to conform to the practice of the sessions. It was therefore necessary for him to have given the usual notice of trying his respited appeal at the *Easter* sessions, and not having done so, the sessions were authorised in dismissing the appeal altogether."

When not.

But it is not necessary to give a notice of trying a respited appeal, unless

it be required by the practice of the sessions. (*R.* v. *Lambeth*, 3 *D. & R.* 340; 2 *D. & R. Mag. Ca.* 26, S. C.; see also *R.* v. *Justices of Gloucestershire*, 3 *Dowl. P. C.* 298.) In *R.* v. *Lambeth*, *supra*, an appeal was entered at the *Easter*, and respited until the *Midsummer* sessions, and on the 24*th of June* a copy of the order of respite was served on the respondents without any notice of trial, and the respondents appeared at the following sessions in *July*; it was held that the sessions were bound to hear the appeal, though no other notice of trying the appeal had been given than the service of the order of respite.

6. Entering and Respiting.

By statute parties were enabled in certain cases to appeal to the quarter sessions for a particular district, giving ten days' notice. The act said nothing as to further notice in the event of such appeal being respited, *nor did it appear that there was any rule of practice on the subject at those sessions.* An appeal under the statute, of which due notice had been given, was respited, and came on a subsequent sessions pursuant to the respite. The appellant was called upon to prove that he had given notice of trial *of the respited appeal*, and on his failing to do so, the appeal was dismissed: Held, that the sessions were wrong in requiring such notice, and that the case was one in which the Court of Queen's Bench might overrule their decision. A mandamus was granted to hear the appeal. (*R.* v. *Justices of the W. R. of Yorkshire*, 3 *Nev. & M.* 86; *Bower* v. *Accounts of Commissioners of Meltham Inclosure*, 5 *B. & Ad.* 667; *ante*, 171.)

The Court of Sessions should be uniform in their rules of practice, and should rather lean to the hearing of appeals than to dismissing them on technical grounds. See per *Denman*, C. J., in *R.* v. *Justices of Norfolk*, 3 *Nev. & Man.* 86; 5 *B. & Adol.* 922.

See when the Court of Queen's Bench will interfere with the practice of the sessions, *ante*, 170.

When Q. B. will interfere with practice.

See as to giving notice of trial after the appeal has been adjourned, *ante*, 173.

Notice after adjournment.

See *post*, "*Poor*," as to the effect of superseding an order of removal before and after an appeal against it has been entered at the sessions.

VII. Costs.

Costs.

The power to give costs is not incident to the authority of the sessions, nor does it exist at common law, and therefore costs can never be given unless by the words of the statute under which the justices are acting.

Whenever the sessions grant costs, they must ascertain the costs by their order, (*Ex-parte Holloway*, 1 *Dowl. P. C.* 26,) for they have no power to grant costs generally, like the courts at Westminster, to be afterwards taxed by the proper officer; they may direct the clerk of the peace to ascertain and report to them the items of the expenditure, which may be the grounds of their decision, but they must themselves determine the sum to be paid.

Therefore it has been held that the recorder of a municipal sessions may, on ordering costs, refer the taxation of the amount to an officer of the Court; but that such taxation must be adopted by him during the continuance of the same sessions. (*Reg.* v. *Long*, 1 *Ad. & El. N. S.* 740; 1 *Gale & D.* 367, S. C.; *Selwood* v. *Mount*, 1 *Ad. & El. N. S.* 726; 1 *Gale & D.* 358, S. C.)

An order for payment of costs, when made, cannot be enforced by attachment, but the party disobeying it, after it has been personally served on him, will be liable to be indicted for a misdemeanor, and punished for his contempt by imprisonment and fine. (*Talf. Dick. Sessions*, 664; see further, *post*, title "*Costs*," Vol. I.; "*Order*," Vol. V.)

At some sessions the practice is to allow the party succeeding on the appeal only 40*s.* costs; and sometimes the practice is, where notice of appeal is given and not countermanded, to refuse the appellant leave to enter and respite his appeal, unless he agree to pay the costs of the day. (See *R.* v. *Justices of Monmouthshire*, 1 *B. & Adol.* 895.)

8. *Forms.*

Construction of the words "heard and determined."

Where an appeal against a poor-rate was entered at the *Midsummer* sessions, and respited until the *Michaelmas* sessions, and then further respited, at the instance of the appellant, till the *Epiphany* sessions, four days previously to which the respondents gave notice that they would not oppose the appeal, and the appeal was accordingly allowed without opposition; it was held, that the appellant was entitled to costs as upon an appeal, which had been "heard and determined," within the meaning of 17 Geo. III. c. 38, s. 4. (*R.* v. *Cawston*, 4 *D. & R.* 445; 2 *D. & R. Mag. Ca.* 269, S. C.; *R.* v. *Essex*, 8 *T. R.* 588; *Ex-parte Holloway*, 1 *Dowl. P. C.* 26; and *R.* v. *Justices of Cambridge*, 2 *Ad. & Ell.* 374.)

As to costs of appeals concerning the poor, see title "*Poor*," Vol. IV.

VIII. Forms.

(1.) General form of notice of appeal against a conviction. (*a*)

to wit: To (b), of, , in the said county.

THIS is to give you [and each and every of you] notice, that I, A. B. do intend, at the next general quarter sessions (c), [or "quarter sessions,"] of the peace, to be holden in and for the said county of , at , in the said county, to appeal against a certain conviction of me, the said A. B. by J. P. Esquire, one of her Majesty's justices of the peace for the said county, for having, as is therein and thereby alleged, on , &c. at , &c. [stating the offence;] *and that the causes and grounds of such appeal are, that I am not guilty of the said offence; and that, &c.* [stating any other causes of appeal the party may have (*d*):] *of all which premises, you [and each and every of you] are hereby desired to take notice. Dated this day of, &c.*

Witness, C. D. *A. B.*

(2.) General form of recognizance to try an appeal against a conviction. (*e*)

, } Be it remembered, that on the day of , in the first year of the
to wit. } reign of our Sovereign Lady Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, A. B. of , in the said county, (labourer,) E. F. of , in the said county, (yeoman,) and G. H. of , in the said county, (farmer,) personally came before me, J. P. one of her Majesty's justices of the peace for the said county, and acknowledged themselves to owe to our said Lady the Queen the sum of pounds each, to be made and levied of their goods and chattels, lands and tenements, respectively, to the use of our said Lady the Queen, her heirs and successors, if default shall be made in the condition following:

Whereas by a certain conviction, under the hand and seal of L. M. one of her Majesty's justices of the peace for the county aforesaid, the said A. B. is convicted, for that the said A. B. on &c. [stating the offence;] *and whereas the said A. B. hath given due notice unto of his intention to appeal against the said conviction, and of the causes and grounds thereof: Now the condition of this recognizance is such, that if the above bounden A. B. shall personally appear at the next [general quarter] sessions (c) of the peace, to be holden at , in and for the said county, and shall then and there try such appeal, and abide the judgment of the said Court of [general quarter] sessions thereupon, and pay such costs as shall be by the said Court awarded, then this recognizance to be void.*

Taken and acknowledged before me, *J. P.*

(3.) Petition of appeal.

See form, *post*, title "*Poor*," Vol. IV.

(4.) Order for hearing of appeal, appointing time, &c.

See form, *post*, title "*Poor*," Vol. IV.

(*a*) For forms of notices of appeal in *particular* cases, see the various titles throughout this work.

(*b*) See *ante*, 161, to whom the notice is to be given.

(*c*) See *ante*, 154, 158, as to what sessions the appeal is to be made.

(*d*) See *ante*, 162, as to contents, &c. of notice.

(*e*) See other forms, title "*Recognizance*," Vol. V. and the different titles throughout this work; and see a form in *Chit. Gen. Prac.* 215.

8. *Forms.*

(5.) Judgment of *affirmance* of the sessions on an appeal against a conviction. (a)

Lincolnshire, parts of Holland. } *AT a general quarter sessions of the peace of our Sovereign Lady the Queen, held by proclamation at Spalding, in and for the parts of Holland, within the county of Lincoln, on Monday the day of , in the year of the reign of our Sovereign Lady the now Queen Victoria, and in the year of our Lord , before A. B., C. D., E. F., and others, their fellows, the justices of our said Lady the Queen, assigned to keep the peace of our said Lady the Queen, within the parts of Holland aforesaid, and also to hear and determine divers felonies, trespasses and other misdemeanors, done and committed within the said parts in the said county, and one of whom is of the quorum.*

And afterwards by adjournment, (to wit,) at Boston, in and for the said parts, on in the year of the reign aforesaid, before G. H., I. K., L. M., and others, their fellows, also the justices of our said Lady the Queen, assigned to keep the peace of our said Lady the Queen, within the parts of Holland aforesaid, and also to hear and determine as aforesaid, within the said parts in the said county, and one of whom is also of the quorum.

At the same court so held at Boston, on the day and year aforesaid, J. W. of , in the parts of Holland, in the county of Lincoln, farmer, entered his appeal to and against a conviction, under the hand and seal of A. D. Esquire, one of her Majesty's justices of the peace for the parts of Holland aforesaid, dated and made the day of , 1843, [here state the offence as in the conviction;] *and by which said conviction he the said A. D. did adjudge that the said J. W. should for the said offence forfeit the sum of two pounds, together with the sum of seventeen shillings for costs, and did order that the said sums should be paid by the said J. W. on or before the day of last, and that in default of payment on or before that day, he the said A. D. did by the said conviction adjudge the said J. W. to be imprisoned and kept to hard labour in the House of Correction at Shirbeck Quarter, in the parts of Holland, in the county of Lincoln aforesaid, for the space of two calendar months, unless the said sums should be sooner paid, and that the said A. D. did, in and by the said conviction, direct that the said sum of two pounds should be paid to P. S., being one of the overseers of the poor of the said parish of Leverton, to be by him applied according to the directions of the statute in such case made and provided; and that the sum of seventeen shillings for costs shall be paid to the said J. J., the informant, on whose information the said complaint was founded.* [Let this agree with the conviction.]

Now therefore at the said Court so holden as aforesaid by adjournment at Boston as aforesaid, upon hearing of the said appeal, it is now here ordered and adjudged by the said court that the said conviction be, and the same is hereby in all things affirmed, and it is also now here by the same Court further ordered and adjudged that the said J. W. be dealt with and punished according to the said conviction, and also that he the said J. W. do and shall pay to the said J. J., the said informant and the respondent in the said appeal, the sum of £ , the amount of the costs sustained by the said J. J., and by him incurred by reason of the said appeal, and now by the said Court here adjudged to be paid to him by the said J. W., according to the statute in such case made and provided. [See as to the power to give costs, &c. *ante*, 175.]

Appearance.

On indictments for felony.

IT is a rule that no one can be tried on an indictment for a *felony* unless he appear in *person*. Also, in criminal cases, where an act of parliament requires it, and on an attachment, the defendant must, in general, appear in person. (2 *Hawk. P. C.* c. 22, s. 1.)

(a) It must appear from an order of sessions that they had jurisdiction over the subject matter of it. (*R.* v. *Spackman*, 1 *Gale & D.* 619; see *post*, "*Sessions.*) Therefore an order of quarter sessions, on appeal against an account of overseers, is bad if it does not appear, either by express averment or necessary intendment, to relate to the annual account; for otherwise it may relate to the quarterly account, which the overseers are directed to render by 4 & 5 Will. 4, c. 76, s. 47, and in respect of which there is no appeal to the quarter sessions. (*R.* v. *Spackman*, *supra.*)

Appearance.

On indictments for misdemeanors.

On an indictment or information for a crime *less than felony*, the defendant may, by favour of the court, appear by attorney, and this he may do as well before plea pleaded as afterwards until conviction. (*Bacon's case*, 1 *Lev.* 146; *Keilw.* 165.)

And in case of mayhem, even though it is stated to be done *feloniously* in the indictment, the defendant need not personally attend, but may cause his plea to be delivered in the office; (*R.* v. *Haddock*, 2 *Stra.* 1101; *R.* v. *Hales*, *id.* 816;) and a clerk in court may confess an indictment for his client in his absence. (*Anon.* 6 *Mod.* 16.)

Infants.

Where infants are prosecuted for misdemeanors, it is the constant practice for them to appear by attorney in the crown office, though in civil cases they must defend by guardian. (*Reg.* v. *Tanner*, 2 *Ld. Raym.* 1284.)

In outlawry.

In order to reverse an outlawry before conviction on an indictment for a misdemeanor, the defendant may appear by attorney, though he cannot do so on a prosecution for a felony; (*Com. Dig. Attorney*, (B. 6); 4 *W. & M.* c. 18;) or when he is taken for a contempt, or on a *cepi corpus* upon an exigent. (*Id.*)

Where prosecutor may enter appearance for defendant.

By the 48 Geo. III. c. 58, s. 1, if a person in custody under a warrant or writ of *capias*, founded on an indictment in the Court of Queen's Bench, (which can only be for a misdemeanor,) shall not cause an appearance and plea or demurrer to be entered for himself within eight days after copy of the indictment delivered with notice to plead in eight days, it shall be lawful for *the prosecutor to cause an appearance* and plea of not guilty to be entered for him, and to proceed to trial as if he were actually present.

What information for penalties not within the act.

An information for penalties under the game law is not an information within the stat. 48 Geo. III. c. 58: and therefore where the prosecutor had entered an appearance and a plea of not guilty for the defendant, the Court set aside such verdict for irregularity; *et per* Abbott, C. J. "It is quite clear that the statute does not apply to an information brought for penalties on the game laws. It enacts, 'that when any person shall be charged with an offence for which he may be prosecuted by indictment or information in his Majesty's Court of K. B.' It therefore contemplates offences over which this Court has exclusive jurisdiction by indictment or information. Now, penalties under the game laws may be recovered by information not only in this Court but in the other Courts in *Westminster Hall*. I think the statute applies only to such offences as the Court of King's Bench may exclusively entertain when prosecuted by indictment or information at the suit of the king." (*Davies* v. *Bint*, 3 *B. & Cres.* 586; 5 *D. & R.* 353, S. C.)

On conviction.

As to the necessity for defendant's appearance in order to convict him on an information before a magistrate, see *post*, "*Conviction.*"

On appeal. Certiorari.

As to the necessity for the appellant and respondent's appearance on an appeal, see *ante*, 165; on a *certiorari*, *post*, "*Certiorari.*"

Judgment.

As to appearance on judgment, *post*, "*Judgment*," Vol. III.

Right of attorney to be present.

As to the right of an attorney or counsel to be present on summary proceedings before magistrates, see *post*, "*Conviction.*"

Arraignment.

As to the arraignment of prisoners, see *post*, "*Arraignment.*"

Appraiser, see "*Excise*," Vol. II.

Apprehension of Offenders, see *post*, "*Arrest.*"

Apprentices.

THE term "*Apprentice*" is derived from the French word *apprendre*, to learn. In *R.* v. *Eccleston*, 2 *East*, 289, Lord Ellenborough said, that where the contract was that the master should *teach* the other a trade, and the latter was to do nothing ulterior to the employment in that trade, it was a contract *apprendre* in the true sense of the word, and constituted an apprenticeship. (And see *R.* v. *Rainham*, 1 *East*, 531; *R.* v. *St. Margaret's, Lynn*, 4 *D. & R. Mag. Ca.* 260; *R.* v. *Combe*, 2 *Man. & R.* 30; 8 *B. & Cres.* 82; *R.* v. *Tipton*, 4 *Man. & R.* 703; 9 *B & Cres.* 888; *R.* v. *Nether Nutsford*, 1 *B. & Adol.* 726; *R.* v. *Crediton*, 2 *B. & Adol.* 493; *post*, 186.) Definition.

The policy of the apprentice laws has been always much questioned, and thought injurious to the community. (See *Chit. Appr. L.* 1 to 22.) And the legislature, by the 54 Geo. III. c. 96, in repealing some of the provisions of the 5 Eliz. c. 4, abolished the necessity of apprenticeships for the purposes of exercising *trades*, except in those corporate towns where there were immemorial customs, or where there were bye laws of a corporation or company, imposing some particular restraints as to apprenticeships. And now, by the 5 & 6 Will. IV. c. 76, s. 14, such customs or bye laws controlling trades, except in London, are abolished. Impolicy of laws.

Apprenticeships, therefore, are now, in general, *absolutely* requisite only for the purpose of obtaining *settlements* under the poor laws. When necessary.

We will divide our considerations on the law of apprentices as follows:— Division of subject.

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[14 & 15 *Hen. VIII. c.* 2; 5 *Eliz. c.* 4, *s.* 25, 26, 28, 30, 40, 54 *Geo. III. c.* 96, *s.* 2, 4.]

II. *Who are capable of being bound*, 182.

[5 *Eliz. c.* 4; 54 *Geo. III. c.* 96.]

III. *The Number allowed*, 183.

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IV. *Who are compellable to be bound*, 184.

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V. *How to be bound*, 184 *to* 188.

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3. *Execution of Instrument*, 186.
4. *Stamp on*, 187.
5. *Memorandum to be printed on Indenture*, 187.
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[5 *Eliz. c.* 5, *s.* 12; 8 *Ann. c.* 9, *s.* 35, 36, 37, 38, 39, 43, 18 *Geo. II. c.* 22, *s.* 23, 24; 29 *Geo. II. c.* 45, *s.* 5, 6, 7, 8; 5 *Geo. III. c* 46, *s.* 19, 41; 54 *Geo. III. c.* 96, *s.* 2; 55 *Geo. III. c.* 184; 56 *Geo. III. c.* 139, *s.* 11.]

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[55 *Geo. III. c.* 184; 6 *Geo. IV. c.* 16, *s.* 49.]

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Apprentices in General.

I. Who may take an Apprentice.

At Common Law.]—At common law any person capable of making a contract may take an apprentice. Who may take, at common law.

It seems the master may be an infant. (*R.* v. *St. Petrox*, 4 *Term. R.* 196; 2 *Bott*, 377, S. C.; *Cald.* 444.) But a master under twenty-four years of age, and not a housekeeper, could not, before the 54 Geo. III., maintain an action for harbouring his apprentice. (*Gye* v. *Felton*, 4 *Taunt.* 876; *Smedley* v. *Gooden*, 3 *M. & Sel.* 189; *post*, "*Poor*," Vol. IV.) Infants.

The binding of an apprentice to a *feme covert* is void. (*R.* v. *Guildford*, 2 *Chit. R.* 284.) Feme covert.

If the binding be *bonâ fide*, the condition of the master is immaterial, nor need he exercise any trade, art or mystery. (*R.* v. *St. Margaret's Lincoln*, 1 *Bott*, 610; *Burr.* S. C. 713, 728.) Trade of master immaterial.

By Statute.]—Previous to the 54 Geo. III. c. 96, s. 2, it was enacted by stat. 5 Eliz. c. 4, s. 25, that every person being a householder, and having and using half a plough-land in tillage, might take an apprentice above the age of ten years, and under eighteen, to serve in husbandry till twenty-one at the least, or till twenty-four, as the parties could agree. Old statutory provisions as to who may take. Husbandmen.

By sect. 26 of 5 Eliz. c. 4, every person being a householder, and twenty-four years old at the least, dwelling in any city or town corporate, and exercising any art, mystery, or manual occupation there, might retain the son of a freeman, not occupying husbandry, nor being a labourer and inhabiting in the same, or in any other city or town corporate, to serve and be bound as an apprentice, after the custom and order of the city of London, for seven years at the least, so as such apprenticeship did not expire before the apprentice shall be twenty-four years of age. Tradesmen in towns corporate.

Sect. 40. The citizens of London and Norwich might take and have apprentices as before that act.

Sect. 28. Every person being a householder, and twenty-four years old at the least, and not occupying husbandry, nor being a labourer, dwelling in any market town not corporate, and exercising any art, mystery, or manual occupation, might have to apprentice the child or children of any other artificer, not occupying husbandry, nor being a labourer, inhabiting in the same or any other such market town in the same shire. Tradesmen in market towns not corporate.

Sect. 30. Any person using the art of a smith, wheelwright, ploughwright, millwright, carpenter, rough-mason, plaisterer, sawyer, lime-burner, brick-maker, bricklayer, tyler, slater, helier, tyle-maker, linenweaver, turner, Particular trades in any place.

1. *Who may take.*

cooper, miller, earthen-potter, woollen-weaver, weaving household cloth only, fuller, otherwise called tucker or walker, burner of oare and woad-ashes, thatcher or shingler, wheresoever he should dwell, might take the son of any person as an apprentice, albeit his parents had no land.

Repeal of part of the above provisions.

But now stat. 54 Geo. III. c. 96, s. 2, reciting, "That by the 5 Eliz. c. 4, s. 25, 30, 41, divers rules and regulations were enacted respecting the qualifications of persons entitled to take and become apprentices, and the term of years for which such apprentices shall be bound, and as to the mode of binding such apprentices, and it was also enacted by the same statute, that all indentures, covenants, promises, and bargains of and for the having, taking, or keeping of any apprentice, otherwise thereafter to be made or taken than is by the said statute limited, ordained, and appointed, should be clearly void in law to all intents and purposes; and that every person that should from thenceforth take or newly retain any apprentice contrary to the tenor and true meaning of the said act, should forfeit and lose for every apprentice so by him taken the sum of 10*l*, and that it is expedient that so much of the said recited act should be repealed;" enacts, "that so much of the said recited act shall be, and the same is hereby repealed, and that it shall and may be lawful *for any person to take or retain or become an apprentice*, though not according to the provisions of the said act; and that *indentures, deeds, and agreements in writing*, entered into for that purpose, which would be otherwise valid and effectual, shall be valid and effectual in law, the repeal of so much of the said act, as is herein last above recited, notwithstanding."

Any person may now take.

It seems evident from the words of this act that the whole of the 25, 30, and 41 sections of the 5 Eliz. c. 4, are repealed thereby.

Justices may determine complaints.

Sect 3 enacts, "That any justice or justices of the peace may hear and determine any complaints that may arise respecting any apprenticeships, in like manner as if they had been made under the act hereby in part repealed."

Proviso as to customs or bye laws, &c. in London.

Sect. 4. Provided "this act or any thing herein contained shall not extend, or be construed to extend, to defeat, alter, or prejudice the custom and order of the city of London concerning apprentices, or the ancient custom, usages, privileges, or franchises of the said city, or of any other city, town, corporation, or company, lawfully constituted, or the citizens and freemen thereof; or any bye-law or regulation of any corporation or company lawfully constituted."

Exclusive rights of trading abolished.

But the Municipal Corporation Act, 5 & 6 Will. IV. c. 76, s. 14, abolishes exclusive rights of trading in corporate cities and places, except in London.

Any person, therefore, capable of doing so at common law, may in general now take an apprentice, notwithstanding the statute of Elizabeth.

Aliens.

The 14 and 15 Hen. VIII. c. 2, however, prohibits any *alien* or *denizen* from taking an apprentice upon pain of forfeiting 10*l*., half to the king and half to the informer; but this does not seem to invalidate the indenture. (See *Moore*, 411; *Chit. App.* 24.)

Sea apprentices.

As to Sea Apprentices, see *post*, "*Seamen*," Vol. V.

Apprenticeship void if in contravention of a statute.

If a statute prohibits a particular person from taking an apprentice, any contract of apprenticeship in contravention of that statute will be void, and not merely voidable. (See *R.* v. *Gravesend*, 3 *B. & Adol.* 240.)

II. Who are capable of being bound.

By common law.

By Common Law.]—By common law any person may bind himself an apprentice.

Adults.

An adult may legally bind himself as an apprentice, in order to enable himself to set up in trade, and may thereby gain a settlement, but in this case he must execute the indenture himself, or he cannot be deemed an apprentice. (*R.* v. *Inhabitants of Ripon*, 9 *East*, 295; see *Smedley* v. *Gooden*, 3 *M. & Sel.* 189, *post*, 183.)

Infants.

An infant, even without his parent's consent (and it seems of any age), *may voluntarily* bind himself, an indenture of apprenticeship being considered

for his benefit, and he will be subject to the jurisdiction of the magistrate, under the 5 Eliz. c. 4, s. 43. (*R.* v. *Arundel*, 5 *M. & Selw.* 257; *Newberry* v. *St. Mary's, Reading*, 2 *Bott*, 363; *R.* v. *Saltren, Cald.* 444; 1 *Bott*, 717; *R.* v. *Joltern*, 1 *Bott*, 613; *Foley*, 154; 6 *T. R.* 556, 652; *R.* v. *Annesley*, 3 *B. & Ald.* 584; *post*, "*Poor*," Vol. IV.)

2. Who are capable of being bound.

But where a statute prohibits the taking of an apprentice under a certain age, and a child under that age is notwithstanding taken as such, the binding will be wholly void, and not merely voidable. (*R.* v. *Hipswell*, 8 *B. & Cres* 466.)

And if an infant were of so tender an age that he is incompetent to learn or otherwise unfit for the apprenticeship, a justice of the peace might, in his discretion, think it right to dissolve the contract and discharge him.

It may be also observed, that no action can be brought against an infant apprentice on his covenant to serve; (*Gylbert* v. *Fletcher, Cro. Car.* 179; *Com. Dig. Justice of Peace, B.* 55; *R.* v. *Inhabitants of Cromford*, 8 *East*, 26;) nor can he be sued in equity; (1 *Equ. Ca. Ab.* 6;) and though the statute 5 Eliz. c. 4, s. 42, 43, expressly enacts that the apprentice shall be bound as if he had been of full age, yet it has been held that this only subjects him to the jurisdiction of the magistrates in case of misbehaviour, &c., and not to an action for the breach of his covenant. (*Gylbert* v. *Fletcher, Cro. Car.* 179; 1 *Bott*, 527.)

In London there is a custom that an infant, of the age of fourteen or upwards, shall be bound by his indenture, and he is liable to be sued on his covenant in any Court. (*Moore*, 135; *Bac. Ab. Master and Servant*, (*B.*); *Com. Dig. London*, n. 2; *Pulling's Laws of London*, 482.)

An infant apprentice may be sued for a *tort* unconnected with a contract (*Jennings* v. *Rundall*, 8 *T. R.* 335), and *semble, assumpsit* or debt lies against him for money he has embezzled. (*Bristowe* v. *Eastman, Peake's N. P. C.* 223; 1 *Esp.* 172, S. C.)

By Statute.]—We have already seen, *ante*, 181, the provisions of the 5 Eliz. c. 4, which pointed out what persons might be bound apprentices, and that these are in effect repealed by the 54 Geo. III. c. 96, s. 2, which allows any person to become an apprentice, though not according to the statute of Eliz.

By statute.

In *Smedley* v. *Gooden*, 3 *M. & Sel.* 189, it was held that the 5 Eliz. c. 4, related only to such persons who bound themselves as apprentices as were under age, and not to adults.

III. Number allowed.

At common law the master may take any number of apprentices.

By stat. 5 Eliz. c. 4, s. 33, 39, 45, every person that shall have three apprentices in any the crafts of a clothmaker, fuller, sheerman, weaver, tailor, or shoemaker, shall keep one journeyman; and for every other apprentice above three, one other journeyman, on pain of 10*l.*; half to the King, and half to him that shall sue in the sessions or other court of record; or if it is in a town corporate, then to be applied as by the charter.

Number restrained in certain cases.

By stat. 1 Jac. I. c. 17, s. 3, 5, no hatmaker shall have above two apprentices at one time, nor those for any less term than seven years, on pain of 5*l.* a month; half to the King, and half to him that shall sue in any court of record: but this not to extend to his own son, in his own house, so as he be bound by indenture for seven years, and his term not to expire before he be twenty-two years of age.

Hatmakers.

By stat. 13 & 14 Car. II. c. 5, s. 18, weavers of stuffs in Norfolk and Norwich, that shall employ two apprentices, shall also employ two journeymen; and no master shall have above two apprentices, or any week boy to weave in the said trade, on pain of 5*l.* a month to the King.

Weavers of stuffs in Norfolk, &c.

An apprenticeship in contravention of these acts, or other such enactments, would be void. (See *R.* v. *Gravesend*, 3 *B. & Adol.* 240.)

4. *Who are compellable to be bound.*

IV. Who are compellable to be bound.

In general.

By the 5 Eliz. c. 4, s. 35, "If any person shall be required by any householder, having and using half a plough-land at the least in tillage, to be an apprentice, and to serve in husbandry, or in any other kind of art, mystery or science before expressed, and shall refuse so to do, that then upon the complaint of such housekeeper made to one justice of the peace of the county wherein the said refusal is or shall be made, or of such householder inhabiting in any city, town corporate or market-town, to the mayor, bailiffs or head officer of the said city, town corporate or market-town, if any such refusal shall there be, they shall have full power and authority by virtue hereof, to send for the same person so refusing: and if the said justice, or the said mayor or head officer, shall think the said person meet and convenient to serve as an apprentice in that art, labour, science or mystery, wherein he shall be so then required to serve, that then the said justice, or the said mayor or head officer, shall have power and authority by virtue hereof, if the said person refuse to be bound as an apprentice, to commit him unto ward, there to remain until he be contented, and will be bounden to serve as an apprentice should serve, according to the true intent and meaning of this present act."

At what age.

By sect. 36, "No person shall by force or colour of this statute be bounden to enter into any apprenticeship, other than such as be under the age of twenty-one years."

But now since the 54 Geo. III. c. 96, s. 2, the above directions about the value of the parent's estate, and such like, are immaterial.

V. Apprentices, how to be bound.

Herein of—1st, The Description of the Instrument;—2d, The Contents of it;—3d, The Execution of it;—4th, The Stamp;—5th, The Memorandum to be printed on the Indenture;—and, 6th, The Enrolment of the Indenture.

(1.) Description of Instrument.

Description of instrument at common law.

At common law, no particular description of instrument is requisite to create an agreement of apprenticeship between the contracting parties.

By statute.

Need not now be by indenture to exercise a trade.

The statute of 5 Eliz. c. 4, required the binding of an apprentice to be by *indenture* for the purpose of exercising *trades*. But now by the 54 Geo. III. (*a*) c. 96, s. 2, this appears no longer absolutely necessary for that purpose, the latter act enacting that it shall be lawful for any person to take or retain, or become an apprentice, though not according to the 25th, 30th, and 41st sections of the statute of Elizabeth, and that indentures, deeds, and *agreements in writing*, entered into for that purpose, which would be otherwise invalid and ineffectual, shall be valid and effectual in law; with a proviso, however, that such enactment shall not affect the immemorial customs of towns or bye-laws of corporations, &c.

But though by the operation of this statute, the binding need not be by

(*a*) Before the passing of this act of 54 Geo. III. it was held, under the stat. of Eliz. that no one could be bound an apprentice, so as to render the apprenticeship available, without *deed*; (*Int. Parish Caston and Aicles*, 1 *Salk.* 68; 2 *Ld. Raym.* 1117; 3 *Esp.* 189;) and such deed must have been by *indenture*, (except to gain a settlement, (31 Geo. II. c. 11,) and a *deed-poll* was not sufficient, although it contained the words "this indenture witnesseth." (*Smith* v. *Birch*, 1 *Sess. Ca.* 284; 1 *Bott*, 528, S. C.) And a mere *agreement to execute* an indenture was unavailable; (*R.* v. *Stratton*, *Burr.* 272; *Bott*, 530, S. C.;) as a memorandum written in the leaf of a parish book; (*R.* v. *Ditchingham*, *Nol.* 169; 4 *T. R.* 769, S. C.;) and this, though a service of seven years had been performed under it. (*Id.*)

deed, for the purpose of *exercising a trade*, it is nevertheless in most cases advisable it should be so. 5. *How bound.*

In order to gain a *settlement*, the instrument of apprenticeship must be by *deed* (see 3 *W. & M.* c. 11, s. 8), though it need not be *indented*, 31 Geo. II. c. 11, s. 1, (see *R.* v. *Ditchingham*, 4 *T. R.* 770,) title "*Poor*," Vol. IV. No *parol binding* would be sufficient. (See *R.* v. *Mawman*, *Burr. S. C.* 290; 1 *Bott.* 531; *R.* v. *Ditchingham*, 4 *T. R.* 769; *R.* v. *Shipton*, 2 *Mun. & Ry.* 217; 8 *B. & Cres.* 88, S. C.) To gain a settlement.

If the binding be, as is usual, for more than a year, by the 4th section of the Statute of Frauds, 29 Car. II. c. 3, it will not in general be available unless it be in writing, signed by the party to be charged therewith, or his agent, the same being a contract not to be performed within a year. (See *Bracegirdle* v. *Heald*, 1 *B. & Ald.* 722; *Snelling* v. *Lord Huntingfield*, 1 *C. M. & R.* 20; *Beeston* v. *Collyer*, 4 *Bing.* 109.) Statute of Frauds.

(2.) Contents of Instrument.

The date is immaterial, but if the binding be by deed, the 35th section of the stat. 8 Anne, c. 9, directs that the indenture shall be *dated* on the day of execution; but the 45th section does not appear to *invalidate* an indenture on account of the non-observance of this regulation. The indenture should not be antedated, but the parties will not be precluded from showing that the deed was executed on a day different to that on which it is dated. (4 *East*, 477.) An indenture antedated two years, in order to evade the provisions of 5 Eliz. c. 4, s. 31, is void. (*Reg.* v. *Barmston, Inhabitants of*, 7 *Ad. & Ell.* 858; 3 *Nev. & P.* 167, S. C.) Date of instrument.

Formerly it was necessary to describe the apprentice in the instrument of binding expressly as such; (*Cald.* 367; 2 *Bott*, 222; *Chesterfield's case*, 2 *Salk.* 479;) but this is not now necessary; (*R.* v. *Laindon*, 8 *T. R.* 379; *R.* v. *Rainham*, 1 *East*, 531; *R.* v. *Inhabitants of Eccleston*, 2 *East*, 298;) and this notwithstanding the 54 Geo. III. c. 96. In some cases, however, from the non-insertion of the word "apprentice," the instrument might be construed to be a hiring as a servant, and not an apprenticeship, and it is therefore always best to insert the word. (*R.* v. *Coltishall*, *Nol. Rep.* 214. See *infra.*) Statement of parties to.

The apprentice and master must be named as parties to the instrument. Service under the deed by the infant is not such an adoption of the deed as will cure the omission. (See *R.* v. *Cromford*, *infra.*)

As to the consequences of not stating the true consideration as provided for by the stamp acts, see title "*Poor*," Vol. IV. Statement of consideration.

As we have already seen, *ante*, 181, that part of the statute of Elizabeth which requires seven years' apprenticeship previous to setting up in trade, is repealed by the 54 Geo. III. c. 96, and no term of apprenticeship is now, in general, necessary to set up a trade, except in London. Term of binding.

Previous to this act of 54 Geo. III. an indenture for less than seven years was voidable, at the election of the parties; (*Guppy* v. *Jennings*, 1 *Anst.* 256;) though a binding for a less time would confer a settlement. (1 *Bott*, 530, 541; 2 *id.* 370.) The deed was never considered absolutely *void*. (*R.* v. *St. Nicholas, Norwich*, *Burr.* 91; 2 *Stra.* 1066; *Gray* v. *Cookson*, 16 *East*, 13; *Grant* v. *Welchman*, *id.* 207; *Gye* v. *Felton*, 4 *Taunt.* 876; and see *R.* v. *St. Gregory*, 2 *Ad. & Ell.* 99; and more fully, title "*Poor*," Vol IV.) (*a*)

(*a*) But this doctrine appears very questionable. The 41st section of the 5 Eliz. declares the indenture to be void in law to all intents and purposes; and where similar words have been used in other statutes, the instruments have been adjudged to be absolutely void. One statute (56 Geo. III. c. 139,) enacted that no indenture shall be valid and effectual; another (28 Geo. III. c. 4,) that all indentures should be absolutely void in law; and another (8 Ann. c. 9, s. 32,) that all deeds should be void and not available for any purpose, unless certain provisions were complied with. Under each of these statutes it has been

5. *How bound.*

An apprenticeship to two masters, to serve them consecutively in two distinct trades, is valid, and will confer a settlement. (*R.* v. *Louth*, 1 *M. & R. Mag. Ca.* 238; 2 *M. & R.* 273; 8 *B. & Cres.* 247, S. C. more fully noticed title "*Poor*," Vol. IV.)

What stipulations make a contract of apprenticeship.

It is necessary for the purposes of *settlement*, that the master and apprentice should be *named as parties* to the deed, and that the former stipulate to *instruct* and the latter to *learn*; (*Chesterfield's case*, 2 *Salk.* 479; *R.* v. *Inhabitants of Cromford*, 8 *East*, 26;) and if there be no stipulation to serve, there will be no apprenticeship. Indeed, the contract may be invalid for all purposes; and it was held, in *Lees* v. *Whitcomb*, (5 *Bingh.* 34; 2 *M. & P.* 86, S. C.,) that a written promise by a party, "to remain with the plaintiff for two years for the purpose of *learning* his business," was invalid for want of mutuality, it not appearing from the mandamus that the plaintiff was bound to retain or teach the defendant during any part of that period. (See *Sykes* v. *Dixon*, 1 *P. & D.* 463.)

If from the whole instrument it appears that the parties contemplated the relation of master and servant, although it contains terms of a contract of apprenticeship, it will not be a perfect contract of apprenticeship, so as to confer a settlement by apprenticeship. (*R.* v. *Tipton*, 9 *B. & Cres.* 888; *R.* v. *Inhabitants of Billinghay*, 5 *Ad. & Ell.* 676.)

On the other hand, where the parties appear from the instrument to have contemplated, above all other things, a contract of master and *apprentice*, the contract must be deemed to be one of apprenticeship. (See *R.* v. *St. Margaret's, King's Lynn*, 6 *B. & Cres.* 97; *R.* v. *Combe*, 8 *id.* 82; *R.* v. *Tipton*, 9 *B. & C.* 888; *R.* v. *Edingdale*, 10 *B. & Cres.* 739; *R.* v. *Nether Knutsford*, 1 *B. & Adol.* 726; *R.* v. *Crediton*, 2 *B. & Adol.* 493; *R.* v. *Newton*, 3 *Nev. & M.* 306; 1 *Ad. & Ell.* 238.) All of which cases, and the law upon this subject, being more peculiarly applicable to the question of *Settlements*, will be found fully noticed, *post*, title "*Poor*," Vol. IV.

Form of covenant.

It is not necessary that the covenants of the parent or friend should be introduced into the deed by any particular form of words. The covenant of the apprentice, as well as that of his parent or friend, may be created by any words which import a stipulation that he shall serve; (*Moore*, 135;) and the usual concluding words, "and for the true performance of all and every the said covenants, each of the said parties bindeth himself to the other," amount to a covenant by all the parties who execute the indenture, for the due performance of those covenants which may be applicable to their respective situations. (*Branch* v. *Ewington*, *Dougl.* 518.)

(3.) Execution of the Instrument.

Execution of instrument.

In order to bind a party, so as to proceed against him for a breach of the instrument of apprenticeship, he must have executed the same.

And before the 54 Geo. III. c. 96, for the purposes of *trade*, to make a valid apprenticeship, the *apprentice* himself, whether an infant or an adult, must have executed the indenture. (See *R.* v. *Cromford*, 8 *East*, 25; *R.* v. *Chesterfield*, 1 *Bott*, 527; *R.* v. *Ripon*, 9 *East*, 295.) But this is no longer necessary for that purpose, though it is in order to gain a settlement. (*R.* v. *Arnesby*, 3 *B. & Ald.* 584.)

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decided that no settlement ever can be gained under instruments thus declared *void*. (*R.* v. *Stoke Damerel*, 1 *Man. & R.* 458; 7 *B. & C.* 563; *R.* v. *Hipswell*, 2 *Man. & R.* 474; 8 *B. & C.* 466; *R.* v. *Chipping Norton*, 5 *B. & Ald.* 412.) But where a statute, incorporating guardians of the poor of a certain district, enacted that it should be lawful for the corporation to bind out apprentices for any number of years, "provided such child be not bound for a longer term than until he or she shall have attained the age of twenty-two, if a boy, and twenty, if a girl," it was held, that an indenture, by which a boy fifteen and a half was bound for seven years, was *voidable* only and not *void*; and that, therefore, a settlement might be gained under it. (*R.* v. *St. Gregory, Canterbury*, 4 *Nev. & M.* 137; 2 *Adol. & Ell.* 99.)

The execution of the indenture or a counterpart by the *master* was never necessary, either for the purposes of trade or settlement; (*R.* v. *Fleet, Cald.* 31; 2 *Bott*, 371, S. C.; *R.* v. *St. Peters on the Hill*, 2 *Bott*, 367;) but it is necessary in order to sue him for a breach thereof. 5. *How bound.*

Where money was given by will to trustees for the purpose of putting out poor boys as apprentices, and the trustees having put a boy out and given a premium of £20 with him, the indenture stated them, as well as the boy and master, to be parties, but it was in fact executed by the boy and master only, and not by the trustees; the indenture was held notwithstanding valid. (*R.* v. *Quainton*, 2 *M. & Sel.* 338; *Bott*, 16.)

An indenture having been prepared for binding a boy apprentice, the apprentice and his father, being unable to write, desired a third person to write their names opposite two of the seals, and he did so. The indenture was not read to them. The apprentice immediately afterwards took the indenture to the master and left it with him; and afterwards stated that when he did so he considered himself bound; and he went into service under the indenture: It was held, that the indenture was sufficiently executed and delivered. (*R* v. *Inhabitants of Longnor*, 4 *B. & Ad.* 647; 1 *Nev. & M.* 576, S. C.)

By an act of parliament all persons seised of land of the annual value of 30*l.* in the hundred of *Stow*, were incorporated by the name of the guardians of the poor within the hundred of *Stow*, in the county of *Suffolk*, and were to have a common seal, and the poor of the hundred were to be placed under the management of the corporation, and the directors and acting guardians, whom the corporation were authorised to appoint in the manner therein mentioned, were empowered, with the consent of two justices, to bind any poor child under their management apprentice, in like manner as churchwardens and overseers of the poor, with assent of the justices of the place, were then by law empowered so to do. By indenture the directors and acting guardians of the poor of the hundred of *Stow*, with the consent of two justices, bound out a poor boy under their management an apprentice for one year, and affixed to the indenture the common seal of the corporation, but it was not otherwise executed by the directors and acting guardians: It was held, that the indenture was invalid. (*R.* v. *Inhabitants of Haughley*, 4 *B. & Adol.* 650; 1 *Nev. & M.* 525, S. C.)

(4.) Premium and Duty paid, and Stamp on Instrument.

As regards the premium and duty paid on the instrument of apprenticeship, and the stamp regulations with respect thereto, see the same fully noticed *post*, title "*Poor*," Vol. IV. as to *Settlements*.

(5.) Memorandum to be printed on printed Indenture.

By the 5 Geo. III. c. 46, s. 19, "all *printed indentures* shall have the following memorandum printed under the same, viz. 'The indenture, covenant, article, or contract, must bear date the day it is executed; and what money or other thing is given or contracted for with the clerk or apprentice must be inserted in words at length; and the duty paid to the stamp office if in London, or within the weekly bills of mortality, within one month after the execution, and if in the country and out of the said bills of mortality, within two months, to a distributor of the stamps or his substitute; otherwise the indenture will be void, the master or mistress forfeit 50*l.* and another penalty, and the apprentice be disabled to follow his trade or to be made free.' And if any printer, stationer, or other person shall sell or cause to be sold any such indenture, covenant, &c. without such notice or memorandum being printed under the same, he shall forfeit 10*l.* in like manner." Memorandum to be printed on printed indenture. Penalty on printer for omission.

The effect of this clause is merely to impose a penalty on printers and others selling printed indentures not having the required notice. But it does Effect of enactment.

5. *How bound.* not operate to make the indenture *void* in the cases specified in the memorandum to be printed. (*Rex* v. *Harrington*, 6 *Nev. & M.* 165.)

(6.) Enrolment of Indenture.

Enrolment of indentures in London.

By the custom of London (and before the 5 & 6 Will. IV. c. 76, s. 14, of other corporate places), the indenture of apprenticeship ought to be enrolled. In London it should be enrolled before the chamberlain within a year; and if it be not so enrolled, upon a petition to the mayor and aldermen a *scire facias* may be issued to the master to show cause why the indenture has not been enrolled; and if it was through the master's default, the apprentice may sue out his indenture, and be discharged; but it is otherwise if it was through the default of the apprentice, as if he could not come to present himself before the chamberlain, &c.; for they cannot be enrolled unless the apprentice be in Court and acknowledge them. (*Bac. Ab. Master and Servant*, (A. 2); *Roll. Rep.* 305; *Com. Dig. London*, (N. 2); *Pulling's Laws of London*, 60, 482, 483.) However, it is said, that if the apprentice refuse to appear to have the indenture enrolled, the master may record the indenture, which will be tantamount. (*Priv. Lond.* 305; *Com. Dig. London*, (N. 2).)

If the indenture be enrolled, then in an action by the master against the apprentice, it will not be necessary to prove the execution of the deed by the defendant, but otherwise it will. (*Skin.* 579.) But in no case the omission to enrol can be taken advantage of by the defendant in an action by a third person; (*Barber* v. *Dennis*, 6 *Mod.* 69;) and it has been held, that the custom of London, that an infant who binds himself apprentice shall be liable to be sued, does not extend to an infant bound to a waterman, because the Company of Watermen are but a voluntary society, and being free of that does not make one free of London. (*Id.*)

Where, by the constitution of a corporation, the indenture ought by custom to have been enrolled within a specified time from the date, the Court of Queen's Bench, by *mandamus*, compelled the proper officer to enrol it, it not appearing that the apprentice was not bound according to the constitution of the corporation. (*R.* v. *Marshall*, 2 *T. R.* 2; *Peake's Cas.* 159.)

A bye-law of a corporation, requiring the indentures to be enrolled, has been held so far complied with as not to deprive the apprentice of the benefits accruing from his service where it is only marked by the town clerk as registered, and is not actually enrolled. (*R.* v. *Mayor of Cambridge*, 2 *Chit. Rep.* 144.)

As to the enrolment of indentures in sea service apprentices, see *post*, "*Seamen*," Vol. V.

VI. Rights and Liabilities of Master and Parent.

Rights and liabilities of master and parent.

And herein of the Rights—1st. Of the Master for Breach of the Contract; —2. Of the Parent for Breach of Contract;—3d. Of the Apprentice for Breach of Contract;—4th. Of the Master to the Services and Earnings of the Apprentice;—5th. Of the Master in case of harbouring or enticing away the Apprentice; 6th. Of the Master to control and protect the Apprentice; —7th. Of the Liabilities of the Master for misusing the Apprentice;—and, lastly, Concerning the Crimes of an Apprentice.

Master's rights.

(1.) Master's Rights for Breach of Contract.

For breach of contract.

If the apprentice absent himself or neglect his duty, or commit any other breach of the stipulations agreed to be performed by him, the master may support an action against the parent or other person who has by the instrument of apprenticeship agreed for the due performance of such stipulations. (*Branch* v. *Ewington*, *Doug.* 518; *Whitley* v. *Loftus*, 8 *Mod.* 190; *Cuming* v. *Hill*, 3 *Barn. & Ald.* 59; *Hughes* v. *Humphreys*, 6 *B. & Cres.* 686; 9 *D. & R.* 715, S. C.)

But there is no remedy by action against the apprentice himself if he be an infant; (*Gylbert* v. *Fletcher*, *Cro. Car.* 179, *ante*, 182;) though, indeed, by the custom of London, an infant is liable to be sued in any court for a breach of his covenant. (*Ante*, 182.) In ordinary cases the only course is to resort to the magistrates to compel the performance of his duty, as hereafter stated.

6. Rights and Liabilities of Master and Parent.

Parish officers are not in general liable for the breaches of covenant in parish indentures, as they do not in general covenant.

What a breach.

Covenant lies against the father, for the apprentice not accounting. (*Elwes* v. *Vaughan*, 1 *Lutw.* 386.) And in such an action, a request to account need not be stated. The breach in a joint action against a father and son may be assigned against the latter only. (*Whitley* v. *Loftus*, 8 *Mod.* 190; 1 *Bott*, 528, S. C.) In this latter case, in the indenture of apprenticeship, the father covenanted to pay the apprenticeship-money; the son covenanted to account for his master's goods; and in the conclusion, the father and son each bound themselves for the due performance of all covenants and agreements therein. *Per Curiam:* "The end of binding the father was to answer the wrong which might be done by his son, and he must answer for *any;* and the covenant that each did bind himself must be so, where the son is bound to perform the thing for which the covenant was made; and this clause is usually inserted that the covenants may be taken distributively, to wit, that each of the covenantors should perform his part; and this makes the covenant of the son bind the father, who covenanted for him as well as for himself."

So in the case of *Branch* v. *Ewington*, *Doug.* 518; 1 *Bott*, 535, S. C., which was an action of covenant by the master against the father of the apprentice; the indenture was in the common form of the statute, and for the true performance of all and every the covenants each of the said parties bound himself to the other. The breach assigned was, that the apprentice had absented himself from the service. Lord *Mansfield*, C. J., said, nothing was clearer than that the father was bound for the performance of the covenants by the son.

So the refusal of the infant on coming of age to fulfil the term of apprenticeship is no answer to an action against the parent or other contracting party for him. Thus, in *Cuming* v. *Hill*, 3 *B. & Ald.* 59, which was an action of covenant on the indenture of apprenticeship, in the common form, by the master against the father of the apprentice, the breach assigned was, that the apprentice had absented himself from the service. Plea, that the apprentice, at the time of making the indenture, was an infant of the age of seventeen years; and that on the 20th October, 1818, he attained his full age of twenty-one years, until which time he faithfully served the plaintiff, according to the meaning of the indenture; and after he had attained the age of twenty-one years, he, on the 21st October, 1818, made void the indenture, and quitted the service of the plaintiff, as it was lawful to do under the statute 5 Elizabeth. To this plea there was a general demurrer. *Abraham*, in support of the demurrer, cited *Branch* v. *Ewington*, 2 *Dougl.* 518, *supra;* and *Bayley*, *contrà*, being then called upon by the Court, admitted that he could not support the plea. *Abbott*, C. J. "I am of opinion that the father is liable to this action; he covenants that the son shall faithfully serve; the avoidance of the apprenticeship by the son during the term cannot discharge the father's covenant. The indenture of apprenticeship has existed in this form for more than a century, and has been in universal use. A construction has been put upon the instrument in a court of law, in the case cited from *Douglas*. I do not see any reason to doubt the propriety of that decision, and I think, therefore, upon principle as well as upon authority, that the defendant is answerable in this action." *Bayley*, J. "I may bind myself that A. B. shall do an act, although it is in his option whether he will do it or not. The father here binds himself that the son shall serve seven years. It is no answer to an action brought against the father, for the breach of that covenant, for him to say that it was in the option of the son whether he would serve or not. If the son does not choose

6. *Rights and Liabilities of Master and Parent.*

to do that which the father covenanted he should do, the covenant is then broken, and the father is liable." The other judges concurred. Judgment for plaintiff.

The covenants of the master and father or apprentice are independent covenants, and the performance of the one does not form a condition precedent to the performance of the other; therefore it is no answer to an action by the master against the parent, that the master neglected to perform some other part of the indenture, which did not prevent the son or parent's performance of the covenant, the breach of which is complained of. (See *Winston* v. *Linn*, 1 *B. & C.* 460; 2 *D. & R.* 465, S. C.; *Hughes* v. *Humphreys*, 6 *B. & C.* 680; 9 *D. & R.* 715, S. C.; *post*, 205.)

Where an apprentice ran away, and enlisted, the master, though refusing to receive him, was held not compellable to return any part of the premium. Thus in *Cuff* v. *Brown and others*, 5 *Price*, 297, where a bill for 100*l.*, payable at the end of three years, was given upon entering into an agreement for the articling of an apprentice for the term of five years at the end of three years, and the deed was executed immediately for a term of eight years; but before the end of the three years, the apprentice of his own accord, and without any misconduct on the part of the master, ran away and enlisted for a soldier. Upon his return, after some time, and offering to renew his services, the master was at first inclined to do so, but on hearing of some other of his misconduct refused to receive him, and upon the bill being put in suit by a *bonâ fide* holder, the court refused to grant an injunction; the premium was a consideration applying to and extending over the whole term of eight years; and as the master performed his contract until it was put an end to by the apprentice, he was entitled to the money arising from the note, as much as if the premium had been paid in money. Upon the objection that the deed was not according to the agreement, the court held, that there was no contradiction between them.

What an unlawful absenting.

With respect to what is a sufficient *unlawful absenting* to constitute a breach of the contract, it is not every little occasional absence, (though they may be the subject of reprehension,) that will constitute an *unlawful absenting*. Therefore, it has been held, that the apprentice's staying on a Sunday evening half-an-hour beyond the time allowed him, was not such an unlawful absenting as would enable his master to sue for a breach of the covenant. (*Wright* v. *Gihon*, 3 *C. & P.* 583.)

Where indenture void.

If the indenture be void or voidable there is no remedy by action against any party thereto; (1 *Anstr.* 256; *Burney* v. *Jennings*, 6 *Esp. Rep.* 8;) though the magistrates would have jurisdiction over the apprentice himself if he surreptitiously and without previous notice absconded from the service. (*Cald.* 26; 1 *Bott*, 530; *Ashcroft* v. *Bertles*, 6 *T. R.* 652.)

Where apprenticeship put an end to.

License.

If the contract of apprenticeship has been put an end to, that would form an answer to any alleged breach subsequent to that time. (See *post*, 196 to 202, as to what is a termination of the apprenticeship.) A parol license to quit the service will not absolutely put an end to a deed of apprenticeship, and the master is at liberty to recall that license, within a reasonable time after, during the term. (See *post*, 197.)

(2.) Parent's Rights for Breach of Contract.

Rights of parent for master's breach of contract.

If the master be guilty of the non-observance of any of the duties pointed out by the contract of apprenticeship, he is liable to an action thereon, at the suit of the infant, or parent or party with whom he contracts.

What a breach.

The master does not covenant that the apprentice shall *stay* and *learn*, and is not liable for his not doing so. (See *Hughes* v. *Humphreys*, 9 *D. & R.* 715; S. C. 6 *B. & C.* 687, *infra*.)

We have already seen that the covenants of the master and father and son are mutual and independent of each other, and that the performance of the one does not form a condition precedent to the performance of the other; and in illustration of this rule, the following cases may be referred to.

In an action on an indenture of apprenticeship, the master pleaded that the apprentice refused to obey his orders, and left his house, saying, he would not return again. To which plea it was replied, that afterwards the apprentice *returned* and *offered* to obey his commands, but the master *would not take him*. The court held, that if the apprentice had under those circumstances stopped away an *unreasonable time*, which ought to have been stated in the rejoinder, the master would have been justified in not taking him back, but that he was not at liberty to turn away, or to refuse to admit his apprentice into his house for misconduct in absenting himself for a few days, but should have sued him by cross-action on his covenants. (*Winston* v. *Linn*, 1 *B. & Cres.* 460; 2 *D. & R.* 465, S. C.; and see 5 *Price*, 297, *ante*, 189.)

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So in an action of covenant by the father against the master for not teaching and providing for the apprentice. Plea, that up to a certain time defendant did teach, &c., and that then the apprentice, without leave, &c. quitted the defendant's service, and never returned. Replication, that on, &c. defendant refused then or at any other time to receive back the apprentice, and therefore discharged him from his service. Rejoinder, that the apprentice enlisted as a soldier, and that plaintiff never requested defendant to receive back the apprentice when he was able to return to the service. Surrejoinder, that soon after the apprentice enlisted, defendant refused then or at any other time to take him back, and wholly discharged him from his service. It was held, on demurrer, that the sur-rejoinder was bad, not being a sufficient answer to the rejoinder, and that the plea was good, as it disclosed sufficient excuse for the non-performance of the defendant's covenant. (*Hughes* v. *Humphreys*, 6 *B. & Cres.* 680; 9 *D. & R.* 715, S. C.)

If the apprentice be unwell, and there be any probability of his recovery, so as to be able at all to attend to his emplyment, the master must provide for him, for the master takes him for better for worse, and is to provide for him in sickness and in health; (*R.* v. *Inhabitants of Hales Owen*, 1 *Stra.* 99; 1 *Bott*, 574;) *aliter*, if the apprentice be an idiot and incapable of learning. (*Id.*)

As to the rights of the master and apprentice in case of the death of the master, see *post*, 199.

In case of death.

The master is not liable on the indenture, if he has not executed or if it be not duly stamped. (See *Aldridge* v. *Ewen*, 3 *Esp.* 188.)

Where indenture not executed or stamped.

(3.) Rights of Apprentice for Breach of Contract.

The rights of an apprentice for a breach of the contract of apprenticeship may be collected from the previous observations as to the rights of the master and parent. He has a right to sue his master in case of non-observance of any of the covenants expressed in the deed.

Rights of apprentice on breach of contract.

The apprentice is not, as we have seen, *ante*, 182, liable to any action for the non-performance of any stipulations in the indenture whilst he continues an infant, nor afterwards if he disaffirms the contract on coming of age, unless by the custom of London.

As to his rights in case of ill-usage, see *post*, 201, 203.

(4.) Rights of Master to Services and Earnings of Apprentice.

As an incident to the right of the master to the service of his apprentice, he is entitled to all the earnings and gains which an apprentice may acquire by his labour either in the service of another or in an employment on his own account. (*Anon.* 12 *Mod.* 415; *Packington* v. *Chepton Beauchamp*, 1 *Stra.* 582.)

Rights to services and earnings of apprentices.

It is not material to such right of the master whether the apprentice be legally an apprentice or not, it is sufficient to maintain an action if he be so *de facto*. Thus in the case of *Barber* v. *Dennis*, (1 *Salk.* 98; 6 *Mod*, 69, S. C.;) the widow of a waterman, who, as was said, by the usage of Watermen's Hall, may take an apprentice, had her apprentice taken from her and

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put on board a Queen's ship, where he earned two tickets, which came to the defendant's hands, and for which the mistress brought trover; it was argued, that the action would well lie if the apprentice were a legal apprentice, for his possession would be that of his master, and whatever he earned would go to his master. But it was objected, that this supposed apprentice was no legal apprentice pursuant to the act of Elizabeth, and if he were not a legal apprentice the plaintiff had no title. But Lord Chief Justice *Holt* said, he would understand him an apprentice or servant *de facto*, and that would suffice against their being wrong doers. In the report in Salkeld the word "servant" is not mentioned. And indeed an action could not have been brought for a servant's wages, either on board or elsewhere, for a master cannot bring an *action* (*Co. Lit.* 117 a) for the wages of his servant; though for those of an apprentice he may, because the time of the apprentice is the time of his master, and what is earned by the apprentice is considered as belonging to the master, *per* Lord *Hardwick*. (1 *Bur. Set. Cas.* 91.)

In the case of *Thompson* v. *Havelock*, (1 *Campb.* 527,) it was held, that if the master of a ship gave a part of his personal services to one who is not the owner, for a stipulated sum, and the latter pay this into the hands of the owner, the master cannot recover it from him. And Lord *Ellenborough* said, "Is it to be contended that a servant, who has engaged to devote the whole of his time and his attention to my concerns, may hire out his services or part of them to another? It would have been a different thing if the owner had been suing for this money, but I am clearly of opinion that, at all events, the present plaintiff has no right to it. Under this contract he must have been taken from superintending the defendant's ship, and I do not know how far it might go if such earnings were recoverable in a court of justice. No man should be allowed to have an interest against his duty. I will assume that the plaintiff obtained as high a freight as possible for his owners, and that his services to government were meritorious, still there would be no security in any department of life or business if servants could legally let themselves out in whole or in part. My opinion on the subject is quite decisive; if it be doubted, I beg that a bill of exceptions may be tendered." (1 *Campb.* 529, n.) In a very learned note of Mr. Hargrave upon the villeinage maxim, *quicquid acquiritur servo acquiritur domino*, he states it as his opinion, that a master cannot maintain an action for the earnings of his servants (although he may for those of his apprentice) where the service has been without his privity, as the master's proper remedy in all cases except those in which the servant is intentionally employed on his master's account, seems to be an action either against the employer for loss of service if he knew of the first retainer, or against the servant himself for breach of his contract. (*Co. Lit.* 117 a, (1).) But the master may retain the earnings of his servant when once paid into his hands, as he is equitably entitled to them, and his right can least of all be controverted by the servant. (*Barber* v. *Dennis*, 6 *Mod.* 69; *Anon.* 12 *Mod.* 415; *Treswell* v. *Middleton*, *Cro. Jac.* 653; 15 *Vin. Abr. Master and Servant* (O. 2); 1 *Campb.* 529, n.)

The prize money gained by an apprentice serving on board a letter of marque ship, does not belong to the master of the apprentice, the usage being proved to be, that such money is the property of the apprentice. *Ashurst*, J., dissentiente. (*Carson* v. *Watts*, 3 *Dougl.* 350.)

Where the property acquired by the apprentice is some specific chattel, the remedy for it is *trover*. Where it is money, *assumpsit* or debt for money had and received will lie. (*Skin.* 579.) Where wages or other remuneration are claimed for the personal services of the apprentice, the form of action may be *assumpsit* or debt for work and labour. (*Lightly* v. *Clouston*, 1 *Taunt.* 112; *Foster* v. *Stewart*, 3 *M. & Sel.* 191.)

In either of these actions the execution of the indenture must be proved. (*Skin.* 579.)

A Court of equity will not in general relieve against the claim of the master for prize money, however large, acquired by an apprentice who has deserted his service; but Lord *Hardwicke* said, that if a case came before him in equity, where the master, instead of instructing his apprentice in the particular busi-

ness his parents intended, encouraged and induced him to go to sea and to a different course of life, he should incline to relieve the apprentice against the master's legal right. (1 *Ves.* 48.)

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It is observed by Mr. *Hargrave, Co. Litt.* 117 a, n. 1, that in the 31 Geo. II. c. 10, one object of which is to regulate the pay of seamen in the royal navy, there is a provision that in particular cases the master shall not be entitled to the wages of his apprentice; and that from the 17th section of the 2 & 3 Ann. c. 6, it seems as if the framers of that law doubted whether the master of an apprentice who goes into the royal navy would be entitled to his wages without an express provision.

In cases of impressment of apprentices it is sufficient notice to the captain of the vessel (to render him liable to the master for the wages of the apprentice in case of his subsequent detention) that the apprentice told him that he was such. (*Eades* v. *Vandeput*, 5 *East*, 39, n. a.; 4 *Dougl.* 1.)

Amount of damages for injury to apprentice.

In an action for permanently injuring the hand of an apprentice, whereby loss of service accrued, the master may recover for the prospective damage, and is not limited to the loss up to the time of the commencement of the action; for the damage alone is not the cause of action, but the illegal act and the damage together; and the master could not bring a fresh action as often as fresh damage resulted. (*Hodsoll* v. *Stallbrass*, 3 *Per. & D.* 200; 11 *Ad. & Ell.* 301; 9 *Car. & P.* 63; 8 *Dowl.* 482, S. C.)

(5.) Rights of Master in case of Enticing away and Harbouring an Apprentice.

Enticing away apprentices.

An action on the case lies by the master for *enticing away* his servant or apprentice; (*R.* v. *Daniel*, 6 *Mod.* 182; *Reevely* v. *Mainwaring*, 3 *Burr.* 1306; *Gunter* v. *Astor*, 4 *Moore*, 12;) but not an indictment; (*id.*;) nor does trespass, unless, indeed, the taking were by force. (*Id.*; *Reg.* v. *Daniel*, 1 *Salk*, 380; 2 *Ld. Raym.* 1116, S. C.; 3 *Salk.* 391; *Holt*, 346.)

If there be no valid and binding contract of service or *apprenticeship* between the master and apprentice, at the time of the enticing and harbouring, it would seem the action would not lie, though indeed the particular decisions on this head, prior to the 54 Geo. III. c. 96, which repeals part of the 5 Eliz. c. 4, will not now be applicable. (See *F. N. B.* 168; *Westerdell* v. *Dale*, 7 *T. R.* 310, 314; *Keane* v. *Boycott*, 2 *H. Bla.* 511.) An apprenticeship *de facto* would always suffice as against a wrongdoer, though there were no legal apprenticeship. (*Barber* v. *Dennis*, 6 *Mod.* 69; 1 *Salk.* 68, S. C.; see *ante*, 191.)

An action lies for *harbouring* a servant or apprentice without any evidence of the defendant's having *enticed* him away. (See *Ashcroft* v. *Bertles*, 6 *T. R.* 652.) In such action, however, plaintiff must be prepared to show that the defendant harboured the servant or apprentice after the regular notice of the service or apprenticeship, and a requisition to the defendant to deliver him up, or not to harbour him any longer. (See *R.* v. *Edwards*, 7 *T. R.* 745; *Fawcett* v. *Blawes*, 2 *Lev.* 63; *Peake, C. N. P.* 55; *Dinsmore* v. *Greenbank, Willes*, 582.) What is a sufficient notice, see *Eades* v. *Vandeput*, (5 *East*, 39, *supra*).

As to when the master may waive the *tort* and sue in *assumpsit*, see *ante*, p. 191.

There must be some damage, *per quod servitium amisit*, proved. (*Ex parte Lansdowne*, 5 *East*, 39; *Bird* v. *Randall*, *Burr.* 1352.) The measure of damages is not to be ascertained at the actual loss plaintiff sustained at the time, but for the injury done by causing the apprentice to leave plaintiff's employment. (*Guntor* v. *Astor*, 4 *Moore*, 12.)

(6.) Right of Master to control and protect the Apprentice.

Right to correct apprentice.

The master has more authority over an apprentice than over a common servant, for he may legally correct his apprentice for negligence or other misbehaviour, provided it be done with moderation; whereas if the master or his

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wife beat any other servant, it is a good cause for departure and action. (1 *Bla. Com.* 428; *F. N. B.* 168; 1 *Hawk.* c. 176.) But in cases of gross misconduct, it is better for the master to apply to a justice of the peace or the sessions, to discharge or punish the apprentice, than to take the law into his own hands. He cannot delegate this authority to another. (9 *Co.* 76.)

Where a master in correcting his apprentice happens to occasion his death, it shall be deemed homicide by misadventure; yet if in his correction he be so barbarous as to exceed all bounds of moderation, and thereby occasion the apprentice's death, it is manslaughter at least; and if he make use of an instrument improper for correction, and apparently endangering the apprentice's life, it is murder. (1 *Hawk.* c. 29, s. 5. See "*Homicide,*" Vol. III.)

Right to turn him away.

By the custom of London a freeman may turn away an apprentice for gaming. (2 *Vern.* 291.) But if an apprentice marries without the privity of his master, yet that will not justify his turning him away, but he must take his remedy on the covenant; (2 *Vern.* 492;) nor can he turn him away on account of his having been absent for a short time, or other breach of covenant; (*Winston* v. *Linn*, 1 *B. & Cres.* 460; 2 *D. & R.* 765, S. C.; 6 *B. & Cres.* 680; 9 *D. & R.* 715, S. C. *ante*, p. 189, 190;) nor on account of his being sick or so lame as to be unable to work. (*R.* v. *Inhabitants of Hales Owen*, 1 *Stra.* 99; *post*, 203.)

In any case he cannot send or take the apprentice out of the kingdom; (*Hob.* 139; *Bac. Abr. Mast. & Serv.* (E.);) or to a different part of the kingdom to serve another master. (*R.* v. *St. Paul, Bedford*, 6 *T. R.* 454, *post*, 203.)

Right to custody of his person.

It does not appear that the master is entitled to the custody of the person of his apprentice. If the apprentice has been voluntarily impressed, the master is not entitled to a *habeas corpus* to bring up his body; (*Ex parte Lansdowne*, 5 *East*, 38; *R.* v. *Edwards*, 7 *T. R.* 745;) and if an apprentice leaves his master and enters into the service of another, the first master cannot sue out a *habeas corpus*, though the apprentice may; (*R.* v. *Reynolds*, 6 *T. R.* 497;) or the chief justice may issue his warrant to bring the apprentice before him. (1 *Leach, C. L.* 233; *R.* v. *Edwards*, 7 *T. R.* 745.)

If the apprentice depart out of his master's service and the master happen after to lay hold of him, yet the master may not in this case beat or forcibly compel his apprentice against his will to return or tarry with him, or to do his service, but either he must complain to the justice of the departure or he may bring an action against the parent on his covenant. (*Dalt.* c. 121, p. 281, 282.)

To defend his person.

As incident to the right of the master to the service of his apprentice, he may justify such a battery as is necessary in his defence. (*Rol. Abr.* 546, D. pl. 2; *Bac. Abr. Mast. & Serv.* (P.); *post*, "*Assault,*" Vol. I.)

(7.) Liability of Master for Misusing Apprentice.

Misusing apprentice.

We have already seen how far the master will be liable for a breach of his contract, *ante*, p. 190, or for improperly correcting his apprentice, *ante*, 193.

Under the provisions of the 5 Eliz. c. 4, and 20 Geo. II. c. 19, if the master neglect to instruct, or shall misuse or evil treat his apprentice, or the apprentice shall have just cause to complain, the justices at sessions may discharge the apprentice and have a power of ordering a restitution of the premium; see further *post*, p. 202, 206, and 1 *Saund.* 313, n.)

And by 20 Geo. II. c. 19, two justices of the peace are authorised, in the case of a parish apprentice, or any other, where more than 5*l.* (increased to 25*l.* by 4 Geo. IV. c. 29) has not been paid as a premium, to discharge the apprentice in case the master has been guilty of any misusage, refusal of necessary provisions, cruelty, or other illtreatment towards his apprentice. (See further, *post*, p. 206, 210.)

But the justices cannot administer *punishment* to *masters* for their faults, but only discharge their apprentices. (*Hawkesworth's case*, 1 *Saund.* 316.)

Independently of the terms of the indenture, and the power of the magistrates, if the master, without cause, beat or ill-use his apprentice, an action may be supported against him; and an indictment at common law may be supported against a master for not providing sufficient food for an apprentice or servant of tender years and under his dominion or control, whereby the infant becomes sick. (*R.* v. *Ridley*, 2 *Camp.* 650; *Russ. & R. C. C.* 20; see forms of indictment, *post*, (Nos. 16, 17).) 6. *Rights and Liabilities of Master and Parent.*

In the indictment against Elizabeth Ridley, (2 *Camp.* 650,) there was no averment that the child was of tender years, and under the control of the defendant; and as no evidence could be given of actual ill-usage, by exposure to the weather or otherwise, the prosecutor consented to an acquittal; for Mr. Justice *Lawrence* held, that unless the servant was of tender years, and under the control of the party, the neglect to supply her with food would be a mere breach of contract; and, as she might leave the service, remonstrate, or complain to a magistrate, no indictment could be supported; but he thought that if the infant be of tender years, and so under the dominion of the defendant as to be unable to take any steps to relieve herself, a *nonfeazance* respecting her would be an indictable offence. And this would appear from the case in which it has been holden murder in a master, if his apprentice die for want of food. (1 *Leach*, 137.) And in the case of *R.* v. *Friend and Wife*, (*Russ. & R. C. C.* 20,) it was held an indictable offence to neglect to supply necessaries to a child, servant, or apprentice, whom a person is bound by duty or contract to provide for, if such child, &c. be of tender years, and unable to provide for itself. The allegation, therefore, of the child, &c. being of tender years, and of inability to provide for himself, is material. (*Id.* And see "*Children*," Vol. I.; and "*Homicide*," Vol. III.)

(8.) Crimes of Apprentices.

At common law, an apprentice, without any regard to age, might be guilty of felony, in feloniously taking away the goods of his master, though they were goods under his charge, as a shepherd, &c.; and may, at this day, for any such offence, be indicted as for a felony at common law; (1 *Hale's P. C.* 505, 666; 2 *East's P. C.* 562;) but at common law, if a man had delivered goods to his apprentice to keep or carry for him, and he carried them away *animo furandi*, this was considered only a breach of trust, and not felony. This, however, was altered by some subsequent statutes, as to apprentices above eighteen years old, and by others of above fifteen. (See 21 Hen. VIII. c. 7; 27 Hen. VIII. c. 17; 12 Ann. c. 7; these are repealed by 7 & 8 Geo. IV. c. 27; but the 7 & 8 Geo. IV. c. 29, still makes the offence a felony. See *post*, "*Larceny*," Vol. III.) Crimes of Apprentices.

If an apprentice, representing himself not to be one, enlist in the army and obtain money on that account, he may be indicted as a cheat. (2 *East's P. C.* 822; *post*, "*Cheat*," Vol. I.)

Although an infant is not liable for money received by him for the plaintiff's use under a contract express or implied, yet, where he wrongfully embezzles money, he may sometimes be sued for money had and received. (*Bristowe* v. *Eastman*, 1 *Esp. Rep.* 172; *Peake, N. P. C.* 223, *ante*, 182.)

VII. Assigning and turning over Apprentices.

The apprenticeship is a *personal* trust and confidence imposed on the master, so that the master cannot of his own will, either at law or equity, assign it over to another. (*Coventry* v. *Woodhall*, *Hob.* 134; *Bac. Abr. Master and Servant*, (E.)) Moreover, the person of a man is not, in strict law, assignable; (*Baxter* v. *Burfield*, 2 *Stra.* 1266; 1 *Bott*, 581; *R.* v. *East Bridgeford*, *Burr.* 133; 1 *Bott*, 581, S. C.;) and an award that an apprentice shall be assigned is void. (*Horne* v. *Blake*, 2 *Stra.* 1267.) Cannot be assigned in general.

Even justices, though they have power on complaint to discharge an apprentice, cannot turn him over to a fresh master, that being beyond their By justices.

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jurisdiction. (*R.* v. *Barnes*, 1 *Stra.* 48; *Bac. Abr. Master and Servant*, (E.); *post*, 202, 206.)

May by consent.

By consent of all parties the apprentice may be assigned; but the master assigning, and the apprentice himself consenting, will not make him an apprentice to the assignee within the 5 Eliz c. 4. (*Dalt.* c. 58, p. 143; *R.* v. *Channel*, 1 *Bott*, 578; 3 *Keb.* 519, S. C.)

In London.

By the custom of London a freeman may turn over his apprentice to another freeman, and such master shall have the same benefit of the apprentice's covenant, as shall the parent or apprentice of the covenants on the part of the master, as if he had been originally bound to him. (*March.* 3; *R.* v. ——, 1 *Keb.* 255; *Com. Dig. London; Pulling's Laws of London*, 482.)

To gain a settlement.

But though indentures of apprenticeship be not assignable in strict law, yet for the purposes of gaining a settlement at least, such assignment is not void, but voidable only, and amounts to a contract between the two masters; so that it is good by way of covenant, but not as an assignment to pass an interest; like the case of assigning a bond, which, though it be not assignable in point of interest, yet it is a covenant that the assignee shall receive the money to his own use. (*Caister* v. *Eccles*, 1 *Ld. Raym.* 683; 1 *Bott*, 580. See further *post*, "*Poor*," Vol. IV.)

As to an apprenticeship to two masters, see *ante*, 185.

Stamps.

The assignment requires a stamp; for it is not within the exemption of stat. 55 Geo. III. c. 184, which clearly refers to the case of a *hiring*. Where, by indenture of apprenticeship, the apprentice agreed to serve for five and a half years, but at the end of two years he was transferred to a new master, to serve him as apprentice for the remainder of the term of five and a half years, with a stipulation, that, for certain considerations, his new master should provide for him during one year longer than the original term, and the assignment had only a stamp of 1*l.* affixed to it; it was held that this was sufficient, and that the deed of transfer did not require an additional stamp for the new term of one year. (*Morris* v. *Cox*, 9 *Dowl.* 661; 3 *Scott, N. R.* 216, S. C.; *R.* v. *St. Paul's, Bedford*, 6 *T. R.* 452. See the schedule of the Stamp Act, *post*, "*Poor*," Vol. IV.)

Parish apprentices.

As to the Assignment of Parish Apprentices, see *post*, 230, "*Apprentices, Parish.*"

Sea service.

As to an Assignment to the Sea Service, see "*Seamen.*"

VIII. Dissolution of Apprenticeships.

Dissolution of apprenticeship, how.

A Dissolution of the Apprenticeships may take place either, 1st. By Consent; 2dly. By Effluxion of Time, or by coming of Age; 3dly. By Death; 4thly. By Bankruptcy or Insolvency; 5thly. By Misconduct; or 6thly. By the Interference of Justices, &c.

(1.) By Consent.

By consent.

It is a general rule that the parties to a contract, whether under seal or otherwise, may by mutual consent cancel it, unless sometimes where an interest in real property has passed. (*Roe* d. *Earl of Berkeley* v. *Abp. of York*, 6 *East*, 94; 4 *Cruise*, 369.)

To cancel an indenture of apprenticeship, the consent of all the parties to the binding should be obtained. (*Burr.* 562, 766.) If the apprentice be an infant, his master cannot discharge the indentures, at all events by his consent alone; (*R.* v. *Austrey*, *Burr.* S. C. 441; 2 *Bott*, 404; *R.* v. *Inhabitants of Hindringham*, 6 *T. R.* 557; see *R.* v. *Gwinear*, 3 *Nev. & M.* 297; S. C. 1 *Ad. & Ell.* 153;) but it may perhaps be done by his father's consent, or that of any other person having the legal superintendence of his minority; (*R.* v. *St. Mary Kallender*, *Burr.* 274; 2 *Bott*, 402, S. C.; *R.* v. *Weddington*, *Burr.* 766; 2 *Bott*, 406, S. C.;) and it seems an infant may consent to the discharge, if it is clearly for his benefit, as where his master runs away in

debt; (*R.* v. *Mountsorrel*, 3 *M. & Sel.* 460;) but this benefit must clearly appear. (*R.* v. *Wigston*, 3 *B. & C.* 484; 5 *D. & R.* 339, S. C.)

8. *Dissolution of Apprenticeships.*

How and what amounts to.

In order to *discharge* the indentures, they should be actually *cancelled*, or mutually *exchanged* or *given up*, or at least something done and acted upon *animo cancellandi*, which the law considers as an equivalent to a cancellation. (*R.* v. *Spawnton*, *Burr.* 801; *Cald* 126; *R.* v. *Parish of the Holy Trinity*, 3 *T. R.* 605; *Roe* d. *Earl of Berkeley* v. *Apb. of York*, 6 *East*, 89.) Lord *Mansfield* was of opinion, in *R.* v. *Inhabitants of Harberton*, 1 *T. R.* 139, that it would have been more convenient if the Court had never gone further than to inquire whether the indentures had been actually cancelled or delivered up.

A verbal or written agreement to cancel does not cancel a deed, the agreement should be by deed. (*R.* v. *Oakhampton*, 1 *Dick. J.* 91; *R.* v. *Bow*, 4 *M. & Sell.* 383; 2 *Ld. Raym.* 1116.)

Where an agreement has been entered into by the mother of the apprentice and the master to separate, but the indenture remained in the hands of a third party, and was never delivered up or applied for, it was held, that such agreement was not sufficient to put an end to the first apprenticeship. (*R.* v. *Skeffington*, 3 *B. & Ald.* 382; and see *R.* v. *Inhabitants of Harberton*, 1 *T. R.* 139; *R.* v. *Inhabitants of Bow*, 4 *M. & Sel.* 383.)

The cancelling must be effected by the original master, and cannot be so by a third person, whom the apprentice may be serving at the time, without the consent of the master. (1 *Bott*, 613.)

Where a master received money of an apprentice of full age to vacate his indentures, and gave the apprentice a discharge, but kept the indentures uncancelled, it was held the apprenticeship was dissolved. (*R.* v. *Justices of Devonshire*, *Cald.* 32.)

On the other hand, where the apprentice agreed to pay 7*l.* to the master, who was to keep the indentures till that sum was paid, the master all that time keeping a control over the apprentice, the indenture was held not cancelled. (*R.* v. *Chipping Warden*, 8 *T. R.* 109.) So where a boy bound out by a parish as an apprentice in husbandry, till he should be twenty-one years of age, served the master first in husbandry and afterwards as a miner; he then left his master, and went to live with his own father, (who was a miner,) and worked with his father at the same mine at which he had worked with his master. The master afterwards agreed with the father that the apprentice should remain with the father, and the indenture be given up on a subsequent day, upon the payment of a sum of money. On the day appointed, which was before the passing of stat. 56 Geo. III. c. 139, the money was paid, and the indenture given up to the father. The son was then under age. He worked with the father as a miner till his majority, when the indenture was given up to him by his father. From his first coming to his father, the father had received his wages and maintained him: it was held, that even supposing the parties to have had power to dissolve the apprenticeship, and to have intended to do so, it was not dissolved till the money was paid; and that a residence of forty days between the making of the agreement and the payment of the money, was a residence under the apprenticeship, and conferred a settlement. (*R.* v. *Inhabitants of Gwinear*, 1 *Ad. & Ell.* 152; 3 *Nev. & M.* 297, S. C.) So an agreement to let off the apprentice for a guinea, which was not paid. (*R.* v. *Shebbear*, 1 *East*, 73 a.) So where, by indorsement on a deed of apprenticeship, the master agreed to cancel it, provided the apprentice "made no engagement or entered into any person's service in the town of N.;" it was held, that his setting up a trade there was a breach of the condition, and that, therefore, the deed of apprenticeship remained uncancelled. (*Gray* v. *Cookson*, 16 *East*, 13.)

It has been laid down, that an apprentice, a minor, by entering as a volunteer in her Majesty's service, with *his master's consent*, does not thereby dissolve the apprenticeship; (*R.* v. *Hindringham*, 6 *T. R.* 557; see 6 *B. & Cres.* 620; 9 *D. & R.* 715, S. C.;) nor does he so by serving with one who covenants to indemnify the first master. (*R.* v. *Charles*, *Burr.* 706.)

An agreement between a master and a parish apprentice, that the apprentice shall work when he pleases on his own account, and pay the master so

8. *Dissolution of Apprenticeships.*

much a week in satisfaction of his service, is not a dissolution of the indentures; (*R.* v. *Offerton*, 1 *Bott*, 611;) nor are the indentures of a parish apprentice cancelled by being delivered up by the son of the master to whom he was bound; (*R.* v. *Nolton*, 1 *Bott*, 609;) and although the master, after three years' service, tell the apprentice to go about his business and work for himself, and he accordingly works with other persons for the remainder of the term, and applies the money he earns to his own use without his master's requiring him to account, or knowing where he was, yet if the indentures are neither cancelled or delivered up, there is no dissolution of the apprenticeship. (*R.* v. *St. Luke's*, *Burr.* 542; 1 *Bott*, 608, S. C.)

When a contract of apprenticeship may be treated as rescinded.

Defendant agreed with plaintiff's father to receive plaintiff (who was a minor) into his service on trial, and to take him an apprentice if he approved it. Plaintiff went and worked for defendant nearly two years. Several applications were made during that time by the father, to take him on paying 10*l.*: this was agreed to; but defendant shortly after quarrelled with plaintiff, and told him to go home about his business. Plaintiff went home, and on the father applying to the defendant for an explanation, the latter told him to go and do his worst. The father then caused a letter to be written to defendant by his attorney, requiring him either to take plaintiff as his apprentice, or recompense him for his work, but no satisfactory answer was given, and plaintiff, by his next friend, brought an action to recover compensation for his service. The judge put it to the jury on these facts, whether or not the defendant's conduct was such as warranted the father in considering the contract for an apprenticeship as rescinded; and he further stated, that if they thought it was, they were to give plaintiff such compensation for his work as they thought proper. The jury found a verdict for the plaintiff, with damages, by way of compensation for his services; and the Court held this direction was right. (*Phillips* v. *Jones*, 1 *Ad. & Ell.* 333.)

In another case, *A.* placed his son with *B.*, a chemist and druggist, who intended to pass his examination at Apothecaries' Hall, but was delayed in so doing by ill health. It was intended that *A.'s* son should be apprenticed to *B.*, but he stayed for five years with *B.*, having his board and lodging, and being taught the business of a chemist and druggist, and he then left *B.*, and was never apprenticed to him. Under these circumstances it was considered, that to entitle *B.* to recover for the board, lodging and teaching of *A.'s* son, the jury must be satisfied that *A.'s* son was placed with *B.* upon an agreement or understanding that *B.* was to be paid for his board and lodging and for teaching him. But that if the jury were not so satisfied, or if they thought that *A.'s* son was not to be paid for till *B.* had passed his examination at Apothecaries' Hall, and that *A.'s* son was then to be apprenticed to *B.* as an apothecary, then *B.* was not entitled to recover anything for the board and lodging and teaching during the five years. (*Attwaters* v. *Courtney*, 1 *Car. & M.* 51.) Where the apprenticeship was to two partners, it was made a question, but not decided, in a recent case, whether a dissolution of the partnership puts an end to the apprenticeship. See *Lloyd* v. *Blackburn*, 9 *M. & W.* 363.

See further as to vacating an apprenticeship, *post*, title, "*Poor*," Vol. IV.

(2.) By Effluxion of Time, or by Apprentice coming of Age

By effluxion of time.

It is scarcely necessary to observe, that on the expiration of the term of the apprenticeship agreed on by the indenture, the same is dissolved.

By infant's coming of age.

We have already seen that no action lies against an infant for a breach of the indenture of apprenticeship during his infancy, *ante*, 182; besides this, the apprentice has the power, in some cases, of determining the contract on his coming of age. By some regulations relative to parish apprentices, they are not bound to serve after they are of age, *post*, 213. In other cases, also, of voluntary bindings, though the apprentice himself may have executed the indenture, it has been considered that he is free from all liability to serve the instant he comes of age; and in the case of *Ex parte Davis*, (5 *T. R* 715,) Lord *Kenyon* said, "it is clear that the apprentice must be discharged · every indenture of an infant is voidable at his election, and in such cases the master trusts to the covenant of those who engaged for the infant. Where

the binding is under the authority of an act of parliament, that does away the power of electing to vacate the indenture. But I know of no act which prohibits the party, in a case like the present, to make such election upon coming of age. According to the argument of the counsel against the rule, an infant, who improvidently bound himself to the age of fifty or upwards, would be bound to serve till that time, but it is impossible to support such a proposition. This apprentice ought not to have been bound longer than till he was twenty-one, and we ought now to discharge her." The other judges concurred.

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By the 5 Eliz. c. 4, s. 36, however, it is enacted, "that no person who shall be of full age shall be compellable to enter into any apprenticeship:" yet the 26th and 28th sections appear to require that the apprenticeship shall not determine till the age of twenty-four; (and see the observations in *R.* v. *Inhabitants of St. John, Bedwardine*, 5 *B. & Adol.* 173; 2 *Nev. & M.* 86, S. C.;) and the 13th section enacts, "that apprentices shall be bound for the years in the indentures contained;" and the 18th Geo. III. c. 47, which enacts, "that no *parish* apprentices shall be bound to serve after they are of age," does not extend to any other description of apprentices.

How disaffirmance by infant to be made.

It has been held, that the apprentice, when he intends dissolving the contract on his coming of age, ought regularly to declare his intention to dissolve it, and not to absent himself in a surreptitious manner; (1 *Nolan*, 348; *Ashcroft* v. *Bertles*, 6 *T. R.* 645; *Cald.* 26; and see *Goode* v. *Harrison*, 5 *Barn. & Ald.* 147;) *sed vide Ex parte Gill*, (7 *East*, 376,) where the Court observed, that if an apprentice, when brought before a magistrate, show that he is of age, and that, therefore, he absented himself from his master's service, and they disregard such defence and commit him, he has his remedy against them.

As an adult is bound by his contract with an infant, (*Holt* v. *Clarencieux*, 2 *Stra.* 937,) the master himself cannot, without the concurrence of the apprentice, put an end to the apprenticeship on account of the apprentice having come of age. and if a person of full age bind himself apprentice for a term, he could not legally vacate his contract. (*R.* v. *Ripon*, 9 *East*, 295; *Williams* v. *Brown*, 3 *B. & P.* 69.)

(3.) By Death.

By death of master covenant to instruct dissolved.

It hath been said that if the master die, the apprentice goes to the executor or administrator to be maintained, if there be assets; but the executor or administrator may bind him to another master for the remaining part of his time. But in the case of *R.* v. *Peck* (1 *Salk.* 68; and see *ante*, p. 195), *Eyre*, J., held that an apprenticeship is a personal trust between the master and servant, and determines by the death of either of them; and by the death of either of them the end and design of the apprenticeship cannot be obtained, and it may be the executor is of another trade. He admitted that covenant would lie against the executor; but in that there is no inconvenience, because the executor may make his defence by pleading no assets, or debts of a higher nature. *Holt*, C. J., said, that by the custom of London, the executor shall put the apprentice to another master of the same trade; and that in other places it would be very hard to construe the death of a master to be a discharge of the covenants; he said it had been held that the covenant for instruction failed, but that he still continues an apprentice with the executor as to maintenance. For the interest of a master in his apprentice is a mere personal trust: and the indentures not being assignable in his lifetime, except by custom, and with the consent of the apprentice, the master's executors cannot claim his services, neither can they maintain debt on a bond for performance of the covenant of the indenture, unless his executors be named; (and see *Barter* v. *Burfield*, 1 *Bott, P. L.* 581; 2 *Str.* 1266, S. C.) (*a*)

(*a*) The words in *Cro. Eliz.* 553, are these: Covenant lies against an executor in every case, although he be not named; unless it be on such a covenant as is to be performed by the person of the testator, which they cannot perform. (*Hyde* v. *Dean of Windsor*, *Cro. Eliz.* 553.)

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But not covenant to provide necessaries.

If the master has also covenanted to find him in meat, drink, and clothes, and other necessaries during the time, it has been held, that his death does not dispense with this condition, but his executors are at common law bound to perform it, as far as they have assets. (*Wadsworth* v. *Gye*, *Sid.* 216; 1 *Keb.* 761, 820, S. C.; *Walker* v. *Hull*, 1 *Lev.* 177.)

Where two masters.

Where an apprentice is bound to two masters, on the death of one he becomes the apprentice of the survivor. (*R.* v. *St. Martin, Exeter*, 1 *Burr. & W.* 69.)

In London.

By the custom of London it is said, that in case of the master's dying, the executor must put the apprentice to another master of the same trade. (*R.* v. *Peck*, 1 *Salk.* 66; *Mayor, &c. of Winton* v. *Wilks*, *id.* 204; 2 *Ld. Raym.* 1129, S. C.; *March.* 3; *Bowchier* v. *Coster*, 1 *Keb.* 250; *Bohun, Priv. London*, 339; *Pulling's Laws of London*, 482.)

Settlement.

And for the purposes of settlement it has been held, that the executor, or even a widow, before taking out administration, may continue the relation of master and apprentice. (1 *Nolan*, 350; *R.* v. *Inhabitants of East Bridgford*, 2 *Stra.* 1115; *Cald.* 62; *post*, "*Poor*," Vol. IV.)

Parish or sea apprentice.

As to the effect of the death of the master in the case of a *parish* apprentice, see *post*, "*Apprentices, Parish*;" in the case of *Sea Service*, *post*, "*Apprentices, Sea Service*."

Return of premium.

In some cases the Court of Chancery have interfered to compel the executors of the master to return a part of the premium. Thus in *Soam* v. *Bowden and Eyles*, M. 30 Geo. II., *Canc. Finch. Rep.* 396, the master received with the apprentice 250*l.* and died within two years, the apprentice having for that time been employed only in inferior affairs. It was decreed, after debts on specialties paid, that the executors repay the 250*l.* as a debt due on simple contract, deducting after the rate of 20*l.* a year for the maintenance of the apprentice during the time he lived with his master; (and see 1 *Bott*, 563; 1 *Vern.* 460; *Bac. Abr. Mast. & Serv.* (E.) See *post*, 205.)

(4.) By Bankruptcy or Insolvency.

By bankruptcy of master.

The bankruptcy or insolvency of the master did not formerly, it seems, release him from his obligation to instruct and maintain the apprentice, or justify the apprentice in misbehaving or absenting himself; (*Inhabitants of Buckington* v. *Inhabitants of St. Michael, Lebington*, 2 *Ld. Raym.* 1352; 1 *Stra.* 582, S. C.; *Parish of Buckington* v. *Parish of Shepton Bechamp*, 8 *Mod.* 235;) and formerly an apprentice who had paid a premium, and whose master became bankrupt before the apprenticeship expired, could only come in as a creditor, and prove for a proportionate part of his apprentice fee; (*Ex parte Sandley*, 1 *Atk.* 149;) although the commissioners, instead of this, usually recommended it to the creditors to allow him a gross sum out of the estate, in order to apprentice him to another master. (*Barwell* v. *Ward*, 1 *Atk.* 259.)

Return of premium.

But now, by stat. 6 Geo. IV. c. 16, s. 49, "Where any person shall be an apprentice to a bankrupt at the time of issuing of the commission against him, the issuing of such commission shall be and enure as a complete discharge of the indenture or indentures whereby such apprentice was bound to such bankrupt; and if any sum shall have been really and *bonâ fide* paid by or on the behalf of such apprentice to the bankrupt as an apprentice fee, it shall be lawful for the commissioners, upon proof thereof, to order any sum to be paid to or for the use of such apprentice which they shall think reasonable, regard being had in estimating such sum to the amount of the sum so paid by or on behalf of such apprentice to the bankrupt, and to the time during which such apprentice shall have resided with the bankrupt previous to the issuing of the commission."

A fiat of bankruptcy having issued against the master of an apprentice, but which was afterwards annulled by means of a composition between the bankrupt and his creditors: it was held, that the indentures of apprenticeship were discharged. (*Allen* v. *Costa*, 1 *Beav.* 274.)

Where the apprentice fee was paid under an agreement for the apprenticeship, but from mere inattention no indenture had in fact been executed, it was

held to be a case within the section of the statute. (*Ex parte Haynes*, 2 *Glyn & J.* 122.) 8. *Dissolution of Apprenticeships.*

And where at the time of the bankruptcy the father of an apprentice was indebted to the bankrupt in 200*l.* for an apprentice fee for his son, who had been apprenticed two years, the Court of Review on petition allowed 100*l.* to be retained. (*Exp. Soames*, 3 *Deac. & C.* 320.)

Allowance for salary.

And by sect. 48 of the same statute, "Where any bankrupt shall have been indebted, at the time of issuing the commission against him, to any servant or clerk of such bankrupt, in respect of the wages or salary of such servant or clerk, it shall be lawful for the commissioners, upon proof thereof, to order so much as shall be so due as aforesaid, not exceeding six months' wages or salary, to be paid to such servant or clerk out of the estate of such bankrupt, and such servant or clerk shall be at liberty to prove under the commission for any sum not exceeding such last-mentioned amount."

By discharge under Insolvent Act.

There are not, it appears, any provisions in the Insolvent Act which discharge an apprenticeship contract.

The 32 Geo. III. c. 57, s. 8, authorising the discharge, &c., of apprentices, where the master becomes insolvent, &c., only relates to *parish* apprentices. See *post*, "*Apprentices, Parish.*"

(5.) By Misconduct.

By misconduct of master.

The misconduct of the *master* cannot of itself avoid an indenture of apprenticeship, and the only remedy at common law is by action on the indenture. We shall, however, hereafter see that it will be a ground for a magistrate's ordering it to be cancelled. (*Post*, 203.)

Of apprentice or parent.

It has been indeed said, that the misconduct of the apprentice or parent is a ground for the master's dissolving the indenture of apprenticeship; (*Shepherd* v. *Maidstone*, 10 *Mod.* 144;) but inasmuch as the covenants of each party are independent covenants, this doctrine seems very questionable, and cannot, perhaps, be supported. (See *Winston* v. *Linn*, 1 *B. & C.* 460; 2 *D. & R.* 465, S. C. *ante*, p. 189; also *Gray* v. *Cookson*, 16 *East*, 13; 1 *Roll. Ab.* 124; *Cornwallis* v. *Savery*, 2 *Burr.* 773; *Hughes* v. *Humphreys*, 6 *B. & C.* 680; 9 *D. & R.* 715, S. C.)

It is clear that an apprentice cannot avoid his indenture by his own delinquency; (*Gray* v. *Cookson*, 16 *East*, 13;) which was an action of trespass against two justices, for committing an apprentice to the house of correction under the authority of 20 Geo. II. (*post*, 210) for running away. The indenture was for less than four years, and it was insisted that it was a void indenture; but the Court of Queen's Bench were clearly of opinion, that such indentures were only voidable and not void, that under the circumstances of the case the apprentice attempted to avoid them only by taking advantage of his own misconduct, which misconduct was the subject of this *ex parte* punishment.

(6.) By Award, or by Justices, or by Queen's Bench.

By award.

An apprenticeship may also be put an end to by means of a reference and award, as appears from the case of *Green* v. *Waring*, 1 *Bla. Rep.* 475.

By justices.

The contract may be determined by the magistrates, in consequence of an application to one of them, founded on gross misconduct on the part of the master or of the apprentice; but as this is only a part of the general jurisdiction of justices of the peace over apprentices, given to them by statute, it will be considered in the next section.

Jurisdiction of Queen's Bench.

An apprentice had at the age of eighteen bound himself till twenty-five; after he was twenty-one years of age, he had, at the suit of his master, been committed upon a conviction before two magistrates, on 20 Geo. II. c. 19, for absenting himself from his service. The case of *M. A. Davis* was cited in support of a motion for a *habeas corpus* to bring up the apprentice. Upon the return to the writ, the conviction was set out, and upon the face of it there appeared no objection to have been made by the apprentice, when before the

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magistrates, on the ground of his right of election to continue after he came of age. The Court remanded him, the conviction appearing regular; and said that the Court of Queen's Bench had no authority to direct the discharge of the apprentice from his indentures, and that in *R.* v. *Davis* the report was mistaken in that respect. *Lawrence*, J., said he did not know of a *habeas corpus* to discharge an apprentice from indentures. How can this Court undertake to discharge men from their covenants upon a *habeas corpus?* (*Ex parte Gill*, 7 *East*, 376; 1 *Bott*, 718; *post*, 206.)

It is suggested, that in *Davis's case*, she was in the care or custody of some person, and that the *habeas corpus* was to bring her up to be discharged. (3 *Smith's Rep.* 372.)

IX. Jurisdiction of Justices and Sessions in Disputes between Masters and Apprentices.

Justices' jurisdiction in disputes.

And herein of the Jurisdiction of Justices—1st. In Apprenticeships on compulsory Bindings, &c. under stat. 5 Eliz. c. 4;—2nd. In Apprenticeships where no Premium, or not more than 25*l.* Premium, is paid.

(1.) Apprenticeships on compulsory Bindings, &c. under Stat. 5 Eliz. c. 4.

As to apprenticeships in general.

By the 5 Eliz. c. 4, s. 35, a single magistrate is constituted a *mediator* between the disputing parties; and if they submit to his decision, it will be binding; but if the *master* will not, the magistrate cannot settle the dispute, but must take a bond from the master to appear at the next sessions, at which four at least of the justices shall, if they think meet, discharge the apprentice from his apprenticeship, or punish him. So that the single magistrate has merely an authority to endeavour to settle the matter amicably between the parties; but in case of a disagreement by the master, the parties must resort to the sessions, who indeed may be applied to in the first instance. (See 1 *Saund.* 316, n.) In practice, proceedings under this statute are rarely resorted to; they are generally adopted under the provisions of the 20 Geo. II. c. 19, or 33 Geo. III. c. 55. (*Post*, 206, 207, 210.)

Differences to be heard by one justice.

The following are the words of that enactment—"If any such master shall misuse or evil intreat his apprentice, or that the said apprentice shall have any just cause to complain, or the apprentice do not his duty to his master, then the said master or apprentice being aggrieved, and having cause to complain, shall repair unto one justice of peace within the said county, or to the mayor or other head officer of the city, town corporate, market town, or other place where the said master dwelleth, who shall by his wisdom and discretion take such order (*a*) and direction between the said master and his apprentice, as the equity of the cause shall require; and if for want of good conformity in the said master, the said justice of peace or the said mayor or other head officer cannot compound and agree the matter between him and his apprentice, then the said justice, or the said mayor or other head officer, shall take bond of the said master to appear at the next sessions then to be holden in the said county, or within the said city, town corporate or market town, to be before the justices of the said county, or the mayor or head officer of the said town corporate or market town, if the said master dwell within any such; and upon his appearance and hearing of the matter before the said justices, or the said mayor or other head officer, if it be thought meet unto them to discharge the said apprentice of his apprenticehood, that then the said justices, or four of them at the least, whereof one to be of the quorum; or the said mayor or other head officer, with the assent of three other of his brethren, or men of best reputation within the said city, town corporate or market town, shall have power by authority hereof, in writing (*b*) under their hands and seals, to pronounce and declare, that they have discharged the

On not agreeing,

bond to be taken to appear

at sessions,

who may discharge apprentice,

(*a*) See forms (Nos. 4, 5), *post*. (*b*) See form (No. 6), *post*.

said apprentice of his apprenticehood, and the cause thereof; and the said writing so being made and enrolled by the clerk of the peace or town clerk, amongst the records that he keepeth, shall be a sufficient discharge for the said apprentice against his master, his executors and administrators; the indenture of the said apprenticehood, or any law or custom, to the contrary notwithstanding. And if the default shall be found to be in the apprentice, then the said justices, or the said mayor or other head officer, with the assistance aforesaid, shall cause such due correction and punishment to be ministered unto him, as by their wisdom and discretion shall be thought meet."

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or may correct him.

By 54 Geo. III. c. 96, s. 3, *ante*, 181, it is enacted that justices may determine complaints respecting apprentices as heretofore.

If any such Master.]—This clause of the statute extends not only to those apprentices mentioned therein, but also to all manner of apprentices, wherever bound, or to whatever trade they are bound, though indeed there were formerly doubts on this point. (*R.* v. *Collingbourne*, 2 *Ld. Raym.* 1410; 1 *Stra.* 663, S. C.; 1 *Bott*, 573.)

To what apprenticeships the statute extends.

And even if the master be a freeman of the city of London, and the indentures are enrolled in London, the sessions for the county of Middlesex have jurisdiction to discharge the apprentice, notwithstanding the saving in section 40 of the act as to privileges of London. (*Id.*; *post*, 204.)

But it seems that the enactment does not apply to cases where a premium is given with the apprentice, but only to compulsory bindings without premiums. (*Per Alderson*, B., in *East* v. *Pell*, 4 *M. & W.* 665.)

Shall misuse or evil intreat his Apprentice.]—An apprentice to a surgeon was sent by his master to the East Indies; it was adjudged that the master cannot compel his apprentice to go beyond the sea, except the master go with him; but he may send him to any part of England. (*Coventry* v. *Windall*, *Brownl.* 67; 1 *Bott*, 569, S. C.; *ante*, p. 194.)

Causes of complaint against master.

But otherwise, if it be expressly agreed, or the nature of the apprenticeship doth import it; as if the master be a merchant adventurer, or sailor. (*Hob.* 134, S. C.)

Neglect on the part of the master to instruct his apprentice in the mysteries of that trade, which he was bound to him to learn, is a sufficient cause for justice's interference, and of discharge. (*R.* v. *Amies*, 1 *Bott*, 574.)

An apprentice was discharged, the master having *used him unkindly*, and refusing to provide for and entertain him; but by the Court:—This is not a good ground for the discharge; for there is a power to oblige the master to receive and entertain the apprentice; *using him unkindly* is too loose. (*R.* v. *Eastman*, 2 *Str.* 1014; 1 *Bott*, 575, S. C.)

Or the Apprentice do not his Duty to his Master.]—An order reciting that *Joseph Higgen* was bound out by indenture, as the statute requires, to *John Parks*, and being lame and having the king's evil, and in the opinion of surgeons incurable, therefore the justices discharged the master from his apprentice. It was moved to confirm the order, because the master cannot now have the end of the binding, which was the service of his apprentice. But the order was quashed by the Court, for the master takes the apprentice for better and worse, and is to provide for him in sickness and in health. (*R.* v. *Hales Owen*, 1 *Str.* 99; 1 *Bott*, 572, S. C.; *ante*, p. 194.)

Causes of complaint against apprentice.

However, where a boy was put apprentice, and after three years' service he plainly appeared to be an *idiot*, incapable of learning the trade, this defect was holden to be good cause of discharge. (*Anon.* 1 *Bott*, 570; *Skin.* 98.)

The statute extends to all kinds of bad and disorderly behaviour on the part of the apprentice. (See *Hawkesworth* v. *Hillary*, 1 *Saund.* 314.)

Shall repair unto one Justice.]—It has been doubted, by *Holt*, C. J. in 1 *Salk.* 67, whether the sessions had an original jurisdiction to discharge an apprentice without a previous application to a single justice, but this doubt has been removed by the following cases:

Application to magistrate.

R. v. *Johnson*, 1 *Salk.* 68. Exception was taken to an order for discharging an apprentice, that the complaint was made originally at sessions,

The sessions have an original jurisdiction.

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without any previous application to a single justice out of sessions. *Holt*, C. J., delivered the opinion of the Court, that the order was good; if it had been a new question, he should have held that the prior application to some justice out of sessions was necessary; but after so many orders affirmed in this Court, which have been otherwise, it is too late to unsettle that now.

And in *R.* v. *Davie*, 2 *Str.* 704, the Court agreed, that it is a point not now to be disputed, that the sessions hath an original jurisdiction to discharge apprentices. And Lord *Hardwicke*, C. J., in the case of *Arglis* v. *Heasman*, (*Cas. temp. Hardw.* 101,) held that this determination was right: for the application which the act directs to be made to a private justice seems to mean only to arbitrate and accommodate the dispute. The statute says, if he cannot *compound* the matter, he is to take bond for the parties' appearance at the sessions, so that they are not to take it by appeal. (And see *R.* v. *Gill*, 1 *Str.* 143.)

This authority, however, must be exercised at a general session. (*Anon. Skin.* 98; 1 *Bott*, 570, 578.)

Application to mayor or other officer.

Or to the Mayor or other Head Officer]—(*R.* v. *Collingbourne*, 1 *Str.* 663; 2 *Ld. Raym.* 1410, S. C.) An order of sessions was made at Hicks's Hall for the discharge of an apprentice to a freeman of the city of London, and who was bound and enrolled there. And the order being removed into the Queen's Bench, the question was, whether the court of sessions at Hicks's Hall hath any jurisdiction to discharge an apprentice to a freeman of London (especially as there is a saving in the act of the custom of the city of London), or whether he ought not to be discharged by the mayor's court only. It appeared that the apprentice lived with his master out of the city of London, and within the jurisdiction of the justices of Middlesex. To this exception it was answered, that the statute doth not regard where the binding or enrolling is, but gives the jurisdiction expressly to the justices where the master lives; and if this did not belong to the justices of Middlesex, where the master lives, there would be a failure of justice; for neither the chamberlain, nor any other city magistrate, has power to compel the master's appearance before them. The Court affirmed the order of discharge, and said they would not take away the jurisdiction of the mayor's court, but only give concurrent jurisdiction to the justices for the county. And it would be very inconvenient to have apprentices to a freeman of London, who are bound there, and who live in distant counties, obliged to come up to the mayor's court to get themselves discharged; and the words of the statute are very plain; for they give the jurisdiction to the justices *where the master dwelleth.*

Order of justice for discharge of apprentice must be by deed.

Who shall by his wisdom and discretion take such order and direction between the Master and Apprentice as the equity of the case shall require.]—Hereupon the justice, if he see cause, may, by *consent* of the master, discharge the apprentice from his apprenticeship: but this must not be by a verbal discharge; for the apprentice being bound by deed cannot be discharged but by deed, that is, by order under the hand and seal of the justice. (*Dalt.* c. 58, p. 141; *Reg.* v. *Daniel*, 6 *Mod.* 182; 2 *Ld. Raym.* 1117, S. C.; *ante*, 196.)

In case master will not conform to justice's recommendation.

If for want of good Conformity in the Master.]—The one justice appears to have a mere equitable jurisdiction as mediator or arbitrator between the parties, and has no express power given him to discharge the indenture. If the *master* refuse to conform to his recommendation, he may leave the matter transferred to the four justices at sessions, who may act compulsorily and inflict a penalty. But the like option is not given to the apprentice. (*East* v. *Pell*, 4 *M. & W.* 665.)

Appearance at sessions.

On his appearance at Sessions.]—The sessions may discharge the apprentice although the master does not appear, but not unless the master was summoned. (*W. Ditton's case*, 2 *Salk.* 490.) It was moved to quash an order made for the discharge of an apprentice. The question arose upon the clause of the statute, which directs that upon appearance of the master

the apprentice may be discharged by four justices, after one justice out of sessions hath endeavoured to compose the matter in difference. And in this case it was objected that *Dutton*, the master, was bound over to appear, and did not; and the justices have but a limited jurisdiction; and it is expressly directed by the act that the discharge is to be made on the appearance of the master; besides there is another remedy, to proceed on the recognizance, which is forfeited by not appearing. By the Court:—The act must have a reasonable construction, so as not to permit the master to take advantage of his own obstinacy; and it would be very hard, that, supposing the master is profligate and runs away, the apprentice shall never be discharged.

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Proceeding on recognizance for not appearing.

An order of sessions for discharging an apprentice was quashed because it did not set forth that the master was summoned, or that he appeared. (*R.* v. *Gill*, 1 *Stra.* 143; *R.* v. *Eastman*, 2 *Stra.* 1013, S. P.)

Discharge of Apprenticeship at Sessions.]—We have already seen, *ante*, 203, that an original jurisdiction is vested in the sessions, and that no previous complaint need have been made to a magistrate.

Discharge of apprenticeship at sessions.

We have also seen, *ante*, 204, the sessions have jurisdiction over the place where the master lives, although the apprentice is bound elsewhere.

The powers of the act can only be amended by a general and not a private sessions. (*Anon. Skin.* 98; 1 *Bott*, 578, S. C.)

As to the cause of discharge, see *ante*, 204.

The intention of the act is, that as the justices may discharge the apprentice from his master for ill usage, so also they may discharge the master from the apprentice for evil and disorderly behaviour in the apprentice. (*Hawksworth* v. *Hillary*, 1 *Saund.* 313, 314; *R.* v. *Duhammel*, *Skin.* 108.)

Return of premium.

The sessions have no power, on making an order for the discharge of an apprenticehood, to direct the return of any part of the premium already paid to the master, or the non-payment of any part of it remaining unpaid; assuming indeed that they have any power at all under the stat. of 5 Eliz. c. 4, in such a case where a premium has been paid. (*East* v. *Pell*, 4 *M. & W.* 665.)

Hale v. *Webb*, T. 26 Geo. III., 2 *Bro.* 78, the plaintiff was bound apprentice to the defendant, with 200*l.* premium. About a year after, the mother wished to have him discharged; which being consented to, and it being necessary the same authority should discharge which bound him, they went before the chamberlain, where an end was put to the contract. The bill prayed a return of part of the premium; but *Lloyd Kenyon*, Master of the Rolls, dismissed the bill. Suppose the discharge had been in consequence of gross misconduct, and the master had agreed to the dissolution, it would be a forfeiture of the premium.

Assigning over apprentice.

The sessions have no power to assign over the apprentice to another. (*R.* v *Barnes*, 1 *Str.* 48; *Bac. Ab. Master and Servant*, (E.))

Order to receive apprentice.

But they may order the master to *receive* the apprentice. (*R.* v. *Barney*, *Comb.* 405.)

Form and enrolment of order.

The order must be under the hands and seals of at least four of the justices. (*R.* v. *Cateley*, *Carth.* 198.)

It must be according to the act enrolled with the clerk of the peace; and in a case where it was not so enrolled, it was held bad. (*R.* v. *Hales Owen*, 1 *Stra.* 99.)

Where the master is complained against, the order must set forth either that he appeared or that he was summoned and made default, or it will be quashed for the defect. (*Supra.*)

The cause for the order must be duly set forth therein. (1 *Bott*, 577; *R.* v. *Fastman*, 2 *Stra.* 1013.)

Order, how far conclusive.

No case has occurred in which the settlement has depended upon the validity of such an order of discharge; the power of a quarter sessions over it when trying a question of settlement is therefore undecided; but it may perhaps be concluded from analogy to the proceedings of ecclesiastical courts, (4 *Co.* 29; *Carth.* 225; 11 *St. Trials*, 218, 222, 285,) and admiralty courts; (*Lothian* v. *Henderson*, 3 *Bos. & Pul.* 499; *Bolton* v. *Gladstone*, 5 *East*, 155;) that being a direct judgment upon the fact by a Court not only of com-

9. *Jurisdiction of Justices, &c.*

petent but exclusive jurisdiction, it is conclusive of the question between contending parishes, although they are not immediately parties to the sentence, unless it has been obtained by fraud; (*Amb.* 762;) or appears altogether void. (*Chichester* v. *Philips*, *Sir T. Raym.* 405; *Havelock* v. *Rockwood*, 8 *Term Rep.* 268; *Case of the Flud Oyen*, *ib.* 270, *n.* a; 1 *Rob. Adm. Rep.* 135.)

On this ground, in the case of *Ex parte Gill*, (7 *East*, 376; 1 *Bott*, 718, *ante*, 201;) where upon a *habeas corpus* to bring up the body of an apprentice, the keeper of the house of correction returned, with the body of the party, a regular conviction of him by two magistrates, on the statute of 20 Geo. II. c. 19, s. 4, *post*, 210, for a misdemeanor in absenting himself as an apprentice from his master's service; it was held to be no answer, to show by affidavit that the party had bound himself when an infant to serve till twenty-five, and that when he came of age he elected to avoid the indentures, after which the offence imputed had been committed; for this was proper matter to be shown to the magistrates below, who, if the matter shown were true, acted at their own peril in committing the party, but that the Court had no power to discharge an apprentice from his indentures, and were bound, by the return of a regular conviction, where the objection did not appear on the face of the return, to remand the party.

Correction and punishment of apprentices.

Sessions shall cause due Correction and Punishment to be administered.]—This being left indefinite, it seemeth most apposite that the justices commit the apprentice to the house of correction for a time to be kept to hard labour, or otherwise corrected as the nature of the offence may require.

This clause, however, does not restrain, but enlarges the power of magistrates over apprentices beyond the power given them over the masters; and the magistrates may inflict corporal punishment on or imprison the apprentice with hard labour in the house of correction, or else discharge him, at their discretion. (*Hawkesworth* v. *Hillary*, 1 *Saund.* 313, 314.)

Justices, &c. may apprehend apprentice who runs away, and may bind him to good behaviour.

Apprehension of runaway Apprentices.]—By 5 Eliz. c. 4, s. 47, "If any servant or apprentice of husbandry, or of any art, science, or occupation aforesaid, unlawfully depart (see *R.* v. *Edwards*, 7 *T. R.* 745), or flee into any other shire, it shall be lawful to the said justices of peace, and to the said mayors, bailiffs, and other head officers of cities and towns corporate, for the time being justices of peace there, to make and grant writs of *capias*, so many and such as shall be needful, to be directed to the sheriffs of the counties, or to other head officers of the places whither such servants or apprentices shall so depart or flee, to take their bodies, returnable before them at what time shall please them; so that if they come by such process, that they be put in prison till they shall find sufficient surety well and honestly to serve their masters, mistresses, or dames, from whom they so departed or fled, according to the order of the law." (*Post*, "*Servants*," Vol. V.)

And by 24 Geo. II. c. 55, s. 1, if a justice of any county, riding, &c. or place, shall issue a warrant against any person, and he shall escape into another county, riding, &c. any justice of such other county, riding, &c., shall upon proof on oath of the handwriting of such justice granting the warrant, indorse his name thereon; and the constable or other person, on having the warrant so indorsed, may arrest him there, and carry him before a justice in such other county, &c. if the offence be bailable, to find bail, or else shall carry him back before a justice in the shire from whence the warrant did first issue. (See further *post*, "*Warrant by Justices*," Vol. VI.)

By the same act, if a justice shall issue a warrant against such person and he shall escape into another shire, the constable or other person, on having the warrant indorsed by a justice of such other shire, may arrest him there, and carry him before a justice of such other shire, if the offence is bailable, to find bail, or else shall carry him back to a justice in the shire from whence the warrant did first issue.

9. *Jurisdiction of Justices, &c.*

(2.) Apprenticeship, where no Premium or not more than Twenty-five Pounds Premium paid.

Herein, 1st, Of complaints by apprentices against masters; and 2ndly, Of complaints by masters against apprentices.

On complaint by apprentice, justices to summon master.

1st. *Complaints against Masters.*]—Stat. 20 Geo. II. c. 19, s. 3, enacts "That it shall and may be lawful to and for any two or more such justices, upon any complaint (*a*) or application by an apprentice, put out by the parish, or *any other apprentice*, upon whose binding out no larger sum than 5*l.* [extended to 25*l.* by 4 Geo. IV. c. 29, s. 1, and by 5 Vict. c. 7, to apprentices where no premium was paid] of lawful British money was paid, touching or concerning any misusage, refusal of necessary provision, cruelty, or other ill-treatment of or toward such apprentice, by his or her master or mistress, to summon (*b*) such master or mistress to appear before such justices at a reasonable time, to be named in such summons; and such justices shall and may examine into the matter of such complaint; and upon proof thereof made, upon oath, to their satisfaction (whether the master or mistress be present or not, if service of the summons be also upon oath proved), the said justices *may discharge* (*c*) *such apprentice*, by warrant or certificate under their hands and seals; for which warrant or certificate no fees shall be paid."

And may discharge apprentice.

Appeal. (*d*)

Sect. 5. "If any person or persons shall think himself, herself, or themselves, aggrieved by such determination, order, or warrant of such justice or justices as aforesaid (save and except any order of commitment), he, she, or they may appeal to the next general quarter sessions of the peace to be held for the county, riding, liberty, city, town corporate, or place where such determination or order shall be made; which said next general quarter sessions is hereby empowered to hear and finally determine the same, and to give and award such costs to any of the respective persons, appellant or respondent, as the said sessions shall judge reasonable, not exceeding forty shillings; the same to be levied by distress and sale in manner before mentioned."

Costs on.

Certiorari taken away.

Sect. 6. "No writ of *certiorari*, or other process, shall issue or be issuable to remove any proceedings whatsoever, had in pursuance of this act, into any of his Majesty's courts of record at Westminster."

Stannaries.

By sect. 7, the act does not extend to the stannaries in Devonshire or Cornwall.

Instead of discharging apprentice, master may be fined.

By 33 Geo. III. c. 55, "It shall and may be lawful for any two or more of his Majesty's justices of the peace, assembled at any special or petty sessions of the peace, upon complaint being made upon oath before them of any neglect of duty or of any disobedience of any lawful warrant or order of any justice or justices of the peace by any constable, overseer of the poor, or other peace or parish officer, or upon complaint made to such two or more justices upon oath, by or on the behalf of any apprentice to any trade or business whatsoever, whether bound apprentice by any parish or township or otherwise, provided that not more than the sum of 10*l.* [extended to 25*l.* by 4 Geo. IV. c. 29, s. 1, and by 5 Vict. c. 7, to apprentices where no premium is paid,] be paid upon the binding of such apprentice, against his or her master or mistress, of any ill-usage of such apprentice by such master or mistress (such constable, overseer, or other officer, master or mistress, having been duly summoned to appear and answer such charge or complaint), to impose upon conviction any reasonable fine or fines, not exceeding the sum of 40*s.*, upon such constable, overseer, or other officer, master or mistress respectively, as a punishment for such disobedience, neglect of duty, or ill-usage, and by warrant under the hands and seals of any two or more of such justices, assembled at any such special or petty sessions as aforesaid, to direct such fine or fines, if not paid, to be levied by distress and sale of the goods and chattels of

Distress for fine. (*e*)

(*a*) See form (No. 7), *post.*
(*b*) See form (No. 8), *post.*
(*c*) See form (No. 9), *post.*
(*d*) See in general, *ante*, "*Appeal.*"
(*e*) See 5 Geo. IV. c. 18, and in general, *post*, "*Distress by Warrant of Justices,*" Vol. II.

9. *Jurisdiction of Justices, &c.*

33 Geo. 3, c. 55.

Application of.

the person or persons so offending, rendering the overplus (if any), after deducting the amount of such fine or fines, and the charges of such distress and sale, to such offender or offenders; and such fine or fines which may be imposed upon any such constable, overseer, or other officer as aforesaid, shall be applied and disposed of for the relief of the poor of the parish, township, or place, where the offenders shall respectively reside, at the discretion of the justices imposing the same, and such fine or fines, which may be imposed upon any such master or mistress, shall, at the discretion of the justices imposing the same, be either so applied and disposed of as aforesaid, or be otherwise paid and applied to or for the use and benefit of such apprentice, for or towards a recompence or compensation for the injury which may have been by him or her sustained by reason of such ill usage as aforesaid; and if any person shall be aggrieved by the imposition of such fine or fines as aforesaid, or by any order or warrant of distress for raising and levying the same, or by the judgment or determination of the said justices, or by any act to be done in the execution of such warrant of distress, such person or persons so aggrieved shall and may appeal to the next general or quarter sessions of the peace to be held for the county, riding, or division, within which such person shall reside, of which appeal ten days' notice at the least shall be given; and for want of such distress, such person or persons shall be committed to the house of correction for any space of time not exceeding ten days."

Appeal. (a)

Commitment. (b)

Action for acts done under act.

Sect. 2. "No person acting under any such warrant of distress as aforesaid shall be deemed a trespasser *ab initio*, by reason of any irregularity or informality in such warrant, or in any proceedings thereon, but any person aggrieved by the issuing or execution of such warrant may recover the special damages thereby by him or her sustained, in an action of trespass, or on the case, in any of his Majesty's courts of record."

Justices may order premium to be refunded.

Stat. 4 Geo. IV. c. 29, intituled "*An Act to increase the Power of Magistrates in case of Apprenticeships*," by sect. 2 enacts, "That from and after the 1st August, 1823, it shall and may be lawful for any two or more of his Majesty's justices of the peace, in any case where they shall direct any apprentice or apprentices to be discharged under and by virtue of the said recited acts, [stats. 20 Geo. II. c. 19, and 33 Geo. III. c. 55], or of this act, to take into consideration the circumstances under which such apprentice or apprentices shall be so discharged, and to make an order upon the master or mistress of such apprentice or apprentices to refund all or any part of the premium or premiums which may have been or shall be paid upon the binding or placing out of such apprentice or apprentices, as such justices in their discretion shall see fit; and in case any sum or sums of money which shall be so ordered to be refunded by such master or mistress, shall be neglected to be paid to the person or persons directed in any such order to receive the same, it shall and may be lawful for such two or more justices, in petty sessions, by warrant under their hands and seals, to levy the same upon the goods and chattels of such master or mistress, with the costs and charges of levying such distress, rendering the overplus of the sale of such goods and chattels, upon demand, to such master or mistress; and in case there shall not be sufficient goods and chattels whereon to levy the same, then it shall and may be lawful for such justices to commit such offender or offenders to the house of correction for any time not exceeding two months, unless the sum or sums ordered to be refunded, with all costs, shall be sooner paid and satisfied."

Distress. (c)

Commitment.

20 Geo. 2. c. 19, and 33 Geo. 3, c. 55, to continue in force, except as herein altered.

Sect. 3 enacts, "That the said recited acts and all and every the powers and provisions thereof (save and except such parts thereof as are varied, altered, or repealed), shall be as good, valid, and effectual for carrying this act into execution, as if the same had been repeated in this act."

Justices may order wages to apprentices, provided sum in question does not exceed 10*l.*

By 4 Geo. IV. c. 34, s 2, all complaints, differences, and disputes which shall arise between masters or mistresses and their apprentices, within the meaning of the said before recited acts [20 Geo. II. c. 19, 6 Geo. III. c. 25, and 4 Geo. IV. c. 29], or any of them, touching or concerning any wages

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(a) See in general, *ante*, "*Appeal.*"

(b) See in general, *post*, "*Commitment in Execution.*"

(c) See 5 Geo. IV. c. 18, and in general, *post*, "*Distress under Justices' Warrant,*" Vol. II.

which may be due to such apprentices, shall and may be determined by one or more justice or justices of the peace of the county or place where such apprentice or apprentices shall be employed, which said justice or justices is and are hereby empowered to examine on oath any such master or mistress, apprentice or apprentices, or any witness or witnesses, touching any such complaint, difference, or dispute, and to summon such master or mistress to appear before such justice or justices at a reasonable time, to be named in such summons, and to make such order for payment of so much wages to such apprentice or apprentices, as according to the terms of his, her, or their indentures of apprentice shall appear to such justice or justices, under all the circumstances of the case, to be justly due (provided that the sum in question do not exceed 10*l.*), the amount of such wages to be paid within such period as the said justice or justices shall think proper, and shall order the same to be paid; and in case of refusal or nonpayment thereof, such justice and justices shall and may issue forth his and their warrant, to levy the same by distress and sale of goods and chattels of such master or mistress, rendering the overplus to the owners, after payment of the charges of such distress and sale.

9. *Jurisdiction of Justices, &c.*

4 Geo. 4, c. 34.

By sect. 4, "Whereas it frequently happens that such masters, mistresses, or employers reside at considerable distances from the parishes or places where their business is carried on, or are occasionally absent for long periods of time, either beyond the seas, or at considerable distances from such parishes or places, and during such residence or occasional absences entrust their business to the management and superintendence of stewards, agents, bailiffs, foremen, or managers, whereby such servants in husbandry, artificers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, labourers, or other persons and apprentices, are and may be subjected to great difficulties and hardships, and put to great expense in recovering their wages; be it therefore enacted, that in either of the said cases, it shall be lawful to and for any justice or justices of the county or place where such servant in husbandry, &c. or apprentice shall be employed, upon the complaint of any such servant, &c. concerning the nonpayment of his or her wages, to summon such steward, &c. to be and appear before him or them at a reasonable time, to be named in such summons, and to hear and determine the matter of the complaint in such and the like manner as complaints of the like nature against any master, mistress, or employer are directed to be heard and determined in and by this and the before recited acts, and also to make an order for the payment by such steward, &c. to such servant, &c. of so much wages as to such justice or justices shall appear to be justly due; provided that the sum in question do not exceed the sum of 10*l.*; and in case of refusal or nonpayment of any sum so ordered to be paid by such steward, agent, foreman, bailiff, or manager, for the space of twenty-one days from the date of such order, such justice or justices as aforesaid shall and may issue forth his or their warrant to levy the same by distress (*b*) and sale of goods and chattels of such master, mistress, or employer, rendering the overplus to the owner or owners, or to such steward, &c. for the use of such master, mistress, or employer, after payment of the charges of such distress and sale."

Recovery of wages, in absence of masters, &c.(*a*)

Sect. 5. "Every justice or justices of the peace, before whom any complaint shall be made, in pursuance of the said stats. 20 Geo. II. c. 19, or 31 Geo. II. c. 11, shall and may order the amount of the wages that shall appear due to any servant in husbandry, artificers, labourers, or other person named in the said acts, or either of them, to be paid to the person entitled thereto, within such period as the said justice or justices shall think proper; and in case of refusal or nonpayment thereof, shall and may levy the same by distress and sale, in manner directed by the said first mentioned act; and every order or determination of such justice or justices made under this act shall be final and conclusive, any thing in either of said acts contained to the contrary in anywise notwithstanding."

Justices may order payment of wages in such time as they think fit.

Sect. 6. "Nothing in this act contained shall extend to impeach or lessen

Saving for juris-

(*a*) See further, *post*, "*Servants*," Vol. V.

(*b*) And see further, *post*, "*Distress under Justices' Warrant*," Vol. II.

9. *Jurisdiction of Justices, &c.* the jurisdiction of the chamberlain of the city of London, or of any other court within the said city, touching apprentices."

diction in London.

The above acts extended to cases where no premium has been paid.

By the 5 Vict. c. 7, intituled "*An Act to explain the Acts for the better Regulation of certain Apprentices,*" reciting the 20 Geo. II. c. 19, the 33 Geo. III. c. 55, the 4 Geo. IV. c. 29, and the 32 Geo. III. c. 57, and that doubts had been entertained whether the said acts applied to the case of any apprentice where no sum of money was paid on the binding of such apprentice, it is enacted, "that all the powers and provisions of the said acts and each of them shall be taken to extend to apprentices where no sum or premium of apprenticeship has been or shall be paid on the binding of such apprentice."

Complaints by *masters.*

2dly. *Complaints by the Master.*]—By stat. 20 Geo. II. c. 19, s. 4, "it shall and may be lawful to and for such justices, [or by 4 Geo. IV. c. 29, s. 1, one justice,] upon application or complaint made (*a*) upon oath, by any master or mistress, [or by 4 Geo. IV. c. 29, s. 1, his steward, manager or agent,] against any such apprentice, [viz. against any apprentice put out by the parish, or any other apprentice upon whose binding out no larger sum than 5*l.* (extended to 25*l.* by stat. 4 Geo. IV. c. 29, s. 1; and by 5 Vict. c. 7, to apprentices where no premium has been paid,) was paid, (see s. 3, *ante*, p. 206,)] touching or concerning any misdemeanor, miscarriage, or ill behaviour, in such his or her service, (which oath such justices are hereby empowered to administer,) to hear, examine, and determine (*b*) the same, and to punish the offender by commitment (*c*) to the house of correction, there to remain and be corrected, and held to hard labour for a reasonable time, not exceeding one calendar month, [extended by 4 Geo. IV. c. 34, s. 1, to three,] or otherwise by discharging (*d*) such apprentice in manner and form before-mentioned."

Punishment of apprentice.

Discharging him.

The apprentice may appeal (*id.* s. 5, *ante*, 207.) The proceedings are not recoverable by certiorari, (*id.* s. 6.) The act does not extend to the stannaries of Devon and Cornwall, (*id.* s. 7, *ante*, 207.)

The complaint must be made by the master, but it may be verified upon the oath of any other person, who knows the fact complained of. (*Finley* v. *Jowle*, 12 *East's Rep.* 248.) The plaintiff was an apprentice within the description of the stat. 20 Geo II. c. 19, against whom his master, the defendant, had preferred a complaint in writing before two magistrates of the county of York; which complaint was verified *by the oath of a witness who spoke to the fact*, but *not* by the oath of the *master himself*: and the magistrates having discharged the defendant of his apprentice, the latter brought an action upon the indentures against his master, who justified under the magistrates' discharge: and at the trial it was objected that the magistrates had no jurisdiction by the words of the act, the complaint not having been verified upon the oath of the master. But this was overruled, and there was a verdict for the defendant. Upon a motion for a new trial, Lord *Ellenborough*, C. J., said the words of the act must be understood with reference to the subject-matter. The application or complaint must be made to the magistrates *by the master or mistress*, because they alone have an interest in preferring it; and it must be verified *upon oath*, but it need not be upon the oath of the master or mistress, who may know nothing of the fact themselves: the complaint may be well founded upon some cause which happened in their absence. But it is sufficient that the master makes the complaint and verifies it by the oath of the person who knows the fact; otherwise, unless the fault were committed in the presence of the master, he would be without the remedy intended to be given by the legislature. *Per curiam*, Rule refused.

Where apprentice absconds, he shall serve beyond his term, for time he absented.

By stat. 6 Geo. III. c. 25, s. 1, "If any apprentice shall absent himself from his master's service before the term of his apprenticeship shall be expired, every such apprentice shall, at any time or times thereafter, when-

(*a*) See form (No. 11), *post*.
(*b*) *Id.*
(*c*) See form (No. 13), *post*; see in general, *post*, "*Commitment in Execution.*"
(*d*) See form (No. 14), *post*.

ever he shall be found," (so it be within seven years after the expiration of his term, s. 3,) "be compelled to serve his said master for so long a time as he shall have so absented himself from such service, unless he shall make satisfaction to his master for the loss he shall have sustained by his absence from his service, and so from time to time, as often as any such apprentice shall, without leave of his master, absent himself from his service, before the term of his contract shall be fulfilled; and in case any such apprentice shall refuse to serve as hereby required, or to make such satisfaction to his master, such master may complain upon oath to any justice of the peace of the county or place where he shall reside, which oath such justice is hereby empowered to administer, and to issue a warrant under his hand and seal for apprehending any such apprentice; and such justice, upon hearing the complaint, may determine what satisfaction shall be made to such master by such apprentice. And in case such apprentice shall not give security to make satisfaction according to such determination, it shall and may be lawful for such justice to commit every such apprentice to the house of correction for any time not exceeding three months."

9. *Jurisdiction of Justices, &c.*

6 Geo. 3, c. 25.

By sect. 5, persons aggrieved by such determination, order, or warrant of the justice (except an order of commitment) may appeal to the next sessions, giving six days' notice to the justice and to the parties of his intention of bringing such appeal, and of the cause and manner thereof, and entering into recognizance, within three days after such notice, before a justice, with sufficient surety, to try the appeal at and to abide the order or judgment of and pay such costs as shall be awarded by the justices at such sessions; which said justices, at their said sessions, on proof of such notice given, and of entering into such recognizance, shall hear and determine the appeal, and give such relief and costs to either party, as they shall adjudge reasonable. And their judgments and orders shall be final and conclusive to all parties concerned. (See *ante*, title "*Appeal;*" and see *R.* v. *Justices of Staffordshire*, 12 *East*, 572.)

Appeal.

Sect. 6. Nothing herein shall extend to the stannaries in Devon or Cornwall; or to impeach or lessen the jurisdiction of the chamberlain of London, or of any other court within the said city, touching apprentices; sect. 2, nor to any apprentice whose master shall have received with him the sum of 10*l.*

Exceptions.

The remedy given by sect. 1 of this latter statute of the 6 Geo. III. c. 25, which empowers the justices to oblige apprentices absenting themselves before the expiration of their apprenticeships to serve for such time as they shall be absent, or to make satisfaction for their absence, or in default of giving security for such satisfaction, to commit them, is cumulative, and does not repeal the penal provision of stat. 20 Geo. II. c. 19, s. 4, as applied to the misdemeanor. (*Gray* v. *Cookson and Clayton*, 16 *East*, 13, *ante*, p. 201.)

Remedy given by 6 Geo. 3 is cumulative with 20 Geo. 2, c. 19, s. 4.

By stat. 4 Geo. IV. c. 34, intituled, "*An Act to enlarge the Powers of Justices in determining Complaints between Masters and Servants, and between Masters, Apprentices, Artificers, and others*," s. 1, after reciting the expediency of extending the powers of stats. 20 Geo. II. c. 19, 6 Geo. III. c. 25, 4 Geo. IV. c. 29, enacts, "That it shall be lawful, not only for any master or mistress, but also for his or her steward, manager, or agent, to make complaint upon oath against an apprentice, within the meaning of the said acts, to any justice of the peace of the county or place where such apprentice shall be employed, of or for any misdemeanor, misconduct, or ill behaviour of any such apprentice; or if such apprentice shall have absconded, it shall be lawful for any justice of peace of the county or place where such apprentice shall be found, or shall have been employed, and on complaint thereof made on oath by such master, mistress, steward, manager, or agent, which oath the said justice is hereby empowered to administer, to issue his warrant for apprehending every such apprentice; and further, to hear and determine the said complaint, and to punish the offender by abating the whole or any part of his or her wages, or otherwise by commitment to the house of correction, there to remain and be held to hard labour for a reasonable time not exceeding three months." See further, *post*, "*Servants*," Vol. V.; and *post*, "*Commitment in Execution*."

Masters or steward, &c. may make the complaint.

Justice may abate wages, or commit apprentice to hard labour.

Parish Apprentices.

Object of parish apprenticeships.

In the establishment of parish apprentices the legislature does not appear even to have had in view the instruction of youth or to fit them for any trade or useful occupation; it is a misapplication of terms to call the parties bound an "apprentice;" there is not even a direction to or covenant by the master to afford the party bound any instruction; the whole of that part of the system is literally a mere parochial billet of youth, compelling clergymen, gentlemen, farmers and traders to quarter and support a part of the poor, and to receive under their own roofs persons, however obnoxious to them, in aid of the parish funds. (See the legislative declaration in 32 Geo. III. c. 57, s. 7, *Chit. App.* 21; *sed vid.* Lord *Kenyon's* observations in *R.* v. *St. Nicholas, Nottingham*, 2 *T. R.* 726; *R.* v. *Hamstall Ridware*, 3 *T. R.* 380; in favour of the stat. 43 Eliz. c. 2.)

The statute of Eliz. was certainly never passed with a view to *settlements.*

We will consider the law relative to *parish* apprentices.:—

Division of subject.

1*st. As respects the Binding of them in general, and the Statutes relating thereto*, 212 *to* 221.

2*d. Who are to be bound*, 221.

3*d. Who are compellable to take and how compellable*, 222 *to* 221.

4*th The Term and Mode of Binding*, 224 *to* 230.

5*th. The Assignment and Discharge of, and settling Disputes as to them, and Statutes relating thereto*, 230 *to* 238.

6*th. The Registry of*, 238.

I. Binding of Parish Apprentices, Statutes as to.

Power to bind.

Stat. 43 Eliz. c. 2, s. 1, directs the churchwardens and overseers of every parish to raise a fund for setting to work the children of those who should not be thought able to keep or maintain them; and by sect. 5 enacts, "that it shall be lawful for the said churchwardens and overseers, or the greater part of them, by the assent of any two justices of the peace, [one of whom must be of the quorum,] (*R.* v. *Woolstanton*, 2 *Stra.* 1110,) to bind any such children as aforesaid, to be apprentices where they shall see convenient, until such man child shall come to the age of 24 years, [now by 18 Geo. III. c. 47, to 21 years,] and such woman child to the age of 21 years, or the time of her marriage; the same to be as effectual to all purposes as if such child were of full age, and by indenture of covenant bound him or herself."

Who to be bound.

By 56 Geo. III. c. 139, s. 7, *post*, 215, the infant must have attained 9 years.

Children bound apprentices, master to provide for them according to indenture signed by justices, &c.

Stat. 8 & 9 Will. III. c. 30, s. 5, reciting stat. 43 Eliz. c. 2, s. 5, "But there being doubts whether the persons to whom such children are to be bound are compellable to receive such children as apprentices, that law hath failed of its due execution;" enacts, "That where any poor children shall be appointed to be bound apprentices pursuant to the said act, the person or persons, to whom they are so appointed to be bound, shall receive and provide for them, according to the indenture signed and confirmed by the two justices of the peace, and also execute the other part of the said indentures; and if he or she shall refuse so to do, (*a*) oath being thereof made by one of the churchwardens or overseers of the poor, before any two of the justices of the peace for that county, liberty, or riding, (*b*) he or she, for every such

(*a*) As to the liability, if the party take another apprentice, when it comes to his turn again, after having paid the penalty, for a refusal under this act, see *post*, 223.

(*b*) See form (No. 25), *post.*

offence, shall forfeit the sum of 10*l.*, to be levied by distress(*a*) and sale of the goods of any such offender, by warrant(*b*) under the hands and seals of the said justices, the same to be applied to the use of the poor of the parish or place where such offence was committed; saving always to the person, to whom any poor child shall be appointed to be bound an apprentice as aforesaid, if he or she shall think themselves aggrieved thereby, his or her appeal to the next general or quarter sessions of the peace for that county or riding, whose order therein shall be final and conclude all parties.

1. *Binding of, Statutes as to.*

Penalty for refusal.

Appeal. (*c*)

The annual Mutiny Act usually enacts, that no officer of her Majesty's forces, residing in barracks or elsewhere under military law, shall be deemed liable to have any parish poor child bound apprentice to him; but that every such officer shall be wholly exempt from taking or receiving, or from having bound to him, any such child as an apprentice, any law, statute, or usage to the contrary notwithstanding.

Military officers exempted from.

By stat. 32 Geo. III. c. 57, s. 12, "Where any parish apprentice shall have been so discharged from any master or mistress as aforesaid under and by virtue of the said last mentioned act, and such master and mistress shall have been convicted of such offence, in consequence of such prosecution by indictment as aforesaid, or shall have been found guilty thereof in any action brought at the suit of the party injured, it shall not be lawful for the churchwardens and overseers of the poor of any parish or place, or the major part of them, to bind any other apprentice upon such person; but that whenever such person ought or would be compellable to take a parish apprentice, it shall and may be lawful for any two justices of the peace of the county, city, town, riding, division or place where such person shall reside, upon application made to them by the churchwardens and overseers of the poor of such parish or place, to order and direct that such person shall pay into the hands of such churchwardens and overseers of the poor, some or one of them, a sum not exceeding the sum of 10*l.* nor less than 5*l.*, for the purpose of binding out a child (intended to be bound) an apprentice with the approbation of such two justices; and in case such person shall refuse to pay such sum as aforesaid, then that it shall and may be lawful for such two justices, by warrant under their hands and seals, to levy the same by distress and sale of the goods and chattels of such person, together with the reasonable expenses of such distress." See the other provisions of this act in reference to the death of the master, &c. *post*, 232.

Master convicted of misusing apprentice, not to have another put on him,

but to pay not exceeding 10*l.* nor less than 5*l.*

Distress for same.

Stat. 56 Geo. III. c. 139, (*d*) passed to regulate *parish* apprenticeships, intituled "*An Act to regulate the Binding of Parish Apprentices*," reciting, s. 1, that "Many grievances have arisen from the binding of *poor children* as apprentices by parish officers to improper persons, and to persons residing at a distance from the parishes to which such poor children belong, whereby the said parish officers and the parents of such children are deprived of the opportunity of knowing the manner in which such children are treated, and the parents and children have in many instances become estranged from each other; and also from the permission given to apprentices, by the persons to whom such apprentices have been bound, to serve others without a formal assignment, whereby the discretion to be exercised by magistrates in placing out apprentices to suitable persons is frequently rendered of no avail;" for remedy thereof enacts, "That from and after the 1st day of October, 1816, before any child (*e*) shall be bound apprentice by the overseers of the poor of any parish, township, or place, such child shall be

How parish apprentices to be bound.

(*a*) See in general *post*, "*Distress by Justices' Warrant*," Vol II.

(*b*) See form (No. 26), *post*.

(*c*) See *ante*, "*Appeal*."

(*d*) This whole statute relates to *parish* apprentices and is intended as an amendment of the system of which 43 Eliz. c. 2, s. 5, *ante*, 212, is the origin. The statute is in parts obscurely worded, see *R.* v. *Threlkeld*, 4 *B. & Adol.* 229; 1 *Nev. & M.* 14, S. C.

(*e*) As to what children are within the act, see *post*, 222.

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56 Geo. 3, c. 139.

Child to be carried before two justices;

who are to inquire whether intended master resides at a reasonable distance, &c.

May examine parents as to distance, &c.

and character, &c. of master.

Justices to make order that overseers may bind, &c.

Order to be referred to in indenture and signed by justices before execution of indenture.

No child to be bound beyond 40 miles out of county,

unless child's parish be more than 40 miles from London. (*g*)

Special grounds for allowing, to be stated by justices.

Indenture to be allowed by two justices of county &c into which apprentice is to be bound, as well by two justices of

carried before two justices of the peace of the county, riding, division or place wherein such parish, township, or place shall be situate, (*a*) who shall inquire into the propriety of binding such child apprentice to the person or persons to whom it shall be proposed by such overseers to bind such child; and such justices shall particularly inquire and consider whether such person or persons reside, or have his, her, or their place or places of business within a reasonable distance from the place to which such child shall belong, having regard to the means of communication between such places, or whether any circumstances shall make it fit, in the judgment of such justices, that such child should be placed apprentice at a greater distance; and if the father or mother of such child shall be living, and shall reside in or near the place to which such child shall belong, such justices shall (if they see fit) examine such father or mother, or either of them, and shall particularly inquire as to the distance of the residence or place of business of the person or persons to whom it shall be proposed to place such child, and the means of communication therewith: and such justices shall also inquire into the circumstances and character of such person or persons; and if such justices shall, upon such examination and inquiry, think it proper that such child should be bound apprentice to such person or persons, such justices shall make an order, (*b*) declaring that such person or persons is or are fit person or persons to whom such child may be properly bound as apprentice, and shall thereupon order that the overseer or overseers (*c*) of the place to which such child shall belong, shall be at liberty to bind such child apprentice accordingly; which order shall be delivered to such overseer or overseers as a warrant for binding such child apprentice as aforesaid; and such order shall be referred to by the date thereof, and the names of the said justices, in the indenture of apprenticeship of such child; (*d*) and after such order shall have been made, such justices shall sign their allowance of such indenture of apprenticeship, before the same shall be executed by any of the other parties thereto; provided always, that no such child shall be bound apprentice to any person or persons residing or having any establishment in trade, at which it is intended that such child shall be employed out of the same county, at a greater distance than forty miles from the parish or place to which such child shall belong, (*e*) unless such child shall belong to some parish or place which shall be more than forty miles from the city of London, in which case it shall be lawful for the justices who shall authorise the apprenticing of such child to make a special order (*f*) for that purpose, in which order such justices shall distinctly specify the grounds on which they shall think fit to allow of the apprenticing of such child to a person or persons residing, or having an establishment in trade, at a greater distance than forty miles from the parish or place to which such child shall belong."

Sect. 2. "In all cases where the residence or establishment of business of the person or persons to whom any child shall be bound, shall be within a different county or jurisdiction of the peace from that within which the place by the officers whereof such child shall be bound shall be situated, and in all other cases where the justices of the peace for the district or place

(*a*) If the parish is in a city, borough, or town corporate, the indenture must be allowed by a justice of peace of such city, &c., and a justice of the peace of the county in which the same is situate; 3 & 4 Will. IV. c. 63, s. 3, *post*, 220; and it would seem to follow, that in such a case the inquiry and order provided by the above act should be made by the same justices.

(*b*) See form (No. 18), *post*.

(*c*) *R.* v. *Fairfax*, 3 *Mod.* 269, *post*.

(*d*) See *R.* v. *Bawbergh*, 2 *B.* & *C.* 222; 3 *D.* & *R.* 338, S. C. *post*, 225.

(*e*) Before this enactment, the overseers might have bound a parish apprentice to a person residing or carrying on trade at any distance out of the county. (*Per cur. R.* v. *St. George, Exeter*, 3 *Ad.* & *Ell.* 373.)

(*f*) The House of Commons, in passing the New Poor Law Act, repealed this clause, but the House of Lords rejected such repeal.

(*g*) See form (No. 21), *post*.

within which the place by the officers whereof such child shall be bound shall be situated, and who shall sign the allowance of the indenture (*b*) by which such child shall be bound, shall not have jurisdiction, every indenture by which such child shall be bound at any time after the said first day of October shall be allowed as well by two justices of the peace for the county or district within which the place by the officers of which such child shall be bound shall be situated, as by two justices of the peace for the county or district within which the place shall be situated wherein such child shall be intended to serve: (*c*) provided always, that no indenture shall be allowed by any justice of the peace for the county into which such child shall be bound, who shall be engaged in the same business, employment, or manufacture in which the person to whom such child shall be bound is engaged; and notice (*d*) shall be given to the overseers of the poor of the parish or place in which such child shall be intended to serve an apprenticeship before any justice of the peace for the county or district, within which such parish or place shall be, shall allow such indenture; and such notice shall be proved before such justice shall sign such indenture, unless one of such overseers shall attend such justice, and admit such notice."

1. *Binding of, Statutes as to.*

56 Geo. 3, c. 139.

county, &c. from which he is bound. (*a*)

Justices not to be engaged in same business as apprentice.

Notice to overseers.

Sect. 3. "The allowance of two justices of the peace for the county within which the place in which such child shall be intended to serve an apprenticeship shall be situated, shall be valid and effectual, although such place may be situated in a town or liberty within which any other justices of the peace may in other respects have an exclusive jurisdiction."

Allowance by county magistrates valid in towns, &c. of exclusive jurisdiction.

Sect. 4. "And whereas there are several cities and boroughs which are counties of themselves, and several districts situated without the limits of the county to which such districts respectively belong, be it enacted, that the distance to which parish apprentices may be bound shall not be construed to be limited to such cities and boroughs being counties, but shall extend to the county in which any such city and borough, and any such district, though belonging to another county, shall be locally situated."

Distance to which apprentices may be bound not limited to cities counties of themselves.

Sect. 5. "No settlement shall be gained by any child who shall be bound by the officers of any parish, township, or place, by reason of such apprenticeship, unless such order shall be made and such allowances of such indenture of apprenticeship shall be signed as hereinbefore directed." (*e*)

No settlement gained unless directions complied with.

Sect. 6. "In case any overseer or overseers shall bind an apprentice to any person or persons without having obtained such order and such allowances as hereinbefore required, and in case any person or persons shall receive any such apprentice as so bound without such order and allowances having been first obtained, the said overseer or overseers, and the said person or persons, shall each respectively forfeit the sum of 10*l.* for each apprentice so bound, to be recovered as the penalties hereinafter given are directed to be recovered."

Penalty on overseers binding apprentices contrary hereto. (*f*)

Sect. 7. "After the said first day of October it shall not be lawful for any parish officers to bind out any child as parish apprentice until such child shall have attained the age of nine years, any thing in any act or acts of parliament to the contrary notwithstanding."

Children not to be bound until nine years old.

Sections 8, 9, and 10, relate to the master's removal to a distance, &c. and to the discharge of the apprentice, &c., and will be found, *post*, 236, 237.

In *R.* v. *St. Paul's, Exeter*, 10 *B. & Cres.* 12; and *R.* v. *St. Peter's, Hereford*, 1 *B. & Adolp.* 196; and *R.* v. *Inhabitants of St. John, Bedwardine*, 5 *B. & Adolp.* 173; 2 *Nev. & M.* 86, S. C.; it was considered that the first ten sections of this act of 56 Geo. III. apply to parish apprenticeships of poor children where the parish officers are parties to the indenture, and that the 11th section applies to parish apprentices of poor children where the binding

(*a*) See now the 3 & 4 Will. IV. c. 63, *post*, 219.

(*b*) See form (No. 22), *post*.

(*c*) See now the 3 & 4 Will. IV. c. 63, s. 1, *post*, 220.

(*d*) *R.* v. *Newark-upon-Trent*, 3 *B. & C.* 59, 4 *D. & R.* 745, S. C.; *R.* v. *Threlkeld*, 4 *B. & Adol.* 229; 1 *Nev. & M.* 14, S. C.; *R.* v. *Whiston*, 6 *N. & M.* 65; 4 *Ad. & E.* 607.

(*e*) See *post*, 227, &c.

(*f*) See form (No. 28), *post*.

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is voluntary, and the parish officers are not actual parties to the indenture, but procured the binding. (And see *R.* v. *Arundel*, 5 *M. & Selw.* 257; *R.* v. *St. Mary, Reading*, 1 *Bott.* 609.)

50 Geo. 3, c. 139. Indentures not valid unless approved by two justices.

Sect. 11, reciting that "The salutary provisions enacted by the 43 Eliz. (*a*) are frequently evaded in the binding out of poor children, and the premium of apprenticeship, or a part thereof, is clandestinely provided by parish officers, who are thus enabled to bind out such poor children without the sanction of justices of the peace," enacts, "that after the said first day of October no indenture of apprenticeship, by reason of which any expense whatever shall be incurred by the public parochial funds, (*b*) shall be valid and effectual, unless approved of by two justices of the peace under their hands and seals, (*c*) according to the provisions of the said act and of this act." (*d*)

Penalties may be recovered by information, &c.

Sect. 12. "All penalties and forfeitures hereby imposed for any offence against this act shall and may be recovered by information before any two justices of the peace of the county or district where such offence shall be committed."

Justices empowered to dispose of penalties.

Sect. 13. "It shall and may be lawful to and for the justices before whom any such penalty shall be recovered, to direct such penalty, after deducting the necessary costs and charges attending any information and the proceedings thereon, to be paid, applied, and distributed either to the person or persons giving information of the offence for which such penalty shall be incurred, or to the overseer of the poor of the parish or township in which such offence shall have been committed, or by the officers whereof such apprentice shall have been bound, for the use of the poor of such parish or township, or in the binding of the apprentice respecting whom such offence shall be committed, to any other person, or to be distributed and applied for any one or more of such purposes as to such justices shall seem meet."

Recovery of penalties.

Sect. 14. "In case of non-payment of any penalty hereby imposed, the same shall be levied by distress (*e*) and sale of the offender's goods and chattels, by warrant under the hands and seals of the justices before whom such offender shall have been convicted, or of any other two justices of the peace of the same county or district: and for want of such distress, such offender shall be committed (*f*) to the common gaol or house of correction for any period not less than one, nor more than six months, to be appointed by the justices before whom such offender shall be convicted."

Form of conviction.

Sect. 15. "The conviction of all offences against this act shall be in the form following." (*g*)

Persons not paying penalty may be imprisoned.

Sect. 16. "In case any person convicted for any offence against this act shall not pay the penalty imposed by such conviction within one calendar month next after such conviction shall take place, it shall be lawful to and for the justices making such conviction, or for any two other justices of the county or district, to issue their warrant for the apprehending and imprisoning of such offender, notwithstanding such offender may have goods or chattels whereby such penalty might have been levied."

Appeal. (*h*)

Sect. 17. "Any person or persons who shall be dissatisfied with any act done by any justice or justices of the peace in the execution of this act, may

(*a*) See form (No. 28), *post*.

(*b*) What is an expense or payment out of parish funds, *R.* v. *Quainton*, 1 *Adol. & Ell.* 133; 3 *Nev. & M.* 289, S. C.; *R.* v. *Mattishall*, 8 *B. & Cres.* 703; 3 *Man. & R.* 386, S. C.; *R.* v. *St. Peter, Hereford*, 1 *B. & Ad.* 916; and see *R.* v. *Stoke Damerel*, 7 *B. & Cres.* 563; 1 *M. & R.* 458, S. C.; *post*, 229. The enactment extends only to indentures of apprenticeship of *poor children*; and therefore an indenture, whereby a person of the age of twenty-four is bound apprentice, part of the premium being paid out of the public parochial funds, does not require the assent of two justices. (*R.* v. *Inhabitants of St. John, Bedwardine*, 5 *B. & Adol.* 169; 2 *Nev. & M.* 86, S. C.)

(*c*) The sealing is requisite, or the indenture will be void. (See *R.* v. *Stoke Damerel*, 7 *B. & Cres.* 563; 1 *M. & R.* 458, S. C.; 10 *B. & Cres.* 12; *post*, 229.)

(*d*) See 5 *B. & Adol.* 173; see form (No. 20), *post*.

(*e*) See in general, *post*, "*Distress by Justices' Warrant*," Vol. II.

(*f*) See in general, *post*, "*Commitment in Execution*."

(*g*) See the form (No. 24), *post*.

(*h*) See in general, *ante*, "*Appeal*."

appeal against the same to any Court of general or quarter sessions to be holden for the county within which such act shall have been done, within three calendar months after the fact so complained of, upon giving notice in writing to such justice or justices, and also to the person or persons who shall be interested in such appeal, within twenty-one days next after the act so appealed against shall have taken place; and in case such appeal shall be against any conviction, entering into a recognizance with two sufficient sureties before any justice of the peace of the county or district within which such conviction shall have taken place, to appear at such general or quarter sessions to abide the judgment of the Court upon such appeal, and to pay the costs which may be awarded thereon; and that it shall and may be lawful to and for the justices at such sessions to hear and determine the matter of such appeal, and to award costs therein as they in their discretion shall think fit; and all such appeals shall be to the sessions of the county within which the act appealed against shall have taken place, and not to any district or liberty within the same."

1. *Binding of, Statutes as to.*

51 Geo. 3, c. 80

Sect. 18. "The provisions and penalties herein contained respecting overseers of the poor shall be deemed to extend to all churchwardens having the power and authority of overseers of the poor; and that all the provisions herein mentioned and contained respecting any parish or place shall extend to any incorporated or other district for the maintenance of the poor; and that the officers of any such district having power to bind apprentices, shall be subject to all the rules, regulations and penalties herein mentioned and contained respecting overseers of the poor."

Churchwardens included in meaning of act.

Incorporated and other districts. (a)

Stat. 51 Geo. III. c. 80, intituled "*An Act to render valid certain Indentures for the binding of Parish Apprentices,*" [15 June, 1811,] reciting, that whereas, by 43 Eliz. c. 2, it is enacted, "That the churchwardens of every parish, and four, three, or two substantial householders there, as shall be thought meet, having respect to the proportion and greatness of the same parish and parishes, to be nominated yearly in Easter week, or within one month after Easter, in the manner therein directed, shall be overseers of the poor of the same parish; and that it shall be lawful for the said churchwardens and overseers, or the greater part of them, by the assent of two justices of the peace, to bind the children of such parents as shall not by the churchwardens and overseers, or the greater part of them, be thought able to maintain their children, to be apprentices; and whereas in divers small parishes, two persons only have been annually appointed to act in the capacity of churchwardens as well as overseers of the poor; and that divers indentures for the binding of parish apprentices have been executed and signed by such two persons, purporting to be the churchwardens and overseers of such parishes; but, by reason that the said indentures have not been signed by distinct persons as churchwardens, and other distinct persons as overseers, such indentures have been or may be deemed to be void," enacts, "That all indentures for the binding of parish apprentices, which have been heretofore executed and signed by two persons only, acting or purporting to act in the capacity of churchwardens as well as overseers of the poor, and also all such indentures as shall hereafter be so signed, shall be considered as good, valid, and effectual, as if the same had been executed and signed by distinct persons as churchwardens and distinct persons as overseers of the poor, according to the said recited act."

Indentures by two persons only acting in double capacity for churchwardens and overseers, valid.

By section 2, "Nothing in this act contained shall extend to do away or alter any decision which may have taken place in any Court of law, respecting the binding of any parish apprentice, or the settlement of any poor person, before the passing of this act."

Stat. 1 & 2 Geo. IV. c. 32, reciting that "In divers parishes, townships, hamlets, chapelries, and places in England, for a long period of time, only

Similar indentures executed by one

(a) See further as to these, *post*, 240.

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1 & 2 Geo. 4, c. 32.

person only as churchwarden, &c. valid.

one churchwarden or chapelwarden has been annually appointed, where two or more churchwardens or chapelwardens had been formerly appointed for each of such parishes, townships, hamlets, chapelries, or places: and that divers indentures for the binding of parish apprentices, which may have been executed and signed by such single churchwarden or chapelwarden, acting in and for a parish, township, hamlet, or place, for which formerly two or more churchwardens or chapelwardens had been appointed, may on that account, if contested in a Court of law, be deemed to be null and void: and that much litigation has recently arisen between parishes owing to the discovery of such defect as above mentioned in the appointment of churchwardens and chapelwardens; and it would tend to prevent future litigation, if such indentures as before-mentioned were in certain cases declared to be valid and effectual:" enacts, "That from and after the passing of this act, [*viz.* 28th May, 1821,] all indentures for the binding of parish apprentices, which have been previous to the passing of this act executed or signed by one churchwarden or chapelwarden, acting or purporting to act in the capacity of churchwarden or churchwardens, chapelwarden or chapelwardens, for any parish, township, hamlet, chapelry, or place in England, for which two churchwardens or chapelwardens had formerly been appointed, shall be deemed and taken to be as good and effectual to all intents and purposes as if the same indentures had been executed by one or more churchwarden or chapelwarden, churchwardens or chapelwardens, legally appointed; any law, statute, usage, or custom to the contrary notwithstanding." (*a*)

Not to affect decisions, &c. already made, &c.

By sect. 2, "Nothing in this act contained shall be construed to affect or set aside any decision or judgment made or given in any Court of judicature respecting any such indentures, or to alter, impeach, or affect the settlement of any person for whose removal any order of justices shall have been duly made previous to the passing of this act, or to legalize or make valid any indentures to be signed or executed as hereinbefore mentioned after the passing of this act."

Indentures valid although churchwardens, &c. not sworn in, &c.

Stat. 54 Geo. III. c. 107, after reciting stat. 43 Eliz. c. 2, s. 5, respecting the binding of parish apprentices, and stat. 8 & 9 Will. III. c. 30, s. 1, respecting certificates of settlement, (*b*) and that "divers parishes contain within themselves several townships, hamlets, or chapelries, each of which separately maintains its own poor: and whereas in such parishes the churchwardens are for the most part sworn into their offices as churchwardens of the whole parish, although in truth and in fact they act as churchwardens of the separate townships, hamlets, or chapelries therein contained: and that divers indentures for the binding of parish apprentices have heretofore been signed and executed by a person or persons styling himself or themselves and stated in such indentures to be churchwarden or churchwardens, chapelwarden or chapelwardens, of the township, hamlet, or chapelry, binding such poor apprentices: and whereas such person or persons have not been sworn into the office of churchwarden or chapelwarden of such township, hamlet, or chapelry, but of churchwardens of the parish wherein such township, hamlet, or chapelry is contained;" enacted, "That all indentures for the binding of poor apprentices, which have been heretofore signed and executed, or which shall hereafter be signed and executed by a person or persons, who at the time of his or their signing and executing such indenture, acted as churchwarden or churchwardens, chapelwarden or chapelwardens, of the township, hamlet, or chapelry, binding such poor apprentice, shall be deemed and taken to be as good, valid, and effectual, as if the same had been signed and executed by a person or persons actually sworn into the office of churchwarden or chapelwarden of such township, hamlet, or chapelry: provided always, that such person or persons shall have been duly sworn into the

Proviso.

(*a*) As to certificates of settlement, see "*Poor*," Vol. IV.

(*b*) As to such certificates, see "*Poor*," Vol. IV.

office of churchwarden of the parish wherein the township, hamlet, or chapelry, binding such poor apprentice, be contained, or into the office of churchwarden or chapelwarden of such township, hamlet, or chapelry."

1. *Binding of, Statutes as to.*

54 Geo. 3, c. 107.

Sect. 2. "All indentures for the binding of poor apprentices, which shall have been heretofore signed and executed, or which may hereafter be signed and executed by the overseers of the poor of any township, hamlet, chapelry, or place, and the churchwarden or churchwardens, chapelwarden or chapelwardens, acting for, or appointed in respect of such township, hamlet, chapelry, or place, or the major part of them, shall be deemed and taken to be as good, valid, and effectual, as if the said indentures had been signed and executed by such overseers and the churchwardens of the parish wherein such township, hamlet, chapelry, or place is situate, or the major part of them."

Such indentures valid if executed by overseers of any township, &c.

Sect. 3. "Nothing herein contained shall be construed to alter, impeach, or affect the settlement of any person for whose removal any order of justices shall have been duly made before the passing of this act."

Not to affect settlements.

By 3 & 4 Will. IV. c. 63, intituled "*An Act to render valid Indentures of Apprenticeship allowed only by two Justices acting for the County in which the Parish from which such Apprentices shall be bound, and for the County in which the Parish into which such Apprentices shall be bound, shall be situated; and also for remedying defective Executions of Indentures by Corporations,*" [28th August, 1833,] reciting, "Whereas by an act passed in the fifty-sixth year of the reign of his late majesty King George the Third, intituled '*An Act to regulate the Binding of Parish Apprentices,*' it is amongst other things enacted, that in all cases where the residence or establishment of business of the person or persons to whom any child shall be bound shall be within a different county or jurisdiction of the peace from that within which the place by the officers whereof such child shall be bound shall be situated, and in all other cases where the justices of the peace for the district or place within which the place by the officers whereof such child shall be bound shall be situated, and who shall sign the allowance of the indenture by which such child shall be bound, shall not have jurisdiction, every indenture by which such child shall be bound, at any time after the first day of October therein mentioned, shall be allowed, as well by two justices of the peace for the county or district within which the place by the officers of which such child shall be bound shall be situated, as by two justices of the peace for the county or district within which the place shall be situated wherein such child be intended to serve; provided always, that no indenture shall be allowed by any justice of the peace for the county into which such child shall be bound, who shall be engaged in the same business, employment, or manufacture in which the person to whom such child be bound is engaged; and notice shall be given to the overseers of the poor of the parish or place in which such child shall be intended to serve an apprenticeship, before any justice of the peace for the county or district, within which such parish or place shall be, shall allow such indenture, and such notice shall be proved before such justice shall sign such indenture, unless one of such overseers shall attend such justice and admit such notice: and whereas, in many instances, petty sessions are held weekly in market towns near adjoining the borders of the county in which such market towns are situate, and the justices holding such petty sessions act as well for the county adjoining as for the county where such petty sessions are held, and transact the business for large districts in both counties at such weekly petty sessions on market days, to the great advantage, convenience and saving of expense to the several parishes and villages whose officers have to attend such petty sessions: and whereas since the passing of the said act of the fifty-sixth year of the reign of his late Majesty King George the Third numerous indentures of apprenticeship have been allowed by two justices attending and acting at such petty sessions for the county within which the place by the officers whereof such child shall be bound is situated, and by the same two justices acting also as justices for the county within which the place is situated wherein such child shall be intended to serve, such justices conceiving that, as they were acting justices for both counties, they were entitled

3 & 4 Will. 4, c. 63.

Recites 56 Geo. 3, c. 139.

1. *Binding of, Statutes as to.*

3 & 4 Will. 4, c. 63.

to allow such indenture accordingly: and whereas doubts (*a*) have lately arisen whether the allowance of such two justices, although they act as justices for both counties, are valid and effectual, or whether it is not necessary that such indenture should be allowed by four justices, two acting for one county, and two for the other only; and the settlement of the numerous persons who have already served and are now serving under indentures allowed by two justices acting for both counties in manner aforesaid will be set aside, to their manifest injury." it is enacted, "That from and after the passing of this act all indentures for the binding of parish apprentices which have been previous to the passing of this act allowed, and shall hereafter be allowed, by two justices of the peace acting as well for the county or district within which the place by the officers of which such child shall be bound shall be situated, as for the county or district within which the place shall be situated wherein such child shall be intended to serve, shall be deemed and taken to be as good, valid and effectual, to all intents and purposes, as if the same had been allowed by two justices of the peace acting only for the county or district in which the place from which such child shall be bound is situated, and also by two other justices of the peace acting only for the county or district within which the place shall be situated in which such child shall be intended to serve."

Indentures allowed by justices acting for two counties to be as valid as if granted by justices acting for different counties.

Indentures with seal of corporations annexed to be valid.

Sect. 2. "And whereas, by divers acts of parliament heretofore made and passed, the directors, guardians, acting guardians, or other officers of incorporated hundreds, parishes and other districts, are by the said acts of parliament respectively authorised to bind poor children apprentices in the manner by the said acts of parliament respectively prescribed and directed: and whereas the said directors, guardians, acting guardians, and other officers, have bound out poor children apprentices by indentures, to which the said directors, guardians, acting guardians, and other officers have been, by their description as directors, guardians, acting guardians, or other officers of such incorporated hundreds, parishes, and other districts respectively, made parties of the one part, or to which they have by their said descriptions respectively been binding parties, and which indentures have been executed by the said directors, guardians, acting guardians, and other officers, by affixing thereto the seal of the corporation of which they are directors, guardians, acting guardians, and officers respectively, and in no other manner by them: and whereas doubts have been entertained as to the effect and validity of indentures so executed; and it is desirable to remove such doubts; be it declared and enacted, that from and after the passing of this act in all cases where any indentures for the binding out poor children apprentices have been heretofore or shall be hereafter executed by any directors, guardians, acting guardians, or other officers of any hundreds, parishes or other districts now incorporated or hereafter to be incorporated under and by virtue of any act of parliament, by affixing thereto the seal of the corporation of which they are or shall be directors, guardians, acting guardians, or other officers respectively, such execution of the said indentures respectively shall be deemed and taken to be a good, valid and effectual execution of the said indentures respectively by the said directors, guardians, acting guardians or other officers of such incorporated hundred, parishes or other districts respectively." (See further as to incorporate district apprentices, *post*, 210.)

Indentures to be allowed by two justices, one of them acting for the county and one for the city, &c.

Sect. 3. "And whereas it is expedient that justices of the peace in every city, borough, or town corporate should have concurrent jurisdiction with county magistrates in apprenticing any child or children within the limits of such city, borough, or town corporate; be it therefore enacted, that from and after the passing of this act every indenture for the binding of parish apprentices within any city, borough, or town corporate, shall be allowed by two justices of the peace, one of such justices acting for and on behalf of the county, and the other of such justices acting for and on behalf of the city, borough or town corporate within the limits of which such child shall be bound.

This act not to set aside decisions already come to.

Sect. 4. "Nothing in this act contained shall be construed to affect or set

(*a*) See *R.* v. *Newark-upon-Trent*, 3 *B. & Cres.* 59; 4 *D. & R.* 745, S. C.

aside any decision or judgment made or given in any Court of judicature respecting any such indenture.

1. *Binding of, Statutes as to.*

By the 4 & 5 Will IV. c. 76, (the New Poor Law Act,) sect. 15, it is enacted, "That from and after the passing of this act the administration of relief to the poor throughout England and Wales, according to the existing laws, or such laws as shall be in force for the time being, shall be subject to the direction and control of the said commissioners; and for executing the powers given to them by this act the said commissioners shall and are hereby authorised and required, from time to time, as they shall see occasion, to make and issue all such rules, orders, and regulations for the management of the poor, for the government of workhouses and the education of the children therein, and for the management of parish poor children under the provisions of an act made and passed in the seventh year of the reign of his late majesty King George the Third, intituled, '*An Act for the better Regulation of Parish Poor Children of the several Parishes therein mentioned within the Bills of Mortality, and the superintending, inspecting, and regulating of the Houses wherein such Poor Children are kept and maintained, and for the Apprenticing the Children of Poor Persons, and for the Guidance and Control of all Guardians, Vestries, and Parish Officers, so far as relates to the Management or Relief of the Poor, and the Keeping, Examining, Auditing, and Allowing of Accounts, and making and entering into Contracts in all Matters relating to such Management or Relief, or to any Expenditure for the Relief of the Poor, and for carrying this Act into Execution in all other respects, as they shall think proper;*' and the said commissioners may, at their discretion, from time to time suspend, alter, or rescind such rules, orders, and regulations, or any of them: provided always, that nothing in this act contained shall be construed as enabling the said commissioners or any of them to interfere in any individual case for the purpose of ordering relief."

Apprenticing of poor children to be under the control of the poor law commissioners. (*a*)

By sect. 61, it is enacted, "That from and after the period at which any rule, order, or regulation of the said commissioners shall come into operation for the binding of poor children apprentices, in addition to such assent or consent, order or allowance of justices, as are now required by law, such justices or any one justice are and is hereby authorised and required to examine and ascertain whether the rules, orders, or regulations of the said commissioners then in force for the binding of poor children apprentices have been complied with, and to certify the same at the foot of every such contract or indenture, and of the counterpart thereof, in such form and manner as the said commissioners by such rules, orders, or regulations, may direct, and until so certified no such contract or indenture of apprenticeship shall be valid: provided nevertheless, that nothing in this act, or in any rule, order, or regulation of the said commissioners, shall affect the jurisdiction of any justices of the peace over any master or apprentice during the period of apprenticeship."

Justices to certify that rules have been complied with in binding poor apprentices.

Justices' power as between master and apprentice.

The above enactment of the 15th section makes no alteration in the law, except that, to secure a conformity with the rules which that section empowers the commissioners to make on this subject, it imposes (s. 61) on justices the duty of certifying that such rules have been complied with.

II. Who may be bound Parish Apprentices.

We have already seen the statutes which point out who is to be bound a parish apprentice, viz. the 43 Eliz. c. 2, s. 5; 18 Geo. III. c. 47, *ante*, 212.

Who may be bound.

The child to be bound should be of the age of nine years or upwards, and of parents who are not able to maintain it, 56 Geo. III. c. 139, s. 7, *ante*, 215.

But it is not necessary that the child should be chargeable to the parish, or even residing within it, to authorise the overseers to put it apprentice; it is suf-

(*a*) By a bill now before parliament it is proposed to enact that the poor law commissioners shall prescribe the duties of poor apprentices, and that masters neglecting to fulfil them shall be subject to a penalty; see *Addenda*, tit. "*Apprentices.*"

2. *Who may be bound.*

ficient if it be the child of a person settled in the parish, who the overseers think is not able to maintain it. (*R.* v. *St. George's, Exeter*, 3 *Ad. & El.* 373.)

A person of the age of twenty-one years cannot be considered a *poor child* within the meaning of the 56 Geo. III. c. 139. (*R.* v. *Inhabitants of St. John Bedwardine*, 5 *B. & Ad.* 169; 2 *N. & M.* 86, S. C.)

Sect. 11 of that statute extends only to indentures of apprenticeship of *poor children;* and therefore an indenture, whereby a person of the age of twenty-four is bound apprentice, part of the premium being paid out of the public parochial funds, does not require the assent of two justices. (*Id.*)

It is discretionary in the parish officers to select those children whose parents the officers think unable to maintain them. (*R.* v. *Crosse, Comb.* 209.)

The consent of the apprentice is not requisite. (*R.* v. *St. George, Exeter*, 3 *Ad. & El.* 373.)

III. Who compellable to take them, and how compellable.

Who compellable to take.

We have already pointed out the enactments as to who are compellable to take parish apprentices, viz. the 43 Eliz. c. 2, s. 5, and 8 & 9 Will. III. c. 30, s. 5, *ante*, 212. (*a*)

As the churchwardens and overseers have the power to place out poor children, they are the proper judges of persons who are fit to be their masters; and those are, all persons who, by their profession and manner of living, have occasion to keep servants; but the same are to be approved of by the justices, and if such master be dissatisfied, he may appeal to the sessions. (*Dalt.* c. 58, p. 143.)

Minchamp's case, 2 *Salk.* 491; 1 *Bott*, 605. Two justices bound an apprentice to a *merchant;* he appealed to the sessions, and the order was discharged. And now the Court of Queen's Bench confirmed the order of sessions; because the act having made persons compellable to take apprentices, and given an appeal to the sessions, it was in the discretion of the justices at sessions to determine whether it was or was not fitting to put an apprentice upon any one; and therefore the Court would not disturb what the sessions had done.

Gentlemen of fortune and clergymen are equally liable with others to take parish apprentices. (1 *Bla. Com.* 426.)

Occupiers of tithes are liable. (2 *Nol.* 221, citing *R.* v. *Saltern, Cald.* 444.)

The condition of the master is immaterial. (*R.* v. *St. Margaret's, Lincoln, Burr.* 728.) Nor need he be of age. (*R.* v. *Petrox*, 4 *T. R.* 196.)

Nor is it necessary that the party should reside in the parish. (*R.* v. *St. Nicholas*, 2 *T. R.* 726.) Persons *occupying* lands in the parish, but residing out of it, are compellable to receive parish apprentices, but *mere strangers* are not. So ruled in the following case:—The parish officers of Sowton, Devon, having apprenticed S. Helier, a poor child of Sowton, to the defendant, according to the statute, he appealed to the sessions, who confirmed the order subject to the opinion of the Court on the following case:—the apprentice was bound (*prout* the indenture) to the appellant, who resided in the parish of Pinhoe, on an estate which he rented and occupied in the parish of Sowton of 20*l.* per annum, which was divided by the highway from the house in which he lived. There was no house on the estate of which he was the occupier. The indenture, together with the apprentice, was tendered to the appellant in the parish of Sowton, in the highway adjoining to the said estate lying in the parish of Sowton. After hearing *East* in support of the order, and *Fanshaw* and *Clapp contrà*, Lord *Kenyon*, C. J., said, "It is highly fit that this question should not remain any longer undecided. I remember a much older case than those mentioned at the bar in which this question was discussed but not decided. The question arises on 43 Eliz. c. 2, s. 5. The general

(*a*) By a bill now before parliament it is proposed to repeal these enactments, and to abolish compulsory apprenticeship on persons. It will probably pass; and if so, it will be found in the *Addenda*, tit. "*Apprentices.*"

purview of that statute was to make a provision for the maintenance of the poor; and the first clause, in mentioning those who are to contribute to such maintenance, describes two sorts of persons, namely, *inhabitants* and *occupiers of lands, &c.* Amongst other provisions for the poor, the 5th section gives power to the parish officers, with the assent of two magistrates, to bind poor children apprentices, *where they shall see convenient.* It is true, indeed, that those words cannot be taken so generally as they purport, because they cannot compel mere strangers, who stand in no relation to the parish, to take such apprentices. But I think that the context of the statute furnishes the means of circumscribing the general extent of those words; and that context I take from the first clause, which imposes other burdens of the same nature on *occupiers of lands, &c.* as well as inhabitants The general object of the act was to compel all those who had any property in the parish to contribute their due proportion towards the maintenance of the poor, and the receiving of apprentices is one mode of contributing to their general relief. In construing these words I see no reason for confining the power of binding to the *inhabitants* of the parish; they ought to be extended to persons *occupying lands in the parish, though residing out of it.* Then it is said that if this construction be put upon the statute, the party may be doubly charged; in the parish where he lives, in respect of his inhabitancy, and in that in which he has lands, in respect of his occupation of them. But if he find himself aggrieved he may appeal to the sessions; and we must take it for granted that the justices will do what is right. They are to adapt the charge to the size of the property, which the person charged possesses; and these are incidental charges which fall on him in respect of that property. I remember it was argued in a former case on this subject, that if this construction of the statute were to prevail, some parishes would disburden themselves of many of their poor by apprenticing out their poor children to persons living out of the parish; but the answer to any such argument is, that at the time when the 43 Eliz. was passed, the stat. 13 & 14 Car. II. was not in existence. However, the ground of my decision here is, that this is one of the modes provided for the maintenance of the poor in this statute, which imposes the duty in respect of the property." The other judges concurred. Order of sessions confirmed. (*R.* v. *Clapp*, H. 29 Geo. III., 3 *T. R.* 107; and see *R.* v. *Guardians of Tunstead*, *id* 523; 1 *Bott*, 619.)

3. *Who compellable to take.*

And in *R.* v. *Barwick*, 7 *T. R.* 33; 1 *Bott*, 624, it was determined, that where several persons hold lands in partnership, some of whom actually reside upon and occupy the same, and others reside at a distance in another parish, the latter as well as the former are obliged to take parish apprentices, if in other respects they are fit persons to take them.

So the court held under 20 Geo. III. c. 36, that the terms "occupier" and "inhabitant" are synonymous. (*R.* v. *Guardians of Tunstead*, 3 *T. R.* 523; and see further, as to the meaning of these terms, *R.* v. *Adlard*, 4 *B. & Cres.* 772; 7 *D. & R.* 340, S. C.; *Attorney-General* v. *Forster*, 10 *Ves.* 335.)

The master must not reside or carry on the trade to which the apprentice is to be bound, out of the same county, beyond forty miles from the parish or place to which the child belongs, unless the child's parish be more than forty miles from London, *ante*, 214.

It was questioned but not decided in the recent case of *R.* v. *Spreyton*, 3 *B. & Adol.* 818, whether the binding can be to a person living abroad, though retaining property in the parish.

We have already seen that officers, &c. in the army are exempt by the Annual Mutiny Act, *ante*, 213.

Also that persons having been guilty of misusing their apprentices should not be made masters, 32 Geo. III. c. 57, s. 12, *ante*, 213.

Persons having paid the penalty for not taking.

It has often been a question whether a person who has paid the 10*l.* under 8 & 9 Will. III. c. 30, s. 5, (*ante*, 212,) is liable to take another apprentice till his turn comes again, for as the penalty fixed in the one case answers in the amount to that which the legislature has directed to be paid where a master, convicted of misconduct, is not allowed to receive an apprentice, but compelled to pay the stipulated sum,—it has been urged that the coincidence

3. *Who compellable to take.* in the amount proves that the payment of the penalty was to be equivalent to the acceptance of the apprentice. But it is obvious that no penalty exacted for an offence can be an apology for the commission of a second offence. The only protection is in the discretion of the two justices, or of the sessions on appeal; not an arbitrary but such a legal discretion as is noticed in the maxims laid down under title "*Justices*," Vol. III.

How compellable. The statutes, *ante*, 213, &c. point out several modes of enforcing the taking the apprentice, by distress, &c. Independently of this an indictment lies for disobeying an order of justices, either in not receiving, or receiving and afterwards turning off, or not providing for a parish apprentice; for though an act of parliament prescribe an easier way of proceeding by complaint, yet it does not hinder an indictment. (*Reg.* v. *Gould*, 1 *Salk.* 381; 6 *Mod.* 164, S. C.; 1 *Bott*, 605; 2 *Show.* 193; 1 *Stra.* 76; and see an indictment, *R.* v. *Shipton*, 8 *B. & Cres.* 772; and "*Order*," Vol. III.)

But where the officers select an improper person, the party is not indictable. (*Minchamp's case*, 2 *Salk.* 491; 1 *Bott*, 605.)

It seems an indictment for refusing to take the apprentice need not aver the parents are poor. (*R.* v. *Crosse*, *Comb.* 289.)

IV. The Mode and Term of Binding Parish Apprentices.

Previous inquiry. *Inquiry to be made before Binding.*]—The statute 56 Geo. III. c. 139, s. 1, requires the justices to make certain inquiries and examinations as to the residence, and character and circumstances of the master, &c. before binding out the apprentice.

Order of justices. *Order of Justices.*]—The 56 Geo. III. c. 139, s. 1, requires this order. In *R.* v. *Fairfax*, 3 *Mod.* 269; *Carth.* 94; *Comb.* 164; it was held that an order under the statute 43 Eliz. to bind out a parish apprentice, must state it to be by the churchwardens, and for the omission the order was quashed; and it should seem this case would apply to an order made under the 56 Geo. III. c. 139, the 18th section of that act, *ante*, 217, extending its provisions to churchwardens having the power of overseers.

Notice to overseers. *Notice to Overseers.*]—This is required by the 56 Geo. III. s. 139, s. 2, and must be duly given, and must be proved to the justices to have been so given, before they allow the indenture, or no settlement will be acquired by a service under it. (*R.* v. *Whiston*, 6 *N. & M.* 65.) A pauper settled in the parish of N. C., in the county of Nottingham, was, pursuant to an order of two justices of the county, bound apprentice by the churchwardens and overseers of that parish, to A. B. of another parish, in a borough situate in the same county, but having justices who had exclusive jurisdiction therein. The indenture was allowed by the two justices, but no notice was given to the overseers of the poor of the parish in the borough of the intention to bind such apprentice, nor did they or any of them attend before the county justices, who allowed the indenture and admitted such notice. It was held by three justices, (*Abbott*, C. J. *dissentiente*,) that by the 56 Geo. III. c. 139, s. 2, *ante*, 214, the indenture was void for want of such notice, and that the pauper did not gain any settlement by serving under it. (*R.* v. *Newark-upon-Trent*, 3 *B. & Cres.* 59; 4 *D. & R.* 745, S. C.)

And in the more recent case of *R.* v. *Threlkeld*, 4 *B. & Adol.* 229; 1 *N. & M.* 14, S. C.; the Court considered that under that enactment, when an apprentice is bound from one parish into another, notice must be given to the overseers of the latter, though both be in the same county and jurisdiction of the peace.

But where the apprentice is bound into another parish by assignment of the indenture, no notice is requisite. (*R.* v. *Inhabitants of Exminster*, 6 *A. & Ell.* 598.)

Term of binding. *The Term of Binding.*]—The time for which a male child is to be bound

is till he becomes twenty-one years of age; the time for which a female child is to be bound is until she becomes twenty-one years of age or is married. 43 Eliz. c. 2; 18 Geo. III. c. 47, *ante*, 212.

4. *Mode and Term of Binding.*

The apprentice may be bound for a shorter time than the statute requires, though not for a longer time. (*R.* v. *Chalbury*, 1 *Bott*, 606.)

But where a local statute enacted that certain guardians of the poor should have power to bind children apprentices, "provided such children be not bound for a longer term than until they shall have attained the respective ages following, viz. a boy the age of twenty-two, and a girl that of twenty;" it was held, that an indenture binding a boy for a longer term than that allowed by the act was not absolutely void, but only voidable. (*R.* v. *Inhabitants of the Vill of St. Gregory*, 2 *Adol. & Ell.* 99; 4 *N. & M.* 137, S. C.)

So an indenture, not made for any certain time, is not thereby void, but voidable only; (*R.* v. *Woolstanton*, 1 *Bott*, 610;) nor is an indenture, binding a poor girl an apprentice, void for want of the alternative "or till marriage." (*R.* v. *St. Petrox*, 1 *Wils.* 96; 1 *Bott*, 607.)

The Indenture.]—The indenture is between the churchwardens and overseers, or the major part of them of the one part, and the master of the other part. There is no need of a stamp to or a statement of the premium in it.

The indenture.

A master is not compellable to give to his apprentice, forced upon him, wages or clothes at the end of the term. It was moved to quash an order to compel a person to take an apprentice, because in the close of the indenture it was said, "that the master, at the end of the term, shall give his apprentice two suits of clothes." Upon debate, the court held this to be ill; for the justices during the term of his apprenticeship cannot order him wages, they must only order him a maintenance as an apprentice, and cannot order him any thing after the term is ended; so the order was quashed. (*Reg.* v. *Wagstaff*, *Fol.* 205; 1 *Sess. Ca.* 48; 1 *Bott*, 605.)

Contents of.

The first section of 56 Geo. III. c. 139, (*ante*, 213, 214,) requiring that the order of magistrates for the binding ut parish apprentices shall be referred to in the indenture of the date thereof, is compulsory; and, therefore, an indenture in which the date of the order is omitted is void, and no settlement is gained by serving under it. (*R.* v. *Bawbergh*, 2 *B. & Cres.* 222; 3 *D. & R.* 338, S. C.)

Order of justices to be referred to.

The 32 Geo. III. c. 57, s. 1, *post*, 231, requires a proviso to be inserted as to the continuance of the apprenticeship after the death of the master.

Proviso as to death of master.

It is not necessary that the master should execute the indenture. (*R.* v. *Fleet*, 1 *Bott*, 601.) This was a question of settlement, and it appeared that the pauper, parish apprentice, was bound by indentures; that the original indenture was properly executed by the parish officers, and allowed by two justices. The counterpart was also allowed by the justices, but neither the indenture nor counterpart was executed by the master. The master accepted the indenture and the pauper, and considered him as his apprentice. And upon this case there arose a question, whether it was necessary, under 8 & 9 Will. III. c. 30, s. 5, (*ante*, 212,) that the master should have executed a counterpart, to enable the pauper to gain a settlement. And the court held that the binding was authorised by 43 Eliz. c. 2, s. 5, long before the act requiring a counterpart; that the statute of William only compelled persons to receive poor apprentices, but did not in other respects confirm the power of binding, which was already fully established; (*Cald.* 31;) and the court said, that it had been so determined in *R.* v. *St. Peter's on the Hill*, 2 *Bott*, 367; in which last case it was decided, that if the apprentice himself be bound, the execution by the master is not actually necessary, but the indenture shall be valid without it.

Execution of, by master.

Nor is it necessary that it should be executed by the apprentice. (*R.* v. *St Nicholas in Nottingham*, 2 *T. R.* 726; 2 *Bott*, 373; *R.* v. *Woolstanton*, 1 *Bott*, 606.)

By apprentice.

It must in general be executed by the major part of the churchwardens and overseers.

An indenture executed by one churchwarden and one overseer only has

By parish officers.

4. *Mode and Term of Binding.*

been held sufficient, as will appear from the following case, it not appearing otherwise than that they constituted the majority. A parish indenture ran thus: — "This indenture, made the 2d day of April, 1800, in the 40 Geo. III. &c. witnesseth, that W. S., churchwarden of the hamlet of Attertan, in the parish of Wetherley, in the county of Leicester, and J. G., overseer of the poor of the said hamlet, by and with the consent of his Majesty's justices, &c., by these presents do put and place J. A., aged fourteen years, a poor child of the said parish, apprentice to J. B., of the parish of Hinckley, in the county of Leicester, framework knitter, with him to dwell and serve, &c. until the said apprentice shall accomplish his full age of twenty-one years, according to the statute, &c.;" and so it proceeded in the common form, concluding with covenants by J. B. to the said churchwardens and overseers, and every of them, &c. and their successors, "to instruct the apprentice in his trade, and so to provide for the said apprentice that he be not a charge to the said hamlet, &c. In witness, &c. (Signed) W. S., J. G., and J. B.;" and the consent of the two justices to the indenture was in the usual form. No other evidence was produced either on the part of the appellants or of the respondents. And the question was, whether the indenture of apprenticeship were a valid instrument or not, being made and executed by one churchwarden and one overseer only. Lord *Ellenborough*, C. J., said, "no evidence having been given to impeach the validity of this indenture by showing that it was executed by less than a majority of the proper officers charged with that duty, the validity of it must be tried by itself: and if any intendment can by law be made to support it, we must make that intendment. Now if there were two existing overseers at the time, and only one churchwarden, the two who executed the indenture, being a majority, would be sufficient to bind the apprentice. Then can there be by law only one churchwarden? That may be regulated by custom, and by custom there may be only one in this place; therefore, the party who impeached the indenture should have given evidence to rebut the intendment which may be made in support of it while unimpeached by evidence." *Le Blanc*, J.: "The indenture was produced on one side, and there was no evidence to impeach it on the other. The question then is, whether by any intendment of law such indenture can be good? And it may be good by intendment in the way put by my lord. Then, not being impeached by evidence, it stands good." The other judges concurring, the order was confirmed. (*R.* v. *Hinckley*, 12 *East*, 361. (*a*))

So in *R.* v. *Earl Shilton*, 1 *B. & Ald.* 275, it was held that the statute 43 Eliz. c. 2, does not *absolutely* require two churchwardens in every parish for the management of the poor, and therefore an indenture binding out a poor apprentice, which was executed by one churchwarden (*where by custom there was but one*,) and one overseer, was held to be within the 5th section of that act, which requires it to be executed by the *greater* part of the churchwardens and overseers. The pauper served his master under such a binding for two years, and resided in his master's parish. The appellants objected to the indenture, that it was signed by one churchwarden and *one overseer* only; and they then proved the registry of appointments of churchwardens for the parish of C. whereof the churchwarden and overseer were such churchwarden and overseer; that in the year when the above indenture was executed only *one* churchwarden was appointed for that parish, and it was admitted that he was the only churchwarden of the parish the year throughout. It was further proved, that for forty years preceding, the practice had invariably been in the above parish to appoint only one churchwarden. The question submitted to the Court was, whether such indenture of apprenticeship, made and executed

(*a*) Mr. Evans, in his Collection of Statutes, observes upon this case, "I have never been able to consent to the correctness of this decision, because the presumption is always to be made according to the general course and operation of the law; and if the appointment of one churchwarden would be *primâ facie* void, the existence of a special custom to support it would seem to require positive proof."

during the time when the parish had but one churchwarden, was a valid instrument or not? The cases of *R.* v. *Hinckley*, 12 *East*, 361, and *R.* v. *All Saints, Derby*, 13 *East*, 150, were cited. Lord *Ellenborough*, C. J., said, "Generally speaking, there are two churchwardens; but I think that the legislature used the word churchwardens here in the plural number, not as requiring that there should be two, but as speaking of the whole body of officers of that description, of whatever number that body be constituted. By custom there may be only one churchwarden in a parish, and if so, it is absolutely necessary that all the powers of the 43 Eliz. should be vested in him, or otherwise the act would be nullified in all those parishes in which such a custom prevailed. The act does not expressly require two churchwardens, and the inconvenience that would necessarily result from adopting that construction of the statute is sufficient to induce me to reject it altogether." *Bayley*, J. "The word churchwardens in the plural number is here used because the legislature were aware that there were generally two. It is as if they had said, 'all churchwardens, whether one or more.' Order of sessions confirmed." See the 1 & 2 Geo. IV. c. 32, s. 1, as to indentures executed before the 28th May, 1821.

1. Mode and Term of Binding

But where a parish indenture was executed by two persons, styling themselves churchwardens and overseers, one of whom was also sole churchwarden, the binding was held insufficient; for the stat. 43 Eliz. c. 2, required, that there shall be two overseers distinct from the churchwardens. (*R.* v. *All Saints, Derby*, 13 *East*, 143.)

This decision, however, procured the enactment of the 51 Geo. III. c. 80, s. 1, (*ante*, 217.) And it has been since held, that an indenture signed by two parish officers, one of whom acted in the double capacity of churchwarden and overseer, is valid under this act, and that such act extends not only to cases where both the parish officers act in a double capacity, but to those also where only one of them is in that situation. (*R.* v. *St. Margaret's, Leicester*, 2 *B. & Ald.* 200.) In that case, W. B. was bound apprentice by indenture to R. W., which witnessed that T. C. and J. I., churchwardens of the parish of F., and the said T. C. and F. G., overseers, placed W. B. apprentice, &c., but it was executed by T. C. and F. G. only. It appeared that L. C. and J. I. were the two churchwardens of F. at the time when the said T. C. and F. G. were appointed overseers. It was agreed that this indenture was within the 51 Geo. III. c. 80, and therefore valid. *Et per Curiam.*—"It is admitted, that if both these persons had been churchwardens as well as overseers, the case would be within the act; but the statute is remedial—it ought to be construed liberally. We do not therefore put a forced construction upon its provisions when we decide that it extends to the case of a defect in one parish officer only, as well as to cases where both the parish officers act in a double capacity. (And see *R.* v. *Stoke Golding*, 1 *B. & Ald.* 173.)

The churchwardens of the parish at large (in which the township is situated) need not join in the execution of an indenture of apprenticeship, executed by the overseers of a township which has no churchwardens or chapelwardens, and maintains its own poor separately. (*R.* v. *Nantwich*, 16 *East*, 228.)

See further the 54 Geo. III. c. 107, s. 1 & 2, *ante*, 218, 219, and the 3 & 4 Will. IV. c. 63, s. 2, *ante*, 220.

Allowance by justices.

Where master resides in same county in which the binding parish is.

Allowance by Justices where Master resides in same County in which the Binding Parish is.]—The stat. 43 Eliz. c. 2, s. 5, *ante*, 212; 56 Geo. III. c. 139, s. 1, *ante*, 213; 3 & 4 Will. IV. c. 63, s. 3, *ante*, 220; and 4 & 5 Will. IV. c. 76, s. 61, *ante*, 221; point out the mode of allowance of the binding by the justices where the child is bound apprentice to a master in the same county in which the binding parish is situated.

It is requisite, under 43 Eliz., that one of the justices should be of the quorum; and where in a special order of sessions the question was, whether a boy bound over by justices (the boy being no party to the indenture) had gained a settlement, it having been stated only that his binding was allowed and approved of by two justices generally, and for this omission the Court quashed the order. (*R.* v. *Woolstanton*, 2 *Stra.* 1110; *Burr. Set. C.* 129.)

4. *Mode and Term of Binding.*

The assent of the justices being in its nature an act of *judgment*, it is, it seems, indispensably necessary that they should be and confer together when their assent is given; for where an indenture was separately signed by two justices, and they neither assented nor signed at the same time, nor in the presence of each other, it was held void, and that no settlement could be gained by service under it. In the case referred to, Lord *Kenyon*, C. J., said, "The rule has long been settled, that the concurrence of justices together is not necessary where the act to be done is merely *ministerial*, but they must confer together and form a joint opinion where the act is of a *judicial* nature; and there is no doubt that this is a case of the latter description." (*R.* v. *Hamstall Redware*, 3 *T. R.* 381; 1 *Bott*, 620.)

It is sufficient, however, although one magistrate sign the indenture when alone, if he be afterwards present when the other executed it, and they both agreed to the propriety of the measure. (*R.* v. *Winwick*, 8 *T. R.* 454; 1 *Bott*, 625; more fully noticed, title "*Poor*," Vol. IV.; and see *R.* v. *Stotfold*, 4 *T. R.* 596.)

And where a master had executed the counterpart of an indenture, and afterwards appealed, the Court of Q. B. held, that the sessions had done right in rejecting parol evidence, which was offered to show that at the time when the counterpart was executed by him, the indenture and counterpart were signed by one justice only, though the indenture when produced appeared to have been signed and allowed by two justices; the appellant by having executed the counterpart was estopped, and could not be permitted to contradict his own deed. *Willes*, J., inclined to think it was sufficient if the justices gave their assent at any time before the appeal. (*R.* v. *Saltern*, *Cald.* 444; 1 *Bott*, 613, S. C.; see *R.* v. *Forrest*, 3 *T. R.* 38.)

An indenture of apprenticeship sufficiently declares the consent of the proper justices, by describing them of the "said county." (*R.* v. *Hinckley*, 1 *B. & Ald.* 273: more fully noticed, *post*, "*Poor*," Vol. IV.) And where by a parish indenture, which purported to be made between the churchwarden and overseers of the parish of D. in the county of Northampton, of the one part, and A. B., of Countesthorpe, in the county of Leicester, of the other part, it was witnessed that the said churchwarden and overseers of the parish of D., with the consent of two of his majesty's *justices of the peace for the said county dwelling in or near the said parish*, had bound, &c.: the justices, in their written consent in the margin of the indenture, described themselves as justices of the county *aforesaid*: it was held, that the words *county aforesaid* had the same meaning as the words *said county* in the body of the indenture; and that it sufficiently appeared by the reference to the latter words, that the consenting justices were justices of the county of Northampton. (*R.* v. *Countesthorpe*, 2 *Barn. & Adol.* 487.)

The allowance in this case should be *signed* by the justices on the indenture, but it need not necessarily be *sealed* by them, though it is usually so. (*R.* v. *St. Peter's*; *R.* v. *St. Paul's*, *infra*.)

Allowance by justices where the binding is to a master out of the county, &c. in which the binding parish is.

Allowance by Justices where the Binding is to a Master out of the County, &c. in which the Binding Parish is.]—In this case, under the second section of the 56 Geo. III. c. 139, *ante*, 214, the indenture must be allowed by four distinct justices, two of them being justices of the county from which the apprentice is to be bound, and the other two being justices of the county into which he is to be bound. But by the statute 3 & 4 Will. IV. c. 63, *ante*, 219, an indenture allowed by two justices acting as well for the county or district within which the place, by the officers of which the child shall be bound, shall be situated, as for the county or district within which the place shall be situated wherein such child shall be intended to serve, shall be as good as if allowed by two justices acting for each separately.

The justices in this case have a discretionary power to determine on the propriety of the binding generally, and not merely with regard to the fitness respectively of the master and apprentice. (*R* v. *Mills*, 2 *B. & Adol.* 578.)

Allowance by Justices where the Binding is at public parochial Expense.]—

4. Mode and Law of Binding.

Allowance by justices where binding at expense of public parochial fund.

The first ten sections of the 56 Geo. III. c. 139, apply to cases where the parish officers are the binding parties, but inasmuch as parish officers intending to bind a child apprentice to an improper person, or to a person not residing or carrying on business within a reasonable distance, might, without being actual parties to the indenture, in order to evade the provisions contained in those sections, advance the public parochial funds to the parents of such child in order to bind him out; to remedy that mischief, and to prevent the parish officers from doing indirectly that which the other sections prevented them from doing directly, the 11th section was introduced. "I think we must construe the enacting part of the 11th section to cases *where the execution of the indenture is directly or indirectly obtained by parish officers, so as in effect to be a binding by them.*"—Per *Tenterden*, C. J., in *R.* v. *St. Peter's, Hereford*, 1 *B. & Adol.* 916. Therefore where A., intending from charitable motives to apprentice a poor person, collected a sum of money for that purpose from several individuals, and among others from the overseers of three different parishes, though there was no evidence that the person belonged to either, and the sums given by the overseers were charged and allowed to them in their respective accounts, and with the sums so collected and with his own money A. paid the premium of apprenticeship; this was held not a binding by the parish officers within the act, and did not require the assent of two justices. (*Id.*)

So where the trustees of a charity established for placing out poor boys of a parish, the parish officers furnished him, from the parochial funds, with a suit of clothes, *all* of which would not have been given to him *at that time*, except with the prospect of his being bound; but no stipulation was made on the subject by or with the master: it was held, that the supply of clothes was not an expense incurred by the parochial funds within the 56 Geo. III. c. 139, s. 11, and therefore that the indenture did not require the approval of two justices. (*R.* v. *Quainton*, 3 *Nev. & M.* 289; 1 *Ad. & Ellis*, 133, S. C.)

Lands were devised for the relief of the poor of H., one-half of the revenue to be employed for the relief of widows, the other half towards binding out apprentices; the rents were received by the churchwardens, and not mixed with the poor's rate, but kept in a distinct account. A parishioner of H., not receiving parish relief, applied to the churchwardens to provide him with the means of apprenticing his son. The son was apprenticed, and the churchwardens paid the premium, costs of indenture, and expense of clothing the apprentice, out of the charity fund: Held, that this was not an indenture by which an expense was incurred by public parochial funds within 56 Geo. III. c. 139, s. 11, and therefore not void for want of the approval of two justices according to that statute. (*R.* v. *Halesworth*, 3 *B. & Adol.* 717.)

And in a similar case, were lands were devised to the churchwardens and overseers of L. and their successors, upon trust to apply the rents towards educating twenty poor children, and a part thereof yearly towards apprenticing eight of such children, to be chosen out and allowed by the said churchwardens and overseers and the principal inhabitants:—Held, that this also was not a public parochial fund within the meaning of the act. (*Id.*)

But where, before the execution of an indenture, the master said that the intended apprentice should have better clothes, the apprentice then applied to the parish officers, who agreed to give him 2*l.* on the execution of the indenture, for the purpose of buying clothes, which they did accordingly; it was held, that the money paid by the parish officers was an expense incurred by reason of an indenture of apprenticeship, within the meaning of the 56 Geo. III. c. 139, s. 11, and therefore that the indenture required the assent of two justices. (*R.* v. *Mattishall*, 8 *B. & Cres.* 733; 3 *M. & R.* 386, S. C.; more fully noticed, *post*, "*Poor*," Vol. IV.)

Where an apprentice is bound out of a parish by his father, but part of the expense is paid out of the parochial funds, the indenture must be approved of by two justices. (*R.* v. *Stoke Damerel*, 1 *M. & R.* 458; 7 *B. & Cres.* 563, S. C.)

It may be observed that the 11th section of the 56 Geo. III. c. 139, extends only to indentures of apprenticeship of *poor children;* and, therefore,

4. *Mode and Term of Binding.*

an indenture whereby a person of the age of twenty-four is bound apprentice, part of the premium being paid out of the public parochial funds, does not require the assent of two justices. (*R.* v. *The Inhabitants of St. John, Bedwardine*, 2 *Nev. & M.* 86; 5 *B. & Adol.* 169, S. C.)

And though an infant be a pauper in the parish workhouse at the time of the binding and the parish officers pay the premium, still it is not necessary for them to sign the indenture, or that the justices should assent thereto, if the infant be not a *parish* apprentice within the meaning of the 43 Eliz. c. 2. (*R.* v. *Arundel*, 5 *M. & Sel.* 257.)

The allowance of the indenture to which the parish officers are actual parties is required, by the 56 Geo. III. c. 139, s. 1 (*ante*, 213), to be *signed* by two justices, but it need not be *under seal*. The allowance, however, of an indenture to which the parish officers are *not* parties, but where they have directly or indirectly *procured the binding*, and in respect whereof some expense has been expressly incurred by the *public parochial funds*, is required, by the 11th section of that statute (*ante*, 216), to be *sealed* as well as *signed* by two justices, or it will be void *ab initio*, and service under it will confer no settlement. This will appear from the cases of *R.* v. *St. Peter's, Hereford*, 1 *B. & Adol.* 916; *R.* v. *St. Paul's, Exeter*, 10 *B. & Cres.* 12; 5 *M. & R.* 94, S. C.; *R.* v. *Stoke Damerel*, 1 *M. & R.* 458; 7 *B. & Cres.* 563; 1 *M. & R. M. C.* 155, S. C.; which will be found more fully noticed while treating of Settlements by Apprenticeships, *post*, "*Poor*," Vol. IV.

Stamp on.

Stamps.]—As to the stamp in general, see *post*, "*Poor*," Vol. IV. the indenture is in general exempt from it. It is unnecessary to set out the premium in words at length in an indenture relating to a *parish* apprentice. (*R.* v. *Oadby*, 1 *B. & Ald.* 477; 1 *Salk.* 68.)

Appeal.

Appeal.]—As to the right of appeal, see *ante*, 213, 216.

V. Assignment, Discharge, and Settling Disputes as to Parish Apprentices.

Assignment.

We have already noticed how far the assignment of apprentices in general is sanctioned and valid, *ante*, 195, 196. In most cases the assignment cannot be supported without the consent of all parties, which in the case of parish indentures includes the master and the parish officers.

In general.

In general a *parish* apprentice under age cannot be *discharged* by his consent; (*R.* v. *Austrey*, 1 *Burr*, 441;) even though his father consent; (*R.* v. *Langham*, *Cald.* 126;) as he is bound out by the parish officers under a special authority, they ought to be consulted and give their assent to his discharge, otherwise the whole policy of the 43 Eliz. might be defeated.

But such assent is not necessary after he has attained the age of twenty-one, at which time the master and apprentice may cancel the indentures by mutual agreement. For at twenty-one the apprentice is *sui juris*, and his discharge from the indenture concerns at that time himself and his master only, and there is no necessity to procure the assent of the parish officers. (*R.* v. *Eccleshall Bierlow*, 1 *Bott*, 608.)

We have already seen, *ante*, 196, as to what amounts to a cancellation of the indentures.

The assignment and vacating of *parish* indentures is provided for and regulated in most cases by the following legislative enactments of 32 Geo. III. c. 57; 56 Geo. III. c. 139; and by those enactments relating to the discharge of apprentices in general in cases of ill-treatment, misconduct, &c. which we have already noticed, *ante*, 202, 211.

On death of master.

On death of Master.]—At *common law* by the death of the master the agreement for the service by the apprentice is put an end to, but the covenant on the part of the master still continues in force, as far as his assets will extend

(see *ante*, 199); so that thereby the apprentice gets all the benefit of being provided for without doing any thing in return (*ante*, 199).

5. *Assignment and Discharge, &c. of.*

This is remedied in some cases by the 32 Geo. III. c. 57. By sect. 1 of which act, after reciting, "Whereas by an act, passed in the forty-third year of the reign of Queen Elizabeth, intituled '*An Act for the Relief of the Poor*,' it is (amongst other things) enacted, that it shall be lawful for the churchwardens and overseers of the poor of any parish, or the greater part of them, by the assent of two justices of the peace, to bind any children, whose parents they shall judge to be not able to keep and maintain such children, to be apprentices, where they shall see convenient, till such man child should come to the age of twenty-four years, and such woman child to the age of twenty-one years, or the time of her marriage, the same to be as effectual to all purposes as if such child were of full age, and by indenture of covenant bound him or herself; and whereas, by an act made in the eighth and ninth years of the reign of King William, intituled '*An Act for Supplying some Defects in the Laws for the Relief of the Poor of this Kingdom*,' after reciting, that there being doubts whether the persons to whom such children were to be bound, under and by virtue of the said statute of the forty-third year of the reign of Queen Elizabeth, were compellable to receive such children as apprentices, that law had failed of its execution, it was therefore enacted, that where any poor children should be appointed to be bound apprentices, pursuant to the said act of Queen Elizabeth, the persons to whom they are so appointed to be bound apprentices shall receive and provide for them according to the indenture signed and confirmed by the two justices of the peace, and also execute the other part of the said indentures, under the penalty, in case of refusal, of the forfeiture of ten pounds for every such offence, to be levied of the goods of the offender, in the manner mentioned in the said act; and whereas, by an act passed in the eighteenth year of the reign of his present majesty, intituled '*An Act to amend such part of an Act, made in the Forty-third Year of the Reign of Queen Elizabeth*,' intituled '*An Act for the Relief of the Poor*,' as relates to the binding of parish apprentices,' it was enacted, that when any man child should be bound to be an apprentice, by virtue of the said act made in the forty-third year of the reign of Queen Elizabeth, such child shall be bound to be an apprentice for no longer term than till he shall come to the age of twenty-one years; and whereas in such indentures of apprenticeship, it hath been usual to insert several agreements and covenants to be done and performed by the several parties thereto; (that is to say) an agreement on the part of the apprentice, that he will faithfully serve his master during the term of such apprenticeship; and also several covenants on the part of the master, for himself, his executors and administrators, that he the said master will teach or cause to be taught, such apprentice in the business of husbandry, or in the craft, mystery or occupation which such master then useth, as the case may be; and that such master shall also, during the term of such apprenticeship, find and allow unto such apprentice sufficient meat, drink, apparel, lodging and all other things needful for an apprentice, during such term: and whereas, in the event of the death of the master during the term of such apprenticeship, the agreement for service on the part of the apprentice is at an end, but the covenant for maintenance on the part of the master still continues in force, as far as the master's assets will extend, or doubts have arisen with respect thereto, and, in consequence thereof, such apprentices do frequently, on the death of their master, leave their master's house, and, after living in idleness, return again and become a burden on their master's effects, and so from time to time as they think proper, which is attended with great inconvenience and hardship to the family and personal representatives of such master, and is at the same time an inducement to such apprentice to continue in a disorderly and idle course of life: and whereas the several powers given to justices of the peace for the better ordering of parish apprentices, by the several acts of parliament made for that purpose, do cease and determine on the death of the master, for which a remedy ought to be provided: and whereas several other regulations are necessary to be made respecting parish

32 Geo. 3, c. 57.
43 Eliz. c. 2.

8 & 9 Will. 3, c. 30, and

18 Geo. 3, c. 47, recited.

5. *Assignment and Discharge, &c. of.*

32 Geo. 3, c. 57. Covenants where no more than 5*l.* given, to continue no longer than three months after death of master, &c.

apprentices:" it is enacted, "that in case of the death of any master or mistress of any parish apprentice, during the term of such apprenticeship, upon the binding out of which apprentice no larger sum than five pounds has been or shall be paid, [or by 5 Vict. c. 7, *ante*, 210, where no premium has been paid,] such covenant as is before mentioned for the maintenance of such apprentice, inserted in the indenture of apprenticeship by which such apprentice shall have been or shall be bound, shall not continue and be in force for and during any longer time than for three calendar months next after the death of such master or mistress, and that during such three calendar months such apprentice shall continue to live with and serve as an apprentice the executors and administrators of such master or mistress, some or one of them, or such person or persons as such executors or administrators, some or one of them, shall appoint; and the master or mistress whom such apprentice shall accordingly serve during the said three calendar months, and also such apprentice, shall during that time be subject and liable to all the laws which are or shall be in force for the better government and regulation of masters and parish apprentices; and that in all such parish indentures of apprenticeship as aforesaid, which shall be made from and after the first day of July, 1792, there shall be annexed to the covenant in such indentures to be entered into on the part of the master or mistress of such apprentice, for such maintenance as aforesaid, a proviso declaring that such covenant shall not be made to continue and be in force for any longer time than for three calendar months next after the death of such master or mistress, in case such master or mistress shall die during the term of such apprenticeship; which proviso may be in the form or to the effect mentioned in the schedule hereunto annexed, marked with the letter A.; (*a*) and in case such proviso shall happen to be omitted in any such indenture, the covenant therein contained on the part of the master, for the maintenance of the apprentice, shall be deemed and taken to continue and be in force for no longer time than for three calendar months next after the death of such master or mistress, in case such master or mistress shall die during the term of such apprenticeship; any thing in any such covenant to the contrary notwithstanding."

Such a proviso to be inserted in indenture.

If omitted, covenant to continue no longer in force.

In three months after death of master, two justices may order apprentices to serve residue of terms with certain other persons.

Sect. 2, reciting "And whereas it is just and reasonable that such apprentice as aforesaid, in case of his master's death during his apprenticeship, should be obliged, during the term of his apprenticeship, to make some satisfaction by his labour to the family or representatives of his deceased master, for the advantages he has received from his apprenticeship in his childhood, when his services could not be equal to the expenses of his maintenance;" enacts, "That within such three calendar months after the death of such master or mistress, it shall and may be lawful for any two justices of the peace of the county, city, town, riding, division or place where such master or mistress shall have died, on application made to them by the widow of such master, or by the husband of such mistress, or by any son or daughter, brother or sister, or by any executor or executrix, administrator or administratrix, of such master or mistress, by indorsement on any such indenture of apprenticeship, or the counterpart thereof, or by any other instrument in writing, (which indorsement or instrument may be in the forms or to the effect mentioned in the schedule hereunto annexed marked with the letters B. and C. (*a*), to order and direct that such apprentice shall serve as an apprentice any one of such persons so making such application as aforesaid, (such person having lived with and having been part of the family of, such master or mistress at the time of his or her death,) as the said justices shall in their discretion think fit, for and during the residue of the term mentioned in such indenture of apprenticeship; and the person obtaining such order shall declare his acceptance of such apprentice, by subscribing his or her name to such order; and that from and after such order shall be made, the executors and administrators, and the personal assets, estate and effects of the master or mistress so dying as aforesaid shall be released and discharged

How order to be made, &c.

How master to declare his acceptance of. His liabilities.

(*a*) See form (No. 19), *post*.

(*a*) See forms (No. 29, 30), *post*.

of and from any promise or covenant whatsoever, contained in any such indenture of apprenticeship, on the part of such master or mistress, his or her executors or administrators, to be done and performed; and the person obtaining the same shall be, and be deemed and taken to be, the master or mistress of such apprentice, in like manner as if such apprentice had been originally bound to such master or mistress; and that such last-mentioned master or mistress, his or her executors and administrators, each and every of them, shall be held and bound by the several promises and covenants contained in any such indenture of apprenticeship on the part of the master or mistress therein-named, his or her executors or administrators, to be done and performed, in like manner as if such master or mistress obtaining such order as aforesaid had duly executed the counterpart of such indenture; and that such master or mistress and apprentice shall be subject and liable to the several penalties, provisions and regulations which shall then be in force for the better government and good order of masters and parish apprentices; and that all justices of the peace shall have the like powers and authority with respect thereto as they shall then have by any act or acts of parliament relating to parish apprentices."

5. *Assignment and Discharge, &c. of.*

32 Geo. 3, c. 57.

Sect. 3. "All and singular the regulations and provisions hereinbefore made, and directed to take place on the death of the original master or mistress, shall be deemed and taken to relate to the like event of the death of any such subsequent master or mistress, and to their several relations and representatives before enumerated, from time to time, as often as the case shall happen, during the continuance of the term mentioned in any such indenture of apprenticeship."

Provisions to take place on death of original master to extend to subsequent one.

Sect. 4. "In case no such application shall be made as aforesaid within three calendar months next after the death of such master or mistress, or in case such two justices to whom any such application as aforesaid shall have been made, shall not think fit that such apprenticeship should be continued, then the said apprenticeship shall be determined, and the indenture of apprenticeship and covenants therein contained shall be at an end, in like manner as they would have been at the expiration of the term therein mentioned."

If no application made, or justices do not think fit that apprenticeship should continue, it shall be ended.

Sect. 5 "Nothing herein contained shall extend, or be construed to extend, to any parish apprentice, but to such only as shall be living with and shall make part of the family, or shall be in the actual employment of such original master or mistress, or of any subsequent master or mistress appointed under and by virtue of the several provisions of this act at the time of the death of any such masters or mistresses respectively." (See *R.* v. *Inhabitants of Sheepshead*, 15 *East*, 59.)

Act to extend to parish apprentices only living with master.

Enforcing Covenant for Maintenance.]—Sect. 6, reciting that "much difficulty and delay must necessarily happen in bringing an action upon the covenant for maintenance before mentioned contained in any such indenture of parish apprenticeship;" enacts, "That in case any such original master or mistress as aforesaid, [where no premium, 5 Vict. c. 7, or not more than 5*l.* premium has been given, 32 Geo. III. c. 57, s. 9,] or any master or mistress appointed under or by virtue of this act, shall, during the term of any such parish apprenticeship as aforesaid, or if the executors or administrators of such masters or mistresses, any or either of them, having assets, shall, during such three calendar months as aforesaid, refuse or neglect to maintain and provide for any such apprentice, according to the terms of such covenant, it shall and may be lawful for any two justices of the peace of the county, city, town, riding, division, or place in which the parish or place shall lie, to which such apprentice shall belong, on complaint of such apprentice, or of the churchwardens and overseers of the poor of such parish or place, by warrant under their hands and seals, to levy, by distress and sale of the personal estate and effects or assets of such master or mistress respectively, such sum or sums of money as shall be necessary for the maintenance and clothing of such apprentice, and as shall also be necessary to reimburse to the churchwardens and overseers of the poor of such parish or place any sum or sums of money that shall have been reasonably expended by them for that purpose."

Justices may order sums for maintenance, &c. to be levied by distress.

5. *Assignment and Discharge, &c. of.*

32 Geo. 3, c. 57.

Apprentices may be assigned with consent of two justices.

Assignment of Apprentice.]—Sect. 7 reciting that it "frequently happens that persons are compellable, under and by virtue of the act of the 9th and 10th years of King William, to take a greater number of parish apprentices than it is convenient for them to maintain or employ in their own families, and they are therefore forced to place out or assign over such apprentices to other persons; and it is proper that such assignment should be legally made, under the inspection and control of the magistrates, as well for the benefit of the apprentice, as that the original master may be discharged from his covenants in respect of such apprentice; and it is fit that the person to whom such assignment shall be made, and also the apprentice, should be made subject to the ordinary jurisdiction of justices of the peace with respect to masters and parish apprentices;" enacts, "That it shall and may be lawful for any master or mistress of any such parish apprentice as aforesaid, [where not more than 5*l.* premium, sect. 9, or no premium, 5 Vict. c. 7, has been given,] by indorsement on the indenture of apprenticeship, or by other instrument in writing, by and with the consent of two justices of the peace of the county, city, town, riding, division, or place where such master or mistress shall dwell, testified by such justices under their hands, to assign such apprentice to any person who is willing to take such apprentice for the residue of the term mentioned in such indenture of apprenticeship: provided always, that such person to whom such apprentice is intended to be assigned shall at the same time, by indorsement on the counterpart of such indenture, or by writing under his or her hand, stating the said indenture of apprenticeship and the indorsement and consent aforesaid, declare his or her acceptance of such apprentice, and acknowledge himself, herself, his or her executors and administrators, to be bound by the agreements and covenants mentioned in the said indenture on the part of the master or mistress of such apprentice to be done and performed; which indorsement or instrument may be in the forms or to the effect mentioned in the schedule hereunto annexed; (*post*, Forms, Nos. 31, 32;) and in such case such apprentice shall be deemed and taken to be the apprentice of such subsequent master or mistress to whom such assignment shall be made, to all intents and purposes whatsoever, and so from time to time, as often as it shall be necessary or convenient for any such subsequent master or mistress to part with any such apprentice; and all justices of the peace shall have the like power and authority, in the several cases last mentioned, with respect as well to the subsequent master or mistress, masters or mistresses, as to the apprentice, as such justices shall then have by any law for the better regulation of parish apprentices." See the 56 Geo. III. c. 139, ss. 9 and 10, *post*, 237, prohibiting the assignment or discharge of parish apprentices without the consent of justices; see also the decisions, *post*, 287.

Assignment by indorsement of master on indenture.

See also 42 Geo. III. c. 46, s. 5, *post*, 239, as to the entry of the assignment in the overseers' book.

On insolvency, &c. of master, justices may discharge apprentices.

Discharge of, on Insolvency, &c. of Master.]—Sect. 8, reciting "That no express provision has been made for the discharging of any such *parish apprentice* from a master or mistress who is become insolvent, or is so far reduced in his or her circumstances as to be unable to employ or maintain such apprentice," enacts, "That it shall and may be lawful for two justices of the peace of the county, city, town, riding, division, or place where any such master or mistress shall live, on the application of such master or mistress, requesting that any such apprentice may be discharged, for the reasons aforesaid, to inquire into the matter of such allegations, and to discharge any such apprentice from his apprenticeship, in case the said two justices shall find such allegations to be true."

These provisions not to extend to apprentices where more than 5*l.* given.

The enactments not to extend to apprentices where more than 5*l.* given.

Sect. 9. Nothing herein shall extend to any parish apprentice with whom more than 5*l.* shall be given, but the same shall remain subject to the like rules and regulations as if this act had not been made. (The provisions of this act are extended by 5 Vict. c. 7, to cases where no premium has been paid, *ante*, 210.)

Stamp.]—Sect. 10. No indorsement made in pursuance of this act shall be chargeable with any stamp duty.

5. *Assignment and Discharge, &c. of.*

32 Geo. 3, c. 57.

Stamp on assignment.

The assignment under this act, where the original premium was within the limit, is exempted from stamp, whatever the consideration for the assignment may be. Though in a *voluntary* binding without consideration, and where *more than* 5*l.* is given in a *parish binding*, the assignment is not exempt from stamp. See the exception in the exemption in schedule, 55 Geo. III. c. 184, when money is given *to* the new master.

The assignment need not state the premium, if any given. (*R.* v. *Ide*, 2 *B. & Adol.* 866.)

Order to be made after discharge.

Order of Justices after Discharge.]—By sect. 11, "Where any *parish* apprentice shall be so discharged, such two justices may order (*a*) such master or mistress to deliver up to such apprentice his or her clothes and wearing apparel, and also to pay to the churchwardens or overseers of the parish or place to which such apprentice shall belong, some or one of them, any sum not exceeding 10*l.* to be applied by them, some or one of them, under the order of such justices, for the again binding out such apprentice so discharged, or otherwise for his or her benefit as to such justices shall seem meet; and also to pay any sum not exceeding 5*l.* in case such master or mistress shall refuse to deliver up such clothes and wearing apparel; and on his or her refusal to pay the sum so ordered, or either of them, or any part thereof, such justices may levy the same by distress, together with the reasonable expenses of such distress. And such justices may, if they think fit, compel such churchwardens and overseers, some or one of them, to enter into a recognizance for the effectual prosecution by indictment of such master or mistress, for such ill-treatment of any such apprentice so discharged as aforesaid; and may also order that the costs and expenses of the prosecutions shall be paid or reimbursed to such person entering into such recognizance as aforesaid; one moiety thereof out of the poor rates of the parish or place to which such apprentice shall belong, and the other moiety out of the county rate in which such parish or place shall lie. And in case the churchwardens and overseers shall refuse to pay such their moiety, such justices may levy the same by distress (*b*) on the goods and chattels of such churchwardens and overseers, or any of them, together with the reasonable expenses of such distress."

Recognizance by churchwardens, &c. to prosecute.

Costs of prosecution.

Moiety to be paid by county.

Appeal.

Appeal.]—Sect. 12. "It shall and may be lawful for such master or mistress, from whom any parish apprentice shall be discharged under and by virtue of the act, 20 Geo. II., to appeal against the order made for such discharge, and also against any such order made for his or her payment of any such sum or sums of money in consequence thereof, or for his or her payment of any sum or sums of money in lieu of a subsequent binding, under and by virtue of the provisions of this act, to the next general quarter sessions of the peace for the county, city, riding, division, or place where such orders, any or either of them, shall be made, and upon such appeal, the said court of general quarter sessions shall finally determine the same, and in their discretion allow to all parties their reasonable costs; and no such distress for enforcing the payment of any such sum or sums of money as are last-mentioned, shall be taken until after the general quarter sessions of the peace, to be holden next after any such order as aforesaid shall be made, in case the person who is ordered to pay the same shall, within seven days after notice given to him or her of such order being made, give notice to such churchwardens and overseers of the poor, some or one of them, of such intended appeal; and in case such person shall fail to appear in support of his appeal at such general quarter sessions, then the sum of 40*s.* shall be added to the expenses of the distress before directed to be taken and levied accordingly." See in general, title "*Appeal*," *ante*.

Distress not to issue on notice of appeal.

If party does not appear, 40*s.* to be added to expenses of distress.

(*a*) See forms (No. 36, 37), *post*. (*b*) See form (No. 38), *post*.

5. *Assignment and Discharge, &c. of.*

32 Geo. 3, c. 57. Appeal in other cases. Costs.

Sect. 14. "That if any person shall be aggrieved by any matter or thing done, or omitted to be done by any churchwarden or overseer of the poor, or by any of his majesty's justices of the peace, or by any other person or persons whomsoever, under and by virtue of this act, (besides such matters or things for which an appeal is herein-before specially given,) it shall and may be lawful for such person or persons to appeal to the next general quarter sessions of the peace, where the same shall be heard and finally determined; and such court may award reasonable costs and expenses to either party before them."

Apprentices discharged for ill-behaviour may be committed to house of correction.

Justices may commit Apprentice when discharged for ill Behaviour.]—Sect. 13, reciting, that by 20 Geo. II. c. 19, (*ante*, p. 206, 210,) it is enacted, "That it shall and may be lawful to and for two justices, upon application or complaint made upon oath by any master or mistress against any parish apprentice, touching or concerning any misdemeanor, miscarriage, or ill-behaviour of such apprentice, to hear and determine the same, and punish the offender in such manner as is therein mentioned, or otherwise to discharge such apprentice from his apprenticeship, and it is expedient to prevent the expectation of such discharge being an inducement to such ill-behaviour on the part of the apprentice;" enacts, "That in all cases where any *parish* apprentice shall be discharged by two justices, under and by virtue of the said last-mentioned act, from his or her apprenticeship, on account of any misdemeanor, miscarriage, or ill-behaviour on the part of such apprentice, that it shall and may be lawful for such two justices, if they think proper, by warrant under their hands and seals, to punish such offender by commitment (*a*) to the house of correction, there to remain and be corrected and kept to hard labour for a reasonable time, not exceeding three calendar months, as to such justices shall seem meet."

On removal, &c. of master out of county or forty miles from parish where apprentice bound, he to give notice to parish where apprentice resides, &c.

Discharge, &c. on Removal of Master.]—By 56 Geo. III. c. 139, s. 8, "If any person or persons to whom any child shall be bound apprentice by the overseers of the poor of any parish or place, shall after the said first day of October remove his, her, or their residence or establishment of business out of the same county, or forty miles from the parish or place wherein the same was when such child was bound apprentice, such person or persons shall, at least fourteen days previous to such removal, give a written notice thereof to the churchwardens or overseers of the poor of the place where such apprentice shall then reside, unless such person or persons shall reside in such place under certificate: and in that case such persons shall give the like notice to the churchwardens or overseers of the poor of the place where such apprentice shall then be legally settled; and which churchwardens and overseers, and also the master or masters, mistress or mistresses of such apprentice, shall cause such apprentice to appear before two of his Majesty's justices of the peace for the county or district within which such apprentice shall be then serving, who shall inquire whether it may be fit and proper that such apprentice should continue in the service of such person or persons, or be discharged therefrom, or bound or assigned over to any other person or persons, and shall thereupon make order (*b*), either for the continuance of such apprentice with such person or persons, or for the discharge of such apprentice, or for the binding or assigning of such apprentice to any other person, as to them in their discretion shall seem meet; and if they shall see fit, shall also require the person or persons so giving notice of removal to pay the amount of the premium received with such apprentice, or such portion of it as to them shall seem meet, for the expense of assigning or binding such apprentice to any other person to be approved by the said justices; and the person or persons to whom such apprentice shall be so bound or assigned shall be subject to the same rules and regulations as the person or persons to

Apprentice to appear before two justices, who to order apprentice's continuance, &c.

Liability of new master.

(*a*) See in general, *post*, "*Commitment in Execution.*"

(*b*) See form (No. 23), *post*.

whom such apprentice shall be originally bound; and in case any such master or masters, mistress or mistresses, shall remove as aforesaid, and shall take any such apprentice to any other place, without such order as aforesaid, or shall wilfully abandon and leave any such apprentice without giving such notice as aforesaid, every person so offending shall forfeit the sum of 10*l.* for every such apprentice, to the churchwardens and overseers of the poor of the parish, township, or place wherein, at the time of such removal or taking, the apprentice shall have been legally settled, for the use of the poor of the same parish, township, or place; provided an information shall be exhibited for such offence within three calendar months next after the commission of the same."

5. *Assignment and Discharge, &c. of.*

56 Geo. 3. c. 139.

Penalty for his abandoning, &c. apprentice.

Limitation of prosecution for.

Consent of Justices to assignment or dismissal in all cases requisite.]—Stat. 56 Geo. III. c. 139, s. 9, after reciting that "Whereas it may be expedient that those to whom parish apprentices are bound or assigned should be empowered to place out or assign over such apprentices to others, and it is proper that such placing out or assignment should in all instances be under the inspection and control of the magistrates; and it is fit that the person to whom such putting out or assignment shall be made, and also the apprentice, shall be made subject to the ordinary jurisdiction of justices of the peace with respect to masters and parish apprentices; and it is inexpedient that any master or mistress should in any way discharge or dismiss from his or her service any parish apprentice without the consent of such justices;" enacts, "That from and after the 1st of October, in the year 1816, it shall not be lawful for any master or mistress to put away or transfer any parish apprentice to any other, or in any way to discharge or dismiss from his or her service any parish apprentice without such consent of justices as is directed in an act passed in the thirty-second year of the reign of Geo. III., intituled '*An Act for the further Regulation of Parish Apprentices;*' *ante*, 234, and that no settlement (*a*) shall be gained by any service of such apprentice, after such putting away or transfer, unless such service shall have been performed under the sanction of such consent as aforesaid."

Apprentices not to be assigned or dismissed without parties consent.

Settlement not gained without it.

This assignment must be executed by the master, or by some person legally authorised by him. Where the master was abroad, and the assignment was executed by his steward without any other authority than what might be implied from his often having done so before, and the expenses being allowed by the master in his accounts, the Court held the assignment to be bad, and that the apprentice gained no settlement under it; the master should exercise his discretion in making it, and it should therefore be executed either by himself, or by express authority from him. (*R.* v. *Spreyton*, 3 *B. & Ald.* 818.)

When a parish apprentice is bound into another parish by assignment of the indenture of apprenticeship, notice from the churchwardens and overseers of the first parish to those of the second is not requisite, under sect. 2 of the 56 Geo. III. c. 56. (*Ante*, p. 214; *R.* v. *Inhabitants of Exminster*, 1 *Nev. & Per.* 603; 6 *Ad. & Ell.* 598.)

Assignment and acceptance of a parish apprentice, in the following words: "The said T. M. doth hereby assign the said Elizabeth Matthews, (the apprentice named in the indenture), and the said M. P. doth hereby agree to accept the said Elizabeth Melhuish:" it was held that the misnomer did not render the acceptance a nullity. (*Ib.*)

The master of a parish apprentice not having work sufficient for him, proposed to him to go to a farm in a different parish, occupied by the master's

(*a*) Where a parish apprentice was assigned before the passing of 56 Geo. III. c. 139, but for want of consent of two magistrates in writing under 32 Geo. III. c. 67, s. 7, the instrument was not valid to confer a settlement; the Court of Queen's Bench held, that though the assignment might be for many purposes inoperative, yet that it manifested a consent of the first master to a service with the second, and rendered that a service under the original binding. (*R.* v. *Barleston*, 1 *D. & R.* 421; 5 *B. & Ald.* 780, S. C. And see *R.* v. *St. Petrox*, 4 *T. R.* 196, and *R.* v. *East Bridgeford*, *Burr.* S. C. 133; *R.* v. *Gwinear*, 1 *Ad. & Ell.* 152.)

5. *Assignment and Discharge, &c. of.*

56 Geo 3, c. 139.

sister. The pauper assented to the proposal, and agreed with her to work there for a twelvemonth for his meat and drink. He worked for her for four years and four months. During the first two years he received from her meat and drink. During the third and fourth years he received wages. It was held, first, that no settlement was gained by the service with the sister, the service not being under the indentures; and, secondly, there had been a putting away of the apprentice without the consent of the justices, within the meaning of the 9th section of 56 Geo. III., and that the pauper did not by his service with the sister gain any settlement by hiring and service. (*R.* v. *Shipton*, 8 *B. & Cres.* 88.)

So where a tailor to whom a parish apprentice was bound, not having work for him, agreed with a draper that he should work for him at the business of a tailor, in consideration of 5*s.* a week being paid to him (the first master) out of the boy's earnings: the court held this to be a putting away of the apprentice within the meaning of the act. (*R.* v. *Wainfleet, All Saints*, 9 *Law J.* 31 *m.*)

Penalty on discharging without such consent.

Sect. 10. "Any person or persons, who, after the 1st of October, 1816, shall put away or transfer any parish apprentice to another, or who shall in any way discharge or dismiss from his or her service any parish apprentice without such consent as aforesaid, shall forfeit a sum not exceeding 10*l.* for every apprentice so transferred."

Penalties how recoverable, &c. Appeal, &c.

Sect. 12 to 18 relate to the mode of recovering penalties under the act, and the right of appeal, &c. and will be found *ante*, 216, 217.

Discharging on complaints in general.

Discharging Indentures on Complaints between Master and Apprentice.]—We have already noticed the jurisdiction of justices as to discharging and settling disputes between and punishing masters and apprentices *in general*; and it will be found those considerations, in addition to the preceding, will, for the most part, be applicable to disputes between masters and *parish* apprentices. (See *ante*, 202 to 211.) See the 32 Geo. III. c. 57, s. 13, *ante*, 236, empowering justices to imprison a parish apprentice in case of his discharge for ill-behaviour.

VI. Registry of Parish Apprentices.

42 Geo. 3, c. 46.

By stat. 42 Geo. III. c. 46, after reciting the power given by the 43 Eliz. c. 2, to overseers of the poor to bind out poor children apprentices: and that "whereas it would tend to the benefit of the children so bound as apprentices, if the overseers of the poor were required to keep a register of all children who shall be so bound:" it is enacted, "That the overseers of the poor of every parish, township, or place, appointed by virtue of the said recited act, passed in the forty-third year of the reign of Queen Elizabeth, shall, from and after the 1st day of June, 1802, and they are hereby required, to provide and keep a book or books, at the expense of the said parish, township, or place, and to enter, or cause to be entered therein, the name of every child who shall be bound out by them respectively as an apprentice, together with the several other particulars, in manner and form required by this act, according to the schedule hereunto annexed; and every such entry, when made in the said register, shall be produced and laid before the two justices of the peace, who shall signify their assent to the indenture of apprenticeship of every such child, at the time when such indenture shall be laid before such justices for their assent, as required by the said recited act; and each entry in the said register shall, if approved of by such justices, be signed by them according to the form marked in the schedule." (*a*)

Overseers to keep a book for entering name of apprentices bound out by them.

Entry to be signed by two Justices.

Not providing such book, or neglecting to make such entries therein, &c.

Sect. 2. "If any overseer or overseers of the poor shall refuse or neglect to provide and keep such book or books, or to make such entry therein as before directed, or shall destroy, or permit, suffer, or cause to be destroyed, any such book or books, or shall wilfully and knowingly obliterate, deface,

(*a*) See form (No. 47), *post.*

or alter any such entry, so that the same shall not be a true entry of the several particulars hereby required, or shall wilfully and knowingly make a false entry therein, or shall so permit, suffer, or cause the same to be done, or shall not produce or lay such book or books before such justices as aforesaid for their signatures, or shall not deliver or tender, or cause to be delivered or tendered, such book or books to his, her, or their successor or successors in office, within fourteen days after the appointment of such successor or successors, or if any such successor or successors shall refuse or neglect to receive the same when offered or tendered to him or them by his or their predecessor or predecessors in office, then and in every such case every such person so offending shall for every such offence, on being convicted thereof before any two justices of the peace for the county, city, or place where the offence shall be committed, on the oath of any credible witness, (which oath such justices are hereby empowered and required to administer,) or on the voluntary confession of the party or parties, forfeit and pay a sum not exceeding 5*l.*, to be recovered by distress and sale of the goods and chattels of the offender or offenders, by warrant under the hands and seals of the justices before whom the offender or offenders shall be convicted, and the overplus (if any) of the money arising by such distress and sale shall be returned upon demand to the owner or owners of such goods and chattels, after deducting the costs and charges of making, keeping, and selling such distress; and such penalties and forfeitures shall be applied for the use of the poor of the parish, township, or place, for which such offender or offenders shall be overseer or overseers; and in case such sufficient distress cannot be found, or such penalties and forfeiture shall not be paid forthwith, it shall and may be lawful to and for such justices, by warrant under their hands and seals, and they are hereby required, to commit every such offender to the common gaol or house of correction of the county, city, or place where the offence shall be committed, there to remain without bail or mainprize for any time not exceeding one calendar month, unless such penalties and forfeitures shall be sooner paid and satisfied."

6. *Registry of.* 42 Geo. 3, c. 46.

Penalty.

Recoverable by distress. (*a*)

How applied.

Commitment.

Sect. 3. "It shall be lawful for any person or persons, at all seasonable hours, to inspect such book or books in the hands of the said overseer or overseers, and to take a copy of such entry in such book or books, upon payment of the sum of sixpence, except in case of any of his Majesty's justices of the peace acting in and for the said county, who shall be entitled at all such times to inspect such book *gratis;* and every such book shall be and be deemed to be sufficient evidence in all courts of law whatsoever, in proof of the existence of such indentures, and also of the several particulars specified in the said register respecting such indentures, in case it shall be proved to the satisfaction of such court that the said indentures are lost or have been destroyed."

Books may be inspected.

Books deemed evidence of indentures, &c. if lost.

Sect. 4. "The justices before whom any person shall be convicted by virtue of this act, shall cause the conviction to be drawn up in form L." (*b*)

Form of conviction.

Sect. 5. "Whenever any such apprentice shall be assigned or bound over to any other master or mistress by virtue of an act passed in the thirty-second year of the reign of Geo. III., intituled, '*An Act for the Further Regulation of Parish Apprentices,*' (*c*) then and in every such case the overseer or overseers, party or parties to the assignment of such apprentice, shall insert the name and residence of the master or mistress, to whom such apprentice shall be assigned or bound over as aforesaid, together with the other particulars, in the book or books herein directed to be provided and kept by such overseer or overseers; and for non-performance thereof, every such overseer or overseers shall be liable to the pains, penalties, and forfeitures incurred by this act, in like manner as if such apprentice had been originally bound to such master or mistress."

Entry of assignment, &c. to be made.

(*a*) See the 5 Geo. IV. c. 18, and in general, *post*, "*Distress by Justices' Warrant,*" Vol. II.

(*b*) See form (No. 48), *post.*

(*c*) *Ante*, 231.

6. *Registry of.*

Persons having like powers as overseers to bind out apprentices to comply with directions of act.

Sect. 6, reciting, that "By different acts of parliament the like powers are given to certain persons therein named, for binding out parish apprentices, as are given to the overseers of the poor;" enacts, "That such several persons shall be subject to the like pains, penalties and forfeitures for non-compliance with the several provisions and directions in this act contained for registering any parish apprentice bound out or assigned by them respectively, to which overseers of the poor are subject and liable by virtue of this act for non-compliance with such provisions and directions."

Appeal. (a)

Costs on.

Sect. 7. "If any person or persons shall think himself, herself, or themselves aggrieved by any thing done in pursuance of this act, it shall and may be lawful to and for such person or persons to appeal to the justices at the first general quarter sessions of the peace to be holden for the county or place where the cause of appeal shall arise, within four calendar months next after the cause of appeal shall have arisen, on giving to the person or persons appealed against ten days' notice of such appeal and of the matter thereof; and the justices at such sessions are hereby authorised and required to hear and determine the matter of such appeal in a summary way, and to grant such costs and expenses to either party as to them shall seem reasonable."

Incorporated District Apprentices.

Incorporate district apprentices.

Stat. 20 Geo. III. c. 36, s. 1, after reciting that "several acts of parliament have of late years been made and passed, for the better relief and employment of the poor in particular incorporated hundreds or districts, within that part of Great Britain called England, whereby power is given to bind poor children apprentices under certain restrictions therein mentioned: and whereas doubts have arisen, whether persons are compellable to receive and provide for such poor children as shall be appointed to be bound apprentices to them in pursuance of the said acts;" enacts, "That from and after the 24th day of June, 1780, the respective persons to whom any poor children shall be appointed to be bound apprentices, in pursuance of any act or acts of parliament made and passed for the better relief and employment of the poor in any particular incorporated hundreds or districts, within that part of Great Britain called England, shall, and they are hereby required to receive and provide for such children, according to the indentures to be executed by the directors and acting guardians of the poor for such respective hundreds or districts, for the binding of such poor children, in like manner as persons are now obliged by the laws in being to receive and provide for poor children appointed to be bound apprentices by churchwardens and overseers of the poor, with the assent of two justices of the peace, and also to execute the counterpart of such indentures respectively: and if any person, to whom any poor child shall be appointed to be bound apprentice, in pursuance of any such act of parliament as aforesaid, shall refuse or neglect to receive and provide for such poor child, or to execute the counterpart of the indenture for binding such child as aforesaid, every person so refusing or neglecting, upon proof of such refusal or neglect being made by the oath of one of the directors or acting guardians, or of some other credible witness, before any two justices of the peace acting in and for the county, liberty, or place, within which the incorporated hundred or district to which such child belongs shall be situate, shall forfeit and pay to the directors and acting guardians of the poor for such incorporated hundred or district, or to their treasurer or appointee, to be applied to the relief of the poor within the same, the sum of ten pounds; such penalty or forfeiture to be levied by distress and sale of the goods of the person refusing or neglecting as aforesaid, by warrant under the hands and seals of such justices; saving always to the person, to whom any poor child shall be so appointed to be bound an apprentice, his or her appeal to the next general or quarter session of the peace for that county, liberty or place, whose order therein shall be final."

Persons to whom children shall be bound in pursuance of act for relief of poor in a particular district, shall be obliged to provide for them, &c.

Penalty on omission, &c.

Recoverable by distress (b)

Appeal.

(a) See in general, *ante*, "*Appeal*."

(b) See the 5 Geo. IV. c. 18, and in general, *post*, "*Distress by Justices' Warrant*," Vol. II.

In Incorporated Districts.

Sect. 2. "Nothing in this act contained shall be construed to compel any person to take any such poor child apprentice as aforesaid, unless such person shall be an inhabitant and occupier of lands, tenements or hereditaments, in the parish to which such child belongs; and that all bastard children born or to be born in the house of industry within any such incorporated hundred or district, shall be deemed to belong to the parish or place where the mother of such bastard child was legally settled."

None except an inhabitant, &c. compellable to take apprentice.

Bastard born in house of industry to belong to mother's parish.

Unless he be an Inhabitant and Occupier.]—*R.* v. *Directors and Guardians of the Poor within the Hundreds of Tunstead and Happing in Norfolk*, incorporated by 25 Geo. III. c. 27; 3 *T. R.* 523; 1 *Bott*, 622. The directors, under the powers given them by that act, bound a poor male child apprentice to one Reynolds, who was an occupier of land, but not an *inhabitant* within the said hundreds. He appealed to the sessions, who were of opinion that he was not bound to receive the apprentice, because he was not an inhabitant as well as an occupier But the Court of Queen's Bench said, that incorporated districts under particular statutes were to be governed, as to binding out apprentices, by the same rule as other places. That for some purposes *inhabitants* and *occupiers* are synonymous terms; that where a person derives a benefit from property which he occupies in a parish, he is liable to contribute to the ease of it. If indeed the legislature had used imperative words, the Court must have been bound by them, but there are none such in this statute. Order of sessions quashed. (See further, as to the meaning of the term "inhabitant," *post*, "*Constable;*" 1 *Nev. & P.* 328.)

Who an inhabitant.

By stat. 42 Geo. III. c. 46, s. 8, in order to obviate doubts, whether the provisions of the 20 Geo. III. c. 36, extended to apprentices bound under the authority of the several acts which have since passed, by which houses of industry, or establishments for the poor, have been authorised to bind apprentices, the powers of that act are extended to poor children bound under the authority of any subsequent act.

Act of 20 Geo 3, c. 36, extended to bindings under subsequent acts.

See the 56 Geo. III. c. 139, s. 18, &c. *ante*, p. 217, regulating the mode of binding apprentices in incorporated districts.

Mode of binding.

By the 3 & 4 Will. IV. c. 63, s. 2, (*ante*, 220), indentures of apprenticeship, with the seal of the corporation annexed, shall be a sufficient execution within the meaning of the above enactments

By sect. 3, if the allowance of the indenture be by two justices, one of them acting for the county, and one for the town corporate, &c. it will suffice. (*Ante*, 210.)

R. v. *Stowmarket*, 9 *East*, 211. It appeared that the pauper was a poor boy of the age of fourteen, in the house of industry for the poor of the incorporated hundred of Stowmarket: that the guardians of this house were empowered by their incorporating act to apprentice poor children for seven years: that it did not appear that they had ever exercised this power, but instead of binding out the children, they were sent to their respective parishes: the pauper was sent to one R of Stowmarket, to whom he had been allotted by the officers of that parish: this person told the pauper he had procured him a service with one F. of Coddenham. The pauper did not object, conceiving he had no discretion on the subject. On the day after Michaelmas he went to F. who received him, and told him he would give him clothes, and that he was to stay with him a year. The pauper did stay the year, receiving clothes, maintenance and a little pocket money. And per Lord *Ellenborough*, C. J. (who reprobated this practice of the directors allotting children out, instead of providing for them in the manner pointed out by the act.) The adoption of a contract must be the act of a free agent; and it appears from the circumstances of the pauper's making no objection or agreement, conceiving that he had no discretion on the subject, and that he was obliged to accept the service as being under the control of others, that he cannot be considered as having *adopted* the act of his master.

Compulsory binding.

Poor child allotted instead of bound.

Where a parish is incorporated with others for the maintenance of its poor, and a guardian is appointed under the 22 Geo. III. c. 83, the churchwardens and overseers may still bind out poor children apprentices, and the indentures

Execution by guardians, &c.

In Incorporated Districts.

need not be signed by the guardians. (*R.* v. *Lutterworth*, 5 *D. & R.* 343; 3 *B. & Cres.* 487, S. C.)

By an act of parliament all persons seised of land of the annual value of £30 in the hundred of Stow were incorporated by the name of the guardians of the poor within the hundred of Stow in the county of Suffolk, and were to have common seal, and the poor of the hundred were to be placed under the management of the corporation, and the directors and acting guardians, whom the corporation were authorised to appoint in the manner therein mentioned, were empowered with the consent of two justices to bind any poor child under their management apprentice in like manner as churchwardens and overseers of the poor with assent of the justices of the peace were then by law empowered to do.

By indenture the directors and acting guardians of the poor of the hundred of Stow, with the consent of two justices, bound out a poor boy under their management an apprentice for one year, and affixed to the indenture the common seal of the corporation, but it was not otherwise executed by the directors and acting guardians: it was held that the indenture was invalid. (*R.* v. *The Inhabitants of Haughley*, 4 *B. & Ad.* 650; 1 *Nev. & M.* 525, S. C.)

Binding for a longer term than provided for.

A local statute enacted that certain guardians of the poor should have power to bind children apprentices, provided such children be not bound for a longer term than until they shall have attained the respective ages following, viz. a boy the age of twenty-two and a girl that of twenty: it was held, that an indenture binding a boy for a longer term than that allowed by the act, was not absolutely void, but only voidable. (*Rex* v. *Inhabitants of the Vill of St. Gregory*, 2 *Adol. & Ell.* 99; 4 *Nev. & M.* 137, S. C.)

Public Charity Apprentices.

Public charity apprentices.

By the 7 Jac. I. c. 3, s. 2, all sums of money given by any person to be continually employed for the binding out apprentices shall be employed in manner following, unless otherwise ordered by the givers, viz. all corporations of cities, boroughs, and towns corporate, and in places not corporate, the parson or vicar, constables, churchwardens, collectors, and the overseers, or the most part of them, shall have the nomination and placing of such apprentices, and the guiding and employment of such monies, and if they shall not employ the same accordingly, every person offending shall forfeit 3*l.* 6*s.* 8*d.*, half to the poor and half to him that shall sue, by action of debt, bill, plaint, or information.

Sect. 3. The master that shall receive the money shall be bound with one or two sureties in double the sum unto such corporation, or to the other persons appointed by this act in places not corporate to take the ordering of it, on condition to repay it at the end of seven years, or within three months thereof; and if the apprentice should happen to die within the seven years, then within one year after such death, and if the master shall die within the seven years, then within one year after such master's death.

Sect. 4. The said money shall always be put forth in three months after it shall come to the said parties' hands: and if there be not then fit persons to be bound apprentices within the places where the money is given to be employed, it shall be disposed of for binding some of the poorest children of any adjoining parish, after the same manner.

Sect. 5. And choice shall always be made of the poorest children; and no such apprentice shall be above fifteen years of age when bound.

Sect. 6. The said persons in places not corporate shall yearly, within a month after Easter, account before four, three, or two justices for the said monies, and within ten days after such accounting yield up the monies and bonds remaining in their hands.

Sect. 7. And if any of the trustees shall break their trust, or commit any offence for which no penalty is given by this act, any person may petition the lord chancellor, who may issue a commission to hear and determine the same, and may levy the money misemployed upon such defaulters, or otherwise

upon such able inhabitants of the place, as they shall think fittest; and persons aggrieved may appeal to the lord chancellor.

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As to the exemption of these apprenticeships from stamp duty, and the cases thereon, see "*Poor*," Vol. IV.

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(1) Forms relating to Apprentices in General.

(1.) Usual printed indenture. (a)

THIS INDENTURE witnesseth, that A B. doth put himself apprentice to C. D. to learn his art, and with him [after the manner of an apprentice] to serve from the unto the full end and term of seven years from thence next following, to be fully complete and ended. During which term the said apprentice his master faithfully shall serve, his secrets keep, his lawful commands everywhere gladly do; he shall do no damage to his said master, nor see to be done of others, but to his power shall let or forthwith give warning to his said master of the same; he shall not waste the goods of his said master, nor lend them unlawfully to any; he shall not commit fornication nor contract matrimony within the said term; he shall not play at cards, dice, tables, or any other unlawful games, whereby his said master may have any loss, with his own goods or others, during the said term, without license of his said master; he shall neither buy nor sell; he shall not haunt taverns or playhouses, nor absent himself from his said master's service day or night unlawfully, but in all things as a faithful apprentice he shall behave himself towards his said master and all his during the said term. And the said A. B. his said apprentice, in the art of which he useth, by the best means that he can, shall teach and instruct or cause to be taught and instructed, limiting unto the said apprentice sufficient meat, drink, lodging, and all other necessaries during the said term. And for the true performance of all and every the said covenants and agreements either of the said parties bindeth himself unto the other by these presents. In witness whereof the parties abovenamed to these indentures interchangeably have put their hands and seals, the day of , in the year of our Lord one thousand eight hundred and .

(2.) Indenture of apprenticeship to two masters to serve them consecutively in distinct trades. (b)

THIS INDENTURE, made the [1st] day of [May], in the year of our Lord [1820,] between J. G. of the parish of Leeds in the county of York, [weaver,] and T. F. [woolcomber,] of the one part, and B. F. of the parish aforesaid, of the other part, witnesseth, that the said B. F. hath of his own freewill and with the consent of his parents, put and bound himself apprentice to and with the said J. G. and T. F. and with them after the manner of an apprentice to dwell, remain, and serve, from the date hereof, for, during, and until the term of seven years thence next following to be fully completed and ended, during all which term the said apprentice his said masters well and faithfully shall serve, their respective secrets shall keep, and lawful commands do, fornication or adultery shall not commit, hurt or damage to his said master shall not do or consent to be done, but to his power shall let it and forthwith his said masters thereof warn; taverns or alehouses he shall not haunt or frequent unless it be about his masters' business there to be done; at dice, cards,

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(a) See *ante*, 184 to 188. It would be advisable to insert a clause providing for the death of the master, resembling the form (No. 19), *post*, 250.

(b) This is the form of the indenture adopted in *Rex* v. *Louth*, 1 *M. & R. M. C.* 238; 8 *B. & Cres.* 247, S. C. *ante*, with an alteration of its grammatical errors.

tables, bowls, or any such unlawful games, he shall not play; the goods of his said masters respectively shall not waste, or lend or give to any person without his masters' license; matrimony within the said term shall not contract, nor from either of his masters' services at any time absent himself, but as a true and faithful apprentice shall order and behave himself towards his said masters and all theirs, as well in words as in deeds, during the said term; and a true and just account of all his masters' goods, chattels, and money committed to his charge, or which shall come to his hands, faithfully he shall give at all times when thereunto required by his said masters, or either of their executors, administrators, and assigns; and the said J. G. for himself, his executors, and assigns, doth covenant, promise, and grant, by these presents, to and with the said B. F. apprentice, that the said J. G. and T. F., their executors, administrators, or assigns, shall and will teach, learn, and inform him the said apprentice, or cause him to be taught, learned, and informed in the mystery of the trade of stuff-weaving and woolcombing, which the said masters now use, after the best manner or knowledge which he or they may or can with all circumstances thereunto belonging, and also shall find and provide to or for him the said apprentice sufficient and enough of meat; and that the said J. G. shall find and provide him meals, drink, washing, and lodgings for the first four years (to and not to exceed eight hanks per day, and to have four hanks allowed for looming, to have three days each year for himself, and to have four shillings for a low count if he works any overwork, and so on in proportion,) the said apprentice to serve the latter three years with T. F. (and not to exceed five pounds per day,) the said apprentice to receive one shilling per year wages, and the said J. G. to be absolutely free from the said apprentice at the end of four years from the date hereof, and the said apprentice not to have above three days if he should have to stand for work; and for the true performance of all and singular the covenants and agreements aforesaid, each of the parties aforesaid doth bind himself unto the other firmly by these presents. In witness whereof, &c.

(3.) Assignment of an apprentice. (*a*)

TO all to whom these presents shall come: I, A. M. of send greeting. Whereas my apprentice A. P. hath divers years yet to come and unexpired of his apprenticeship, to wit, whole years from the day of now last past, as by his indenture of apprenticeship to be sealed doth appear; Now know ye, that I the said A. M. for divers good causes and considerations me hereunto moving, have given, granted, assigned, and set over, and by these presents do fully and absolutely give, grant, assign, and set over unto A. S. of , all such right, title, duty, term of years to come, service, and demand whatsoever, which I, the said A. M. have in or to the said A. P. or which I may or ought to have in him by force and virtue of the said indenture of apprenticeship. And moreover I, the said A. M. do by these presents covenant, promise, and agree to and with the said A. S. his executors and administrators, that notwithstanding any thing by me the said A. M. to be done to the contrary, the said A. P. shall, during the said term of years, well and truly serve the said A. S. as his master, and his commandments lawful and honest shall do, and from his service shall not absent himself during the said term. Provided that the said A. S. shall well intreat and use him the said A. P., and him the said A. P. in the craft, mystery, and occupation of a , which he the said A. S. now useth, after the best manner that he can or may, shall teach, instruct, and inform, or cause to be taught, instructed and informed, as much as thereunto belongeth, or in anywise appertaineth; and shall also during the same term find and allow unto the said A. P. sufficient meat, drink, apparel, washing, lodging, and all other things needful or meet for an apprentice. In witness, &c.

County of } To the constable of

(4.) Summons of master for missing apprentice; on 5 Eliz. c. 4, s. 33. (*b*)

WHEREAS complaint and information have been made unto me , one of her Majesty's justices of the peace in and for the said county, [or *to me, mayor, &c.* or as the case may be,] *by A. P. apprentice to A. M. of in the said county,* [*shoemaker,*] *that the said A. M. hath misused and evil intreated him the said A. P. by cruel punishment and beating him the said A. P. without just cause, and by not allowing unto him sufficient meat, drink, apparel* [or as the case shall be]: *These are therefore in her Majesty's name to command you to summon the said A. M. to appear before me at the house of , in the said county, on the day of , at the hour of in the afternoon of the same day, to answer unto*

(*a*) See *ante*, 195. (*b*) *Ante*, 203.

Forms.

the said complaint, and to be further dealt with according to law. Herein fail you not. Given under my hand and seal the day of, &c.

Note.—A summons rather than a warrant, in all such like cases, between party and party, is generally most eligible; yet in this case it seems that a warrant is justifiable to apprehend the master and bring him before the justice (especially if he shall contemn the summons); because it is required that he shall give security to the justice to appear at the sessions, if he shall not conform to the justice's order in the premises.

(5.) Summons of apprentice on complaint of master; on 5 Eliz. c. 4, s. 35. (a)

County of } To the constable of

WHEREAS complaint and information have been made unto me , one of her Majesty's justices of the peace in and for the said county, by A. M. of , in the said county, [husbandman,] that A. P. now being an apprentice to him the said A. M., is negligent, stubborn, disorderly, [or as the case shall be,] *and doth not his duty to him the said A. M. his master: These are therefore to command you to summon the said A. P. to appear before me at , in the said county, on the day of , at the hour of in the afternoon of the same day, to answer to the said complaint, and to be further dealt with according to law. Herein fail not. Given under my hand and seal the day of, &c.*

As to complaints by master or his steward, &c. on oath, under stats. 20 Geo. II. c. 19, and 4 Geo. IV. c. 34, s. 1, see *post*, (No. 11 to No. 15.)

(6.) Order of discharge by four justices at sessions; on 5 Eliz. c. 4, s. 35. (b)

County of } AT a general quarter sessions of the peace holden [by adjournment] at in and for the county aforesaid, the day of , in the year of the reign of our lady Victoria, by the grace of God of Great Britain and Ireland Queen, Defender of the Faith, and so forth: before [four] justices of our said lady the Queen, assigned to keep the peace in and for the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, and the said J. P. being one of the quorum, [or if in a town corporate, &c. say, "*before M. M., Esq. mayor, with the assent of N. N., Esq. deputy recorder, and as such one of her Majesty's justices of the peace acting in and for the said town, and O. O. and P. P., Esqs. aldermen of the said town respectively, three of the brethren of the said M. M., as such mayor,* (see ante, 203,) *within the town of Falmouth aforesaid, in the county aforesaid,*"] *it is ordered as followeth:*

Upon the petition of A. P. apprentice to A. M. of , in the said county, [*husbandman,*] *to be relieved upon certain neglects of the said master in instructing him in his trade, and in misusing and evil intreating the said apprentice by cruel punishment* [or as the case shall be]: *And the said master having likewise appeared upon his recognizance taken before J. P., Esq., one of the said justices, to answer to the complaint of the said petition, and having proved nothing whereby to clear himself of the said complaint, but on the contrary, the said A. P. having given full proof of the truth of the said complaint to the satisfaction of the said court; we, therefore, whose hands and seals are hereunto set, being four of the said justices, and the said J. P. being of the quorum,* [or if in a town corporate, say, "*the said M. M., mayor, and N. N., O. O., and P. P., three of the brethren of the said M. M. as such mayor as aforesaid,*"] *do hereby order, pronounce and declare, that the said apprentice shall be and is hereby discharged and freed from his said apprenticehood: (b) and this to be a final order betwixt the said master and apprentice, any thing contained in their indentures of apprenticeship, or otherwise, to the contrary notwithstanding. Given under our hands and seals the day and year first above written.*

(7.) Complaint by apprentice to justice against master for misusing him; on 20 Geo. 2, c. 19, s. 3. (c)

—— *THE information and complaint of A. P. apprentice to A. M. of , in the said county,* [*husbandman,*] *exhibited before me J. P. one (c)* [or *us and , two*] *of her Majesty's justices of the peace in and for the said county, the day of , in the year of our Lord .*

Who saith that he the said A. P. is an apprentice bound by indenture to A. M. of aforesaid, [*husbandman;*] *and upon whose binding out no premium* [or *no*

(a) *Ante*, 202 to 206.

(b) As to an order to refund the premium, see *ante*, 205.

(c) See the 3 Geo. IV. c. 23, s. 2, which allows the complaint to be before *one* justice only, *post*, "*Conviction.*"

larger sum than 25l. of lawful British money, to wit, the sum of £] was paid or contracted to be paid; and that he the said A. M. hath misused and ill-treated him the said apprentice, and particularly [as the case shall be.]

Before me, J. P. [or *us, J. P., K. P.,* as the case may be.] *A. P.*

Forms.

} *To the constable of .*

(8.) Summons of master thereon.

WHEREAS information and complaint have been made unto me J. P. one (*a*) [or *us and , two*] *of her Majesty's justices of the peace in and for the said county, by A. P. apprentice to A. M. of , in the said county,* [*husbandman,*] *that he the said A. M. hath misused and ill treated him the said A. P., and particularly* [as the case shall be]: *These are therefore to require you to summon the said A. M. to appear before me* [or *us,* as the case shall be], *at , in the said county, on the day of , at the hour of in the forenoon of the same day, to answer unto the said information and complaint. And be you then there to certify what you shall have done in execution hereof. Herein fail you not. Given under my* [or *our*] *hands and seals the day of , in the year .*

} *WHEREAS complaint hath been made before me J. P. one* [or *us and , two*] *of her Majesty's justices of the peace in and for the said county, by A. P. apprentice to A. M. of , in the said county* [*tailor,*] *that he the said A. M. hath misused and evil treated him the said apprentice, and particularly* [as the case shall be]: *and whereas the said A. M. hath appeared before us in pursuance of our summons to that purpose, but hath not cleared himself of and from the said accusation and complaint, but on the contrary the said A. P. hath made full proof of the truth thereof, and the said A. M. now stands duly convicted of the same before us upon oath: We therefore by these presents do discharge him the said A. P. of and from his apprenticeship to the said A. M.; any thing in the indenture of apprenticeship made betwixt them, or otherwise howsoever, to the contrary notwithstanding. Given under our hands and seals, the day of , &c.*

(9.) Discharge of apprentice by two justices on master misusing him; on 20 Geo. 2, c. 19, s. 3. (*b*)

[Or, "*And whereas it hath been duly proved before us, as well upon the oath of A. C. constable of aforesaid, as otherwise, that he the said A. C. did duly summon the said A. M. to appear before us at a reasonable time in the said summons mentioned and specified; but notwithstanding the same, he the said A. M. hath not appeared before us according to such summons: We therefore, having duly examined into the matter of the said complaint, and the truth thereof having been fully proved before us upon oath, do discharge, &c.*]

—— *BE it remembered, that at a special* [or *petty*] *sessions holden at , in the county aforesaid, on the day of , in the year of our Lord , A. B. of, &c.* [*labourer,*] *came before* [*us,*] *J. P.* [*and L. M. two*] *of her Majesty's justices of the peace in and for the same county, and informed* [*us*] *on the behalf of A. P. an apprentice (upon whose binding out no premium* [or *not more than the sum of 25l.*] *was paid), that A. M. of , in the county of ,* [*shoemaker,*] *to whom the said A. P. was bound as an apprentice as aforesaid, did, on the day of , in the year aforesaid, at , in the said , ill-use the said A. P. by* [stating how] *; contrary to the form of the statute in such case made and provided: whereupon the said A. M. after, &c.* [conclude as usual, *post,* "*Conviction,*" Vol. I.]

(10.) Conviction for ill-using a parish or other apprentice; on 33 Geo. 3, c. 55. (*c*)

The penalty is not exceeding 40*s*.

} *THE complaint and information of A. M. of , in the said county of , [husbandman,]* [or *by A. A. of , in the county of , steward* [*manager,* or *agent*] *of A. M. of , in the said county,*] *the master of A. P. an apprentice to the said A. M. on oath* (*d*) *before me , one* [or *us and , two*] *of her Majesty's justices of the peace in and for the said county, the*

(11.) Complaint to justice, by master or agent, &c. against apprentice, for ill-behaviour; on 20 Geo. 2, c. 19, s. 3, 4. (See *ante*, 210.)

(*a*) See *ante*, note (*c*).

(*b*) See *ante*, 207.

(*c*) *Ibid.*

(*d*) Though the complaint must be by the master or his steward, &c., yet the verification on oath may be by another person, in which case the words "*on oath*" must be omitted; and afterwards, after the statement of facts, must be added, "*and which said complaint and information were verified before us by the oath of A. W. of* [*labourer*], *on the day and year aforesaid, at aforesaid, in the county aforesaid.*"

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day of , who saith, that A. P. apprentice by indenture to the said A. M., and upon whose binding out no premium [or *no larger sum than 25l. of lawful British money, to wit, the sum of £] was paid or contracted to be paid, hath in the service of his apprenticeship been guilty of several misdemeanors, miscarriages, and of much misconduct and ill behaviour towards the said A. M. and particularly* [as the case shall be.]

Before me, J. P. [or *us, J. P., K. P.*] *A. M.* [or *A. A.*]

(12.) Warrant thereon against apprentice.

To the constable of .

WHEREAS complaint and information have been made before me , one [or *us and , two*] *of her Majesty's justices of the peace in and for the said county, by A. M. of , in the said county* [*husbandman,*] [or *by A. A. of , in the said county, steward* [*manager*, or *agent*] *of A. M. of , in the said county,*] *the master of A. P. an apprentice by indenture to the said A. M. on oath, that A. P. the said apprentice, upon whose binding out no premium* [or *no larger sum than 25l. of lawful British money, to wit, the sum of £] was paid or contracted to be paid, hath, in the service of his apprenticeship, been guilty of several misdemeanors, miscarriages, and of much misconduct and ill behaviour towards the said A. M., and particularly* [as the case may be, and following the words of the complaint,]* [or if the complaint is not made on oath, but is made by the master or his agent, verified by the oath of another person, then proceed as above to the asterisk, omitting the words "on oath," and then say] *and which said complaint has been verified before us by the oath of A. W. of : These are therefore to require you forthwith to apprehend the said A. P. and bring him before us to answer unto the said complaint, and to be dealt with according to law: and you are to give notice to the said A. M. that he appear before us at the same time, to make good the said complaint. Given under our hands and seals, &c. the day of, &c.*

(13.) Commitment thereon by two justices to house of correction.

To the constable of , in the said county, and to the keeper of the house of correction at , in the said county.

WHEREAS complaint and information have been made before me , one [or *us and , two*] *of her Majesty's justices of the peace in and for the said county, by A. M. of , in the said county,* [*husbandman,*] [or *by A. A. of , in the said county, steward* [*manager*, or *agent*] *of A. M. of , in the said county,*] *the master of A. P. an apprentice by indenture to the said A. M. on oath, that the said A. P. upon whose binding out no premium* [or *no larger sum than 25l. of lawful British money, to wit, the sum of £] was paid, or contracted to be paid, hath in the service of his said apprenticeship been guilty of several misdemeanors, miscarriages, and of misconduct and ill behaviour towards the said A. M. and particularly* [as the case shall be,]* [or if the complaint is not made on oath, but is made by the master or his agent, verified by the oath of another person, then proceed as above to the asterisk, omitting the words "on oath," and then say] *and which said complaint has been verified before us by the oath of A. W. of .*

And whereas upon examination thereof, and upon hearing the allegations of both parties, they having come before us, two of her Majesty's justices of the peace in and for the said county of , for that purpose, and upon due consideration had thereof, it manifestly appears to us, and we do adjudge that he the said A. P. is guilty of the premises so charged against him as aforesaid: we do therefore hereby command you the said constable to take and convey the said A. P. to the said house of correction, and to deliver him to the said keeper thereof, together with this warrant: and we do hereby command you the said keeper of the said house of correction to receive the said A. P. into your custody in the said house of correction, there to remain and be corrected, and held to hard labour for the space of . Given under our hands and seals the day, &c.

(14.) Discharge of apprentice by two justices on complaint of master; on 20 Geo. 2, c. 19, s. 4, (*ante*, 210.)

WHEREAS complaint, &c. [as in the form No. 13.] *We do therefore by these presents discharge the said A. P. from his apprenticeship to the said A. M., any thing in any indenture or indentures of apprenticeship betwixt them, or otherwise, to the contrary notwithstanding. Given, &c.*

(15.) Master's oath to claim apprentice; on stat. 6 Geo. 3, c. 25, s. 3, (*ante*, 210.)

I, A. M. of , in the county of , do make oath that I am by trade a , and that A. P. was bound to serve as an apprentice to me in the said trade, by indenture bearing date the day of , in the year of our Lord one thousand eight hundred and , for the term of years, and that the said

A. P. did, on the day of , in the year of our Lord one thousand eight hundred and , abscond and quit my service without my consent, and that to the best of my knowledge and belief the said A. P. is aged about years. Witness my hand, the day of in the year of our Lord one thousand eight hundred and .

Sworn before me, at , in the of , this day of , in the year of our Lord one thousand eight hundred and . J. P.

One of her Majesty's justices of the peace for the of .

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(16.) Indictment for ill-treating an apprentice. (a)

—— [venue] *to wit. THE jurors for our Lady the Queen upon their oath present, that on the day of , in the year of the reign of our Lady the now Queen Victoria, at the parish of in the county of , C. D., late of the parish aforesaid, in the county aforesaid, in and upon one A. B., a child of tender years, to wit, the age of years, being the servant and apprentice of the said C. D., did make an assault, and with certain rods, whips, sticks, and cords,* [as the case may be,] *the said A. B. did then and there violently, cruelly, and immoderately beat, scourge, and strike, and did then and there pull and strip, and force and compel the said A. B. to pull and strip from off the body of the said A. B. certain clothes and wearing apparel, wherewith the said A. B. was then and there clothed and covered, so that the said A. B. was then and there naked and uncovered, and the said A. B. as well whilst she was so covered and clothed with the said clothes and wearing apparel as whilst she was so naked and uncovered, did force and compel to work and labour violently, immoderately, and beyond her strength in the business of the said C. D. for the space of hours then next following; and the said A. B. so working and labouring as aforesaid did then and there shut up, confine, and keep in a certain room there for all the time aforesaid, without giving or affording to her the said A. B. or permitting her to have sufficient meat, drink, and food, for her nourishment and support during that time; and such assaulting, beating, scourging, striking, and otherwise ill-treating her the said A. B. in manner and form aforesaid, he the said C. D. on other different days then next following, at the parish aforesaid, in the county aforesaid, did barbarously, cruelly, and inhumanly, repeat and reiterate in, upon, and against the said A. B. with an intent her the said A. B. then and there feloniously, wilfully, and of his malice aforethought, to kill and murder, and other wrongs to her did, against the peace of our Lady the Queen, her crown and dignity.* [Second count was for an assault, and compelling the apprentice to go naked into a frozen rivulet; the third count was for holding the apprentice near to a large fire, and scorching her and throwing her against the ground.]

(17.) Indictment for not providing sufficient food for servant of tender age. (b)

—— (venue) *to wit. THE jurors for our Lady the Queen upon their oath present, that E. R., the wife of S. R., unlawfully and maliciously contriving and intending to hurt and injure one E. W., being a servant to her the said E. R. and an infant of tender years, to wit, of the age of ten years, and under the control of the said E. R. (c) heretofore, to wit, on the day of in the year of the reign of our Lady the now Queen Victoria, and on divers other days and times, as well before as after that day, with force and arms, at the parish of in the county of unlawfully, wilfully and maliciously did omit, neglect, and refuse to provide for, and give and administer to the said E. W. sufficient meat and drink necessary for the sustenance, support, and nourishment of the body of her the said E. W., and did then and there expose the said E. W. to the cold and inclemency of the weather, as well within as without the house wherein she the said E. R. then dwelt, and kept the said E. W. without sufficient and proper warmth necessary for the health of her the said E. W. to wit, at the parish aforesaid, in the county aforesaid, the said E. R. on the several days and times, and during all the times aforesaid, living separately and apart from the said S. R. her husband, to wit, at the parish aforesaid, in the county aforesaid, contrary to the duty of her the said E. R. as the mistress of the said E. W., by reason of all which premises, she the said E. W. afterwards, to wit, on the day of in the year of the reign aforesaid, became and was, and for a long*

(a) See a similar form, *Cro. C. C.* 8 *ed.* 63, from which this one was taken. See also *Stark.* 417; 2 *Campb.* 650; 1 *Leach*, 137; 3 *Chit. C. L.* 829. As to the offence, see *ante*, p. 194.

(b) This is taken from the form of the indictment against *Elizabeth Ridley*, 2 *Campb.* 650; *ante*, 195. (See *R.* v. *Marriott*, 8 *C. & P.* 425.)

(c) Query, if it ought not to be averred that the infant was unable to provide for itself. (*R.* v. *Friend*, *Russ. & R. C. C.* 20; *ante*, 195.)

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time, to wit, the space of six months then next following, continued to be very weak, sick and ill, and greatly consumed and emaciated in her body, to wit, at the parish aforesaid, in the county aforesaid, to the great damage of the said E. W., to the evil example of all others, and against the peace of our Lady the Queen, her crown and dignity.

(2.) Forms relating to Parish Apprentices.

(18.) Order from two justices empowering overseers to bind a poor apprentice, within 40 miles of place of settlement, pursuant to 56 Geo. 3, c. 139, s. 1, (*ante*, 213.)

—— } *WHEREAS A. B. and C. D. overseers of the poor of the parish of*
to wit. } *in the county of , have on this day of , in the year of the reign of our sovereign Lady Victoria, at the parish of in the said county, brought before us, J. C. and S. P. Esquires, two of the justices assigned to keep the peace in and for the said county of , A. P. a poor male* [or *female*] *child, and exceeding the age of nine years, that is to say, of the age of* (a) *and upwards, belonging to and having a settlement in the said parish of , in the said county, whose parents E. P. and G. P. are not able to maintain such child · and the said A. B. and C. D. as such overseers of the poor of the parish of aforesaid, have proposed and now propose to us the said justices to bind such child to be an apprentice to one A. M. of the parish of , in the county of ,* [*tailor,*] *residing within the distance of forty miles from the parish and place to which the said child belongs,* [see ante, 214], *and as an apprentice with him the said A. M. to dwell and serve until the said A. P. shall come to the age of years,* [or, if a female, *or until the time of her marriage, which shall first happen,*] *according to the statutes in such case made and provided. And whereas we the said justices, having now here inquired into the propriety of binding such child apprentice to the said A. M., being the person to whom it hath been so proposed by such overseers to bind such child as aforesaid: and whereas we, the said justices, have now here particularly inquired and considered whether such person doth reside and hath his place of business within a reasonable distance from the place to which such child doth so belong as aforesaid, having regard to the means of communication between such places, and whether any circumstances make it fit in the judgment of us, the said justices, that such child should be placed apprentice at a greater distance.* [*And whereas also we have now here examined the said E. P. and G. P. the father and mother of the said child, and who reside in the said parish and place to which the said child doth belong,* (omit this averment if not according to fact).] *And we have now here particularly inquired of the said E. P. and G. P. and otherwise, as to the distance of the residence and place of business of the said A. M. and the means of communication therewith: and whereas also we, the said justices, have also now here inquired into the circumstances and character of the said A. M. and on such examination and inquiry, we, the said justices, think it proper that such child should be bound apprentice to the said A. M. Now, therefore, we the said justices do declare, that the said A. M. is a fit person to whom the said child may be properly bound as apprentice as aforesaid. And we do therefore hereby order and direct, that the said A. B. and C. D. the overseers of aforesaid, being the place to which such child doth belong, shall be and are at liberty to bind such child apprentice accordingly. Given under our hands and seals this day of in the year of our Lord one thousand eight hundred and .*

J. C. (L. S.)
J. P. (L. S.)

(19.) Indenture of apprenticeship in pursuance of such order, and according to 43 Eliz. c. 2, and 56 Geo. 3, c. 139, s. 1, with proviso directed to be added by 32 Geo. 3, c. 57, s. 1, in case of death of master. (b)

THIS INDENTURE, made the day of in the year of our Lord one thousand eight hundred and Witnesseth, that J. K. and L. M. churchwardens of the parish of in the county of and A. B. and C. D. overseers of the poor of the said parish, by and with the consent of J. P. and K. L. two of her Majesty's justices of the peace for the said county, whose names are hereunto subscribed, one of them, to wit, Esquire, being of the quorum, and by virtue and in pursuance of an order in writing made by and under the hands and seals of J. P. and S. P. Esquires, justices of the peace in and for the said county, in pursuance of the statute in that case made and provided, and bearing date the day of , have put and placed, and by these presents do put and place A. P. exceeding the age of nine years, to wit, of the age of years or thereabouts, a poor child of the said parish of apprentice to A. M. of with him to dwell and serve from the day of the date of these presents, until the said apprentice shall accomplish his full age of years, [or, if a female, *or until the time of her marriage, which shall first happen,*] *according to*

(a) The child must exceed nine years of age; *ante*, 215.

(b) See *ante*, 212, 213, 231.

the statute in that case made and provided. During all which term the said apprentice his said master faithfully shall serve, in all lawful businesses, according to his power, wit and ability, and honestly, orderly and obediently in all things demean and behave himself towards his said master, and all his, during the said term. And the said A. M. for himself, his executors, and administrators, doth covenant, agree and grant, to and with the said churchwardens and overseers, and every of them, their and every of their executors and administrators, and their and every of their successors for the time being, by these presents, that he the said A. P. the said apprentice, in the art, trade, or mystery of shall and will teach and instruct, or cause to be taught and instructed, in the best way and manner that he can during the said term [here insert any other covenant that may be desirable;] *and shall and will during all the term aforesaid find, provide, and allow unto the said apprentice, proper, competent, and sufficient meat, drink, apparel, lodging, washing, and all other things necessary and fit for an apprentice: (provided always, that the said last-mentioned covenant on the part of the said A. M. his executors and administrators, to be done and performed, shall continue and be in force for no longer time than for three calendar months next after the death of the said A. M. in case he the said A. M. shall happen to die during the continuance of such apprenticeship, according to the provisions of an act passed in the thirty-second year of the reign of his late Majesty King George the Third, intituled* "An Act for the further Regulation of Parish Apprentices," *and also of another act passed in the fifty-sixth year of the reign of King George the Third, intituled* "An Act to Regulate the Binding of Parish Apprentices.") *And also shall and will so provide for the said apprentice that he be not in any way a charge to the said parish of or the parishioners of the same: but of and from all charge shall and will save the said parish and parishioners harmless and indemnified during the said term.*

In witness whereof the parties above said to these present indentures interchangeably have set their hands and seals, the day and year first above written.

Sealed and delivered in the presence of .

(20.) Justices' allowance of such indenture. (*a*)

WE, whose names are hereunto written, justices of the peace, acting in and for the county of aforesaid (whereof one is of the quorum), do consent to the putting forth and binding of A. P. to be an apprentice, according to the intent and meaning of this indenture; and do sign and seal this our allowance of such indenture of apprenticeship before the same hath been executed by any of the other parties thereto, in pursuance of the statute in such case made and provided. Given under our hands and seals this day of , in the year of our Lord one thousand eight hundred and .

J. P. (L. S.)
K. L. (L. S.)

(21.) Order under 56 Geo. 3, c. 139, s. 1, for binding a poor apprentice at a greater distance than forty miles from place of settlement. (*b*)

WHEREAS A. B. and C. D. overseers of the poor of the parish , in the county of , have on this day of , in the year of the reign of our Sovereign lady Victoria, at the parish of , in the said county, brought before us, J. P. and S. P. Esquires, two of her Majesty's justices assigned to keep the peace in and for the said county of , A. P. a poor male [or *female*] *child, exceeding the age of nine years, to wit of the age of years and upwards, belonging to and having a settlement in the said parish of , in the said county, and whose parents E. P. and G. P. are not able to maintain such child; and the said A. B. and C. D. as such overseers of the poor of the parish of aforesaid, have proposed to us, the said justices, to bind such child to be an apprentice to one A. M. of the parish of , in the county of , he the said A. M. residing and having an establishment in trade at which it is intended such child should be employed, out of the same county of aforesaid, at a greater distance than forty miles from the parish of aforesaid, to which such child so belongs as aforesaid; and the said parish of , to which such child so belongs as aforesaid, being also more than forty miles from the city of London, and as an apprentice with the said A. M.; to dwell and serve until the said A. P. shall come to the age of years,* [or, if a female, *or until the time of her marriage, which shall first happen,*] *according to the statutes in such case made and provided: and whereas we, the said justices, having now inquired into the propriety of binding such child apprentice to the said A. M. and having particularly inquired and considered whether such person doth reside and have his place of business within a reasonable distance from the place to which such child doth so belong as aforesaid, having regard to the means of communication between such places,*

(*a*) See *ante*, 214. (*b*) See *ante*, 214.

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and whether any circumstances make it fit, in the judgment of us the said justices, that such child should be placed an apprentice at a greater distance: [*and whereas also we have now here examined the said E. P. and G. P. the father and mother of the said child, and who reside in the said parish and place to which the said child doth belong,* [omit this averment if not according to the fact.] *And having particularly inquired of the said E P. and G. P. and otherwise, as to the distance of the residence and place of business of the said A. M. and having, also, now here inquired into the circumstances and character of the said A. M.: and whereas, also, we, the said justices, have now here particularly inquired into and considered the grounds for allowing of the apprenticing of such child to the said A. M. so residing and having an establishment in trade at a greater distance than forty miles from the said parish and place to which such child so belongs as aforesaid, we do hereby find the grounds following; that is to say,* [state the reasons according to the fact, which may be thus: *because it appears to us, the said justices, that there is no person within the said distance of forty miles to whom such child may be more properly bound apprentice, &c.*] *And whereas, also, on such examination and inquiry, we, the said justices, think it proper that such child should be bound apprentice to the said A. M. notwithstanding he the said A. M. resides and has an establishment in trade at a greater distance than forty miles from the said parish and place to which the said child belongs as aforesaid. Now, therefore, we, the said justices, do declare, that the said A. M. is a fit person to whom the said child may be properly bound as an apprentice as aforesaid; and we do, therefore, hereby order and direct that the said A. B. and C. D. the overseers of the poor of the parish of aforesaid, being the place to which such child doth belong, shall be and are at liberty to bind such child apprentice accordingly. Given under our hands and seals this day of , in the year of our lord one thousand eight hundred and*

(22.) Justices' allowance of indenture pursuant to such order. (a)

WE J. P. and K. L. Esquires, whose names are hereunder written, two of her Majesty's justices of the peace in and for the county of , (whereof J. P. one of us is of the quorum,) do consent to the putting forth and binding of A. B. as an apprentice, according to the intent and meaning of this indenture; it having been proved upon oath before us, that due notice in writing has been given by the overseers of the poor of the parish of , [the parish binding the apprentice,] *to the overseers of the poor of the parish of* , [the parish in which the apprentice is to serve,] *of such binding being intended, and do sign this our allowance of such apprenticeship, in pursuance of the statute in such case made and provided. Dated this day of one thousand eight hundred and .*

(23.) Order on indenture in case of original master removing to another county, or forty miles distant from parish were apprentice bound, either for apprentice to continue with such master or be discharged or assigned to another person; on 56 Geo. 3, c. 130, s. 8. (b)

WHEREAS A. M. the master of the apprentice , in the within indenture mentioned, is about to quit his present residence at , and to remove out of the same county of , or at least forty miles from the place of residence where the said A. P. was bound apprentice, and has given fourteen days previous notice in writing to the churchwardens and overseers of the poor of the parish of [the parish where the apprentice resides at time of removal]: *And whereas the said A. P. the said apprentice, as also the said A. M. and the overseers of the poor of the parish of , did on, &c. the day of the date hereof, appear before us J. P. and K. L. two of the justices of the peace in and for the said county, and upon inquiry we do find* [state whether the apprentice is to continue with his master in another parish, or whether to be assigned or discharged]: *and we, the said justices, do hereby order that the said A. P. the apprentice aforesaid, may* [here insert as above;] *and we do further order, that the said A. M. the former master of the said A. P. do pay to , the intended new master of the said A. P. the sum of , as and for the expense of assigning or binding of the said apprentice to the said as aforesaid, being in our judgment a reasonable part of and proportion of the original apprentice fee paid to the said on his being bound an apprentice to the said . Given under our hands and seals this day of one thousand eight hundred and .*

J. P.
K. L.

(24.) Conviction; on stat. 56 Geo. 3, c. 130, s. 15. (c)

BE it remembered, that on the day of in the year of our Lord , A. M. of, &c. is convicted before us and , two of her Majesty's justices of the peace in and for the county of , upon the information of , for that [here state the offence,] *contrary to the form of the statute passed*

(a) See *ante*, 214.
(b) See *ante*, 236.
(c) See *ante*, 216. The act gives this form.

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in the fifty-sixth year of the reign of his late Majesty King George the Third, intituled "An Act to regulate the binding of Parish Apprentices," *and for which offence we do adjudge that the said shall forfeit and pay the sum of , to be paid and applied as follows* [here state the application of the penalty]; *and in case such penalty shall not be paid by the said , or levied by distress upon goods and chattels, within days from the date of this conviction, we adjudge that the said shall be imprisoned in for the space of . Given under our hands and seals the day and year first above mentioned.*

(25.) Information for not receiving a poor apprentice; on 8 & 9 Will. 3, c. 30, s. 3, (*ante*, 212.)

—— } *THE information and complaint of A. B. churchwarden* [or *overseer of the poor*, as the case may be,] *of the parish of , in the said county, made upon oath before me, J. P. one* (*a*) [or *us and , two*] *of her Majesty's justices of the peace in and for the said county of , the day of , in the year of our Lord one thousand eight hundred and twenty . Who says that he A. B. and C. D. churchwardens, and E. F. and G. H. overseers of the poor of the parish of by the assent of and , Esquires, two of her Majesty's justices of the peace in and for the said county, dwelling near to* [or *in*] *the said parish of , one whereof is of the quorum, did endeavour to bind A. P. a poor* [*male*] *child of the said parish, whose parents are not able to maintain* [*him,*] *apprentice to A. M. of , in the said parish,* [*tailor,*] *and for that intent did prepare and duly perfect one pair of indentures, pursuant to the statute in that case made and provided, which said pair of indentures was signed and confirmed by the said justices. And the said A. B. further says that he the said A. M. hath refused and doth refuse to receive and provide for the said A. P. as an apprentice, and also to execute another part of the said indentures, being duly tendered to him by the said churchwardens and overseers of the poor, whereby the said A. M. hath forfeited the sum of* 10*l.* *to the use of the poor of the said parish of , in which such offence has been committed. Whereupon the said A. P. prays the judgment of two of her Majesty's justices of the peace for the said county of in the premises, and that the said A. M. may be summoned to answer the premises accordingly.* *A. B.*

Before me, J. P. [or *us J. P. and K. P.* as the case may be.]

(26.) Warrant thereon to levy 10*l.*

—— *to wit. To* [*and* or] *the Constables of*

WHEREAS A. B. and C. D. churchwardens, and E. F. and G. H. overseers of the poor of the parish of , in the said county, by the assent of [*us*] , *two of her Majesty's justices of the peace for the said county, dwelling near to* [or *in*] *the said parish of , one whereof is of the quorum, did endeavour to bind A. P. a poor* [*male*] *child of the said parish, whose parents are not able to maintain* [*him,*] *apprentice to A. M. of , in the said parish,* [*tailor,*] *and for that intent did prepare and duly perfect one pair of indentures, pursuant to the statute in such case made and provided, which said pair of indentures was signed and confirmed by* [*us*] *the said two justices; and whereas the said A. M. is duly convicted before us the justices aforesaid, as well upon the oath of the said A. P. as otherwise, for that he the said A. M. hath refused and doth refuse to receive and provide for the said A. P. as an apprentice, and also to execute another part of the said indentures, being duly tendered to him by the said churchwardens and overseers of the poor, whereby the said A. M. hath forfeited the sum of* 10*l.*: *these are therefore, in her said Majesty's name, to require and command you to make distress of the goods and chattels of him the said A. M. and if within the space of* [*six*] *days next after such distress by you made, the said sum of* 10*l.*, *together with reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and out of the money arising by such sale pay the said sum of* 10*l.* *to the overseers of the poor of the said parish of , where the said offence was committed, for the use of the poor of the said parish: returning the overplus upon demand unto him the said A. M., the reasonable charges of taking, keeping and selling the said distress being thereout first deducted. Herein fail you not. Given under our hands and seals the day of , in the year .*

Practical directions.

Note.—As an appeal is given to the sessions against the appointment of an apprentice to be bound to any person as aforesaid, it is proper either not to make out, or not to execute the warrant of distress until after the next sessions.

And it is to be observed, that one *precedent* alone in this case is here inserted,

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(*a*) See 3 Geo. IV. c. 23, s. 2, *post*, "*Conviction.*"

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for brevity sake, as being not in a matter of constant practice; but it is to be understood, in all such like cases, that there must be a *complaint* or *information* in writing, then a *summons* of the party accused, or *warrant*, as the case may be, and a hearing and determining of the cause, and *conviction* thereupon, if the party shall be found to be guilty. But as the special fact must be the same throughout all the forms of proceedings, it is easy from one to frame all the rest.

(27.) Summons thereon.

—— *WHEREAS A. I. one of the overseers of the poor of the parish of hath informed and laid a complaint before me that A. O. of the said parish of [farmer,] being an occupier of certain lands and tenements in the parish of aforesaid, hath refused and doth refuse to receive and provide for A. P. an apprentice duly bound to him by indentures by the churchwardens and overseers of the poor of the said parish of , the said A. P. being a poor child of the said parish of whose parents are not able to maintain him, and that he the said A. O. hath also refused and doth refuse to execute the other part of the said indentures, the same being duly tendered to him for that purpose, whereby he the said A. O. hath forfeited the sum of 10l.: These are therefore, &c.* [Conclude as *post*, No. 41.]

(28.) Conviction on 56 Geo. 3, c. 139, against persons taking or overseers binding, poor apprentices, without an order of justices. (*a*)

—— BE it remembered, that on, &c. C. D. of, &c. is convicted before us, J. P. and S. P. Esquires, two of her Majesty's justices of the peace for the county of upon the information of G. H. for that the said C. D. on, &c. at, &c. aforesaid, did receive as an apprentice a certain poor child, named A. P. who was then and there by a certain indenture of apprenticeship bound unto him the said C. D. as such apprentice by E. F. overseer of the poor of the parish aforesaid; [or *being overseer of the poor of the parish aforesaid, did, by a certain indenture of apprenticeship, bind a certain poor child, named A. P. as an apprentice to one E. F.*] *an order of two justices of the peace in that behalf, and an allowance of such indenture of apprenticeship by two justices of the peace, not having before then been obtained, as required by the statute in that case made and provided; contrary to the form of the statute made in the fifty-sixth year of the reign of his late Majesty King George the Third, intituled* "An Act to regulate the Binding of Parish Apprentices;" *and for which offence we do adjudge that the said C. D. shall forfeit and pay the sum of* [*ten*] *pounds, to be paid and applied as follows, that is to say* [*the sum of*] *to be paid and applied for the necessary costs and charges attending the said information and the proceedings thereon; and the sum of being the residue of the said sum of 10l. to be paid unto G. H. who gave us information of the said offence,* [or *unto for the use of the poor of the said parish;* (*b*)] *and in case such penalty shall not be paid by the said C. D. or levied by distress upon his goods and chattels, within days from the date of this conviction, we adjudge that the said C. D. shall be imprisoned in* [*the house of correction for the said county*], *for the space of months.* (*c*) *Given under our hands and seals, the day and year first above mentioned.*

J. P.
S. P.

(29.) Order of two justices, directing a parish apprentice to continue with widow, &c. of deceased master; on 32 Geo. 3, c. 57, s. 2. (*d*)

—— WHEREAS D. M. within named, late of the parish of in the said county, died on the day of being within three calendar months now last past, we, two of her Majesty's justices of the peace in and for the county aforesaid, whose names are hereunto subscribed, on the application and at the request of A. M. widow [or as the case may be] *of the said D. M. living with and being part of the family of the said D. M. at the time of his death, do hereby order and direct, that A. P. the apprentice within named, who was in the service and actual employment of the said D. M. at the time of his death, shall serve the said A. M. as such apprentice for the residue of the term of such apprenticeship within mentioned, according to the provisions of an act passed in the thirty-second year of the reign of his late Majesty King George the Third, intituled* "An Act for the further Regulation of Parish Apprentices." *Witness our hands this day of .*

J. P.
S. P.

(*a*) See *ante*, 215. The formal parts of this form are given by the 56 Geo. III. c. 139, s. 15, *ante*, 216. See form, Archb. Forms of *Convictions*.

(*b*) See 56 Geo. III. c. 139, s. 13, *ante*, 216.

(*c*) Not less than three nor more than six months.

(*d*) See *ante*, 223.

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I, the above named A. M. do hereby declare, that the above order is made at my request, and that I do accept the said A. P. as my apprentice, according to the terms and covenants contained in the said indenture, and according to the provisions of the said act. Witness my hand, the day and year above written. A. M.

(30.) The like order, by a separate instrument.

WHEREAS it appears unto us, two of her Majesty's justices of the peace for the said county, that A. P. was bound an apprentice by the churchwardens and overseers of the poor of the parish of to D. M. late of the said parish of and that the said D. M. died on the day of being within three calendar months now last past; now we, the said two justices, on application and at the request, &c. [then to the end of the form (No. 29), *mutatis mutandis.*]

(31.) Assignment of a parish apprentice, with consent of two justices, by indorsement on indenture, &c.; on 32 Geo. 3, c. 57, s. 7. (*a*)

BE it remembered, that the within named F. M., by and with the consent and approbation of J. P. and S. P. two of her Majesty's justices of the peace in and for the said county, whose names are subscribed to the consent hereunder written, doth hereby assign A. P. the apprentice within named, unto N. M. to serve him during the residue of the term within mentioned; and that he the said N. M. doth hereby agree to accept and take the said A. P. as an apprentice for the residue of the said term, and doth hereby acknowledge himself, his executors and administrators, to be bound by the agreements and covenants within mentioned on the part of the said F. M. to be done and performed, according to the true intent and meaning thereof, and pursuant to the provisions of an act passed in the thirty-second year of the reign of his late Majesty, King George the Third, intituled "An Act for the further Regulation of Parish Apprentices." *In witness whereof we, the said F. M. and N. M. have hereunto set our hands, this day of .*

F. M.
N. M.

WE, two of her Majesty's justices of the peace above mentioned, do consent thereto. Witness our hands this day of . *J. P.* *S. P.*

(32.) The like assignment by a separate instrument.

WHEREAS it appears unto us, J. P. and S. P. two of her Majesty's justices of the peace in and for the said county, whose names are subscribed to the consent hereunder written, that A. P. was bound an apprentice by the churchwardens and overseers of the poor of the parish of to F. M. of the same parish, by indenture bearing date on or about the day of until the said A. P. should attain his age of twenty-one years. Now be it remembered, that the said F. M. by and with the consent, &c. [and so on to the end, as in form (No. 31), *mutatis mutandis.*]

(33.) Discharge of a parish apprentice; on 32 Geo. 3, c. 57, s. 11. (*b*)

WHEREAS complaint has been made before us, J. P. and S. P. two of her Majesty's justices of the peace in and for the said county, by A. P. a parish apprentice to A. M. of, &c. that he the said A. M. has misused and evil-treated him the said apprentice, and particularly [here state the particular acts of ill-treatment.] *And whereas the said A. M. has appeared before us, in pursuance of our summons for that purpose, yet has not cleared himself of and from the said accusation and complaint, but on the contrary, the said A. P. has made full proof of the truth thereof before us, upon oath: We therefore by these presents do discharge him the said A. P. of and from his apprenticeship to the said A. M.; any thing in the indenture of apprenticeship whereby the said A. P. is bound to the said A. M. to the contrary notwithstanding.*

And we do hereby order that he the said A.M. shall, upon due notice hereof, forthwith deliver up to the said apprentice his clothes and wearing apparel, and also pay immediately to the churchwardens or overseers of the poor of the parish of in the said county, to which parish the said apprentice belongs, some or one of them, the sum of to be applied by them, some or one of them, under our order, for the benefit of the said apprentice, as to us shall seem meet. Given under our hands and seals the day of one thousand eight hundred and .

(34.) Complaint thereon that the money has not been paid.

THE information and complaint of A. O. of, &c. one of the overseers of the poor of the parish of in the said county, made on oath before us J. P. and S. P. two of her Majesty's justices of the peace in and for the said county, this

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(*a*) See *ante*, 234. (*b*) See *ante*, 235.

Forms.

day of one thousand eight hundred and who on his oath aforesaid says, that by an order under the hands and seals of us the said J. P. and S. P. two of her Majesty's justices of the peace in and for the said county, which said order he now here produces to us the said justices, A. P. the parish apprentice of A. M. of the said parish was discharged of and from his apprenticeship to the said A. M. for ill-treatment; and further, that in and by the said order the said A M. was ordered upon due notice of the said order forthwith to deliver up to the said apprentice his clothes and wearing apparel, and also to pay immediately to the churchwardens or overseers of the poor of the said parish, to which parish the said A. P. belongs, some or one of them, the sum of to be applied by them, some or one of them, under the order of us the said justices, for the benefit of the said apprentice; and that of the said order the said A. M. has had due notice, but that the said A. M. has nevertheless not paid the said sum of so directed to be paid by him the said A. M. nor any part thereof, but refuses so to do: Whereupon the said A. P. prays that justice may be done in the premises.

Sworn before us, J. P. and S. P. the day and year first above mentioned at . } A. O.

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(35) Warrant of distress thereon. (a)

To the constable of in the said county, and others whom this may concern.

WHEREAS by an order under the hands and seals of us J. P. and S. P., two of her Majesty's justices of the peace in and for the said county, dated the, &c., A. P. the parish apprentice of A. M. of in the said county, was discharged of and from his apprenticeship to the said A. M. for misusage and ill-treatment; and whereas in and by the said order the said A. M. was ordered upon due notice of the said order forthwith to deliver up to the said A. P. his clothes and wearing apparel, and also to pay immediately to the churchwardens or overseers of the poor of the said parish of (to which parish the said A. P. belongs), some or one of them, the sum of to be applied by them, some or one of them, under the order of us the said justices, for the benefit of the said apprentice: and whereas it appears unto us upon the oath of A. O. one of the overseers of the poor of the said parish, that the said A. M. has had due notice of our said order, but has not paid the said sum of so directed to be paid by the said A. M. nor any part thereof, but on the contrary has refused and still refuses so to do, and thereupon the said A. O. prays that justice may be done in the premises: These are therefore to command you [that at the expiration of seven days from the notice of our said order, you do make distress of the goods and chattels of the said A. M. unless before the expiration of the said seven days, he the said A. M. give notice to the churchwardens and overseers of the said parish of or to one of them, of his intent to appeal to the next general quarter sessions after such order made, against the said order of discharge, or the said order of payment, in which case you are to postpone the taking of the said distress till after the said next sessions shall have been holden; and if at the sessions the said A. M. shall not appear in support of his said appeal, then you are hereby further commanded to add the sum of 40s. to the said expenses of distress, and immediately upon such nonappearance, or upon the confirmation at the said sessions of the said order of discharge or payment, you are to proceed forthwith to make the said distress,] that you do levy the same by distress of the goods and chattels of the said A. M. together*

(a) See *ante*, 235. It will be seen that this form is applicable only to where the warrant of distress has been issued within the seven days. If the warrant be issued after that time, then it may be in the above form, omitting the words between brackets. In the event of the appeal being made, and the order confirmed; or if the appeal being made, and the master do not appear, then the warrant of distress may be framed from the above form *mutatis mutandis*; and may be thus from the above asterisk: *And that within seven days after such notice of the said order, the said A. M. did give notice to the churchwardens and overseers of the said parish of of his intent to appeal against the said order at the then next sessions of the peace, to be holden for the said county. And that at the said session the said order was then and there confirmed,* [or "*but that at the said sessions the said A. M. did not appear in support of the said appeal.*"] *These are therefore to command you, &c.* [proceed from these words in the above form, except that after the words *thereout first deducted*, should be added in case of non-appearance, *and that you add 40s. to the said reasonable expenses on account of the non-appearance of the said A. M. as aforesaid.*]

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with the reasonable expenses of such distress; and if within the space of four days next after such distress by you made, the said sum of , together with the reasonable expenses of taking and keeping the said distress, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and out of the money arising by the sale thereof that you pay the said sum of unto the churchwardens or overseers of the poor of the said parish of to be by them applied as aforesaid, returning the overplus, upon demand, unto the said , the reasonable charges of taking, keeping, and selling the said distress being thereout first deducted. Given under our hands and seals the day of one thousand eight hundred and .

J. P.
S. P.

(36.) Complaint against master for not giving a discharged parish apprentice his clothes; on 32 Geo. 3, c. 57, s. 11.(a)

THE information and complaint of A. P. of, &c. late the parish apprentice of A. M. of in the said county, made on oath before us J. P. and S. P. two of her Majesty's justices of the peace in and for the said county, this day of, &c. who, on his oath aforesaid, saith, that by an order under the hands and seals of us the said justices, dated the day of, &c. which said order he now here produces to us the said justices, he the said A. P. was discharged from his apprenticeship to the said A. M. for ill-treatment; and that in and by the said order, the said A. M. was ordered, upon due notice of the said order, forthwith to deliver up to him the said A. P. his clothes and wearing apparel; and that the said A. M. had due notice of the said order on the day of, &c. and that this complainant did then demand his clothes and wearing apparel of and from the said A. M. according to the said order, which he the said A. M. then refused, and still refuses, to deliver up, wherefore he the said A. P. prays us the said justices that justice may be done in the premises.

A. P.

Sworn before us, J. P. and S. P. the day and year first above named.

(37.) Order thereon.

WHEREAS by an order under the hands and seals of us J. P. and S. P. two of her Majesty's justices of the peace in and for the said county, dated the day of, &c. A. P. the parish apprentice of A. M. of in the said county, was discharged of and from his apprenticeship to the said A. M. for ill-treatment: and whereas in and by the said order the said A. M. was ordered upon due notice of the said order forthwith to deliver up to the said A. P. his clothes and wearing apparel: And whereas information and complaint have been made unto us the said justices, by and upon the oath of the said A. P. that the said A. M. had due notice of our said order on the day of, &c. and that the said A. P. did then demand his clothes and wearing apparel, but that the said A. M. then refused, and still refuses to deliver up to him the said A. P. such clothes and wearing apparel as aforesaid, according to the direction of the said order: And thereupon the said A. P. prays us the said justices that justice may be done in the premises: And whereas the said A. M. has been duly summoned to appear before us the said justices to answer unto the said complaint, but has not shown unto us any just cause why he refuses to comply with the directions of the said order, and to deliver up the said clothes and wearing apparel as thereby commanded: We do therefore hereby order the said A. M. upon due notice of this our order, to pay to the churchwardens and overseers of the poor of the said parish of the sum of (b) to be by them applied as the law directs. Given under our hands and seals the day of one thousand eight hundred and .

J. P.
S. P.

(38.) Warrant of distress thereon.

To the constable of and others whom this may concern.

WHEREAS by an order under the hands and seals of us, J. P. and S. P. two of her Majesty's justices of the peace in and for the said county, dated the day of &c., A. P. of, &c. the parish apprentice of A. M. of in the said county, was discharged of and from his apprenticeship to the said A. M. for misusage and ill treatment: And whereas in and by the said order the said A. M. was ordered upon due notice of the order forthwith to deliver up to the said A. P. his clothes and wearing apparel: And whereas information and complaint have been made unto us the said justices, by and upon the oath of the said A. P. that the said A. M. had due notice of our

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(a) See *ante*, 235.

(b) A sum not exceeding 5*l*.

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said order on the day of, &c., but refused to deliver up to him the said A. P. such clothes and wearing apparel as aforesaid, according to the direction of the said order: And whereas the said A. M. was duly summoned to appear before us on the day of last, to answer unto the said complaint, but did not show unto us any just cause why he refused to comply with the directions of the said order, and deliver up to the said A. P. the said clothes and wearing apparel as thereby commanded: We the said justices did thereupon then and there, by an order under our hands and seals, order that he the said A. M. should, upon due notice of the said order last mentioned, pay to the churchwardens or overseers of the poor of the said parish of the sum of to be by them applied as the law directs: And whereas it appears unto us the said justices, upon the oath of A. O. one of the overseers of the poor of the parish of aforesaid, that the said A. M. has had due notice of our said order last mentioned, but has not paid the said last mentioned sum of so directed to be paid by the said A. M. nor any part thereof: These are therefore to command you to make distress of the goods and chattels of the said A. M., and if within the space of four days next after such distress by you made, the said last mentioned sum of , together with the reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the goods and chattels so by you distrained, and out of the money arising by the sale thereof that you pay the said last mentioned sum of unto the churchwardens or overseers of the poor of the parish of to be by them applied as aforesaid, returning the overplus, upon demand, unto the said A. M., the reasonable charges of taking, keeping, and selling the said distress being thereout first deducted. Given under our hands and seals the day of one thousand eight hundred and

J. P.
S. P.

(39.) Recognizance of overseers to prosecute master for ill-treatment of parish apprentice; on 32 Geo. 3, c. 37, s. 11. (a)

BE it remembered, that on the day of in the year of the reign of our Sovereign Lady Victoria, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, A. O. and P. O. overseers of the poor of the parish of in the said county, [or, P. O. one of the overseers of the poor of the parish of as the case is,] *personally came before us, J. P. and S. P. Esquires, two of her Majesty's justices of the peace in and for the said county, and acknowledged themselves to owe to our said Lady the Queen the sum of each, to be made and levied of their goods and chattels, lands and tenements respectively, to the use of our said Lady the Queen, her heirs and successors, if default shall be made in the condition following:*

Whereas A. P. an apprentice by a parish indenture to A. M. of the parish of in the said county, [farmer,] has charged on oath the said A. M. his master, before us the said justices, with misusage and ill treatment, he the said A. M. having [here state shortly the particular grounds of complaint,] *for which said offences and misconduct we have discharged the said A. P. of and from his apprenticeship to the said A. M.*

Now the condition of this recognisance is such, that if the above bounden A. O. and P. O. do and shall produce the said A. P. or other material evidence, and prosecute with effect the said A. M. for the said offence and misconduct, by indictment at the next general quarter sessions of the peace [or *gaol delivery*, as the case is,] *for the said county, according to the directions of an act passed in the thirty-second year of the reign of his late Majesty King George the Third, intituled* "An Act for the further Regulation of Parish Apprentices," *then this recognizance to be void, otherwise of force. Acknowledged before us,*

J. P.
S. P.

(40.) Information against master for abandoning a parish apprentice, and removing above forty miles; on 33 Geo. 3, c. 139, s. 8. (b)

THE information and complaint of A. O. overseer of the poor of the parish of in the said county, made upon oath before me, one [or *us, two*] *of her Majesty's justices of the peace in and for the said county, the day of, &c. who says that A. P. a poor child of the parish of aforesaid, in the county aforesaid, was put apprentice by the churchwardens and overseers of the poor of the said parish of , by and with the consent of two of her Majesty's justices of the peace in and for the said county, unto A. M. then of the said parish of* [*tailor,*] *and that the said A. M. afterwards removed into the parish of in the county*

(a) See *ante*, 235. (b) See *ante*, 236.

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aforesaid, [or as the case is, see *post,* (No. 42),] *with the said A. P. his apprentice, and where he left her and wilfully abandoned her on the , removing his residence more than forty miles from the parish where the same was when the said A. P. was bound apprentice, as well as from the said parish of , where he so wilfully abandoned her, without giving a written notice thereof to the churchwardens and overseers of the poor of the parish where the said apprentice then resided and was legally settled, fourteen days previous to such removal, according to the directions of an act passed in the fifty-sixth year of the reign of King George the Third, intituled* "An Act to regulate the Binding of Parish Apprentices," *whereby the said A. M. has forfeited the sum of* 10*l.* *to be paid to the overseers of the poor of the said parish in which such offence has been committed: Whereupon the said A. O. prays the judgment of two of her Majesty's justices of the peace for the said county of in the premises, and that the said A. M. may be summoned to answer the premises accordingly.*

Sworn before me [or *us,*] *J. P. Esquire,* [*and S. P. Esquire,*] *the day and year first above named.*

(41.) Summons thereon.

To the constable of in the county of and others whom this may concern.

WHEREAS information and complaint upon oath have been made before me, [or *us,* as the case may be,] *one* [or *two*] *of her Majesty's justices of the peace in and for the said county, by A. O. overseer of the poor of the said parish of in the said county, that A. P. a poor child of the parish of aforesaid, in the county aforesaid, was put apprentice by the churchwardens and overseers of the poor of the said parish of by and with the consent of two of her Majesty's justices of the peace in and for the said county, unto A. M. then of the said parish of* [*tailor,*] *and that the said A. M. afterwards removed into the parish of in the county aforesaid,* [or as the case is,] *with the said A. P. his apprentice, and where he left him and wilfully abandoned him on the , removing his residence more than forty miles from the parish where the same was when the said A. P. was bound apprentice, as well as from the said parish of* [or as the case is,] *where he so wilfully abandoned him without giving a written notice thereof to the churchwardens and overseers of the poor of the parish where the said apprentice then resided and was legally settled, fourteen days previous to such removal, according to the directions of an act passed in the fifty-sixth year of the reign of his late Majesty King George the Third, intituled* "An Act to regulate the Binding of Parish Apprentices," *whereby the said A. M. has forfeited the sum of ten pounds, to be paid to the overseers of the poor of the said parish in which such offence has been committed: These are therefore, in her Majesty's name, to command you to summon the said A. M. to appear before me* [or *us, and such other of her Majesty's justices of the peace in and for the said county as shall be present at in in the said county, on the day of instant, at the hour of in the forenoon, to answer unto the said information and complaint, and to be further dealt with according to law. Given under my hand and seal,* [or *our hands and seals,*] *this day of in the year of our Lord one thousand eight hundred and .*

J. P.
S. P.

(42.) Conviction of master removing with, or abandoning, a parish apprentice without order, &c.; on 56 Geo. 3, c. 139.

BE it remembered, that on the day of in the year of our Lord A. M. of, &c. [*tailor,*] *is convicted before us, J. P. and S. P., Esquires, two of her Majesty's justices of the peace in and for the county of upon the information of A. O. for that the said A. M. being a person to whom a child, named A. P. had been before them bound apprentice by the overseers of the poor of the parish of and whilst the said A. P. was so bound to him as aforesaid, did, on the day of last past, and within three calendar months next before the information in this behalf was exhibited, remove his residence to in the county of being forty miles and upwards from the parish wherein the said A. M. resided, when the said A. P. was so bound apprentice as aforesaid,* (*a*) *and took the said A. P. to aforesaid, without an order in that behalf being made by two justices of the peace, either for the continuance of such apprentice with the said A. M. or for the*

(*a*) See the 56 Geo. III. c. 139, s. 8, *ante,* 236.

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discharge of such apprentice, or for the binding or assigning of such apprentice to any other person; [or *did wilfully abandon and leave the said A. P. without giving a written notice to the churchwardens or overseers of the poor of the said parish, in which the said A. P. then resided, of his the said A. M.'s intention to remove his residence or establishment of business, pursuant to the statute in that case made and provided:*] *contrary to the form of the statute made in the fifty-sixth year of the reign of his late Majesty King George the Third, intituled* "An Act to regulate the Binding of Parish Apprentices," *and for which offence we do adjudge that the said A. M. shall forfeit and pay the sum of ten pounds, to be paid and applied as follows, that is to say, to be paid to the churchwardens and overseers of the poor of the parish of wherein the said A. P. was legally settled at the time the said A. M. did so remove,* [or *did so abandon and leave the said A. P.*] *as aforesaid, for the use of the poor of the said parish; and in case such penalty shall not be paid by the said A. M. or levied by distress on his goods and chattels within days from the date of this conviction, we adjudge that the said C. D. shall be imprisoned in* [*the house of correction for the said county,*] *for the space of months.* (a) *Given under our hands and seals, the day and year first above mentioned.*

J. P.
S. P.

(43.) Warrant of distress thereon.

To the constable of the parish of and others whom this may concern.

WHEREAS A. M. late of, &c., [*tailor,*] *is this day duly convicted before us, J. P. and S. P. Esquires, two of her Majesty's justices of the peace in and for the said county, upon the oath of A. O. overseer of the poor of the said parish of* [or, as the case is,] *for that A. P. a poor child of the parish of aforesaid, in the county aforesaid, was put apprentice by the churchwardens and overseers of the poor of the said parish of by and with the consent of two of her Majesty's justices of the peace in and for the said county, unto the said A. M. then of the said parish of* [*tailor,*] *and that the said A. M. afterwards removed into the parish of in the county aforesaid,* [or as the case is,] *with the said A. P. his apprentice, and where he left him and wilfully abandoned him on the , removing his residence more than forty miles from the parish where the man was when the said A. P. was bound apprentice, as well as from the said parish of* [or as the case is] *where he so wilfully abandoned him, without giving a written notice thereof to the churchwardens and overseers of the poor of the parish where the said apprentice then resided and was legally settled, fourteen days previous to such removal, according to the directions of an act passed in the fifty-sixth year of the reign of his late Majesty King George the Third, intituled* "An Act to regulate the Binding of Parish Apprentices," *whereby the said A. M. hath forfeited the sum of* 10*l.* *to be paid to the overseers of the poor of the said parish in which such offence has been committed: These are therefore to command you, in case no notice of appeal to any Court or general or quarter sessions to be holden for the said county, within three calendar months from the date of such information and complaint, be given by the said A. M. to us the said justices, and also to the person or persons interested in such appeal, within twenty one days from the date hereof, the said A. M. entering into a recognisance with two sufficient sureties, before some justice of the peace for the county or district within which the said conviction has taken place, to appear at such general or quarter sessions to abide the judgment of the Court upon such appeal, and to pay the costs which may be awarded thereon, to levy the said sum of* 10*l.* *by distress and sale of the goods and chattels of the said A. M.; and if within the space of four days next after such distress by you taken, the said sum of* 10*l.* *together with the reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods and chattels so by you distrained as aforesaid, and out of the money arising by such sale that you do pay the sum of* 10*l.* *to the overseers of the poor of the said parish in which the said offence was committed, to be by them applied under our orders as the said act directs, returning the overplus (if any) on demand unto the said A. M. and if sufficient distress cannot be found of the goods and chattels of the said A. M. whereon to levy the said sum of* 10*l.* *that then you do certify the same to us, together with the return of this precept. Given under our hands and seals at in the said county, the day of in the year of our Lord one thousand eight hundred and .*

J. P.
S. P.

(a) Not less than one nor more than six months.

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(44.) Commitment thereon for want of distress.(a)

To the constable of , in the said county, and to the keeper of the house of correction, [or common gaol,] at , in the said county.

WHEREAS A. M. late of, &c. [tailor,] was on the of last, duly convicted before me [or us] J. P. [and S. P.] esquires, one [or two] of her Majesty's justices of the peace in and for the said county, upon the oath of A. O. overseer of the poor of the said parish of , [or as the case is,] for that A. P. a poor child of the parish of aforesaid, in the county aforesaid, was put apprentice by the churchwardens and overseers of the poor of the said parish of , by and with the consent of two of her Majesty's justices of the peace in and for the said county, unto the said A. M., then of the parish of , [tailor,] and that the said A. M. afterwards removed into the parish of , in the county aforesaid, [or as the case is,] with the said A. P. his apprentice, and where he left him and wilfully abandoned him on the , removing his residence more than forty miles from the parish where the same was when the said A. P. was bound apprentice as well as from the said parish of , [or as the case is,] where he so wilfully abandoned him, without giving a written notice thereof to the churchwardens and overseers of the poor of the parish where the said apprentice then resided and was legally settled, fourteen days previous to such removal, according to the directions of an act passed in the fifty-sixth year of the reign of his late Majesty King George the Third, intituled "An Act to regulate the Binding of Parish Apprentices," whereby the said A. M. has forfeited the sum of 10l. to be paid to the overseers of the poor of the said parish in which such offence has been committed: And whereas on the day of, &c. we, [or the said justices,] did issue our [or their] warrant to the constable of to levy the said sum of 10l. by distress and sale of the goods and chattels of the said A. M. and to pay the same according to the direction of the said statute; and whereas it duly appears unto us J. P. and S. P. esquires, two [or me, J. P. esquire, one] of her Majesty's justices of the peace in and for the said county, as well upon the oath of the said constable of as otherwise, that he, the said constable of , has used his best endeavours to levy the said sum of 10l. on the goods and chattels of the said A. M. as aforesaid, but that no sufficient distress can be found whereon to levy the same. These are therefore to require you the constable of aforesaid to convey the said A. M. to the said house of correction [or common gaol] of the said county of , and deliver him to the said keeper thereof, together with this precept. And you the said keeper are hereby commanded to receive into your custody in the house of correction [or common gaol] him the said A. M. and there safely to keep him for the space of : And for your so doing this shall be your sufficient warrant. Given under our hands and seals, [or my hand and seal,] at in the said county, the day of , in the year of our Lord one thousand eight hundred and .

J. P.
S. P.

(45.) Conviction for discharging parish apprentices without consent of two justices, on 56 Geo. 3, c. 139, s. 10. (b)

[The 56 Geo. III. c. 139, s. 15, gives the formal part of the conviction, (*ante*, No. 42), and states the offence thus:] *in the county aforesaid, did put away and transfer unto A. B., [or did discharge and dismiss from his service] a parish apprentice named G. H. then bound to the said C. D. as apprentice, without the consent of two justices of the peace in that behalf; contrary to the form of the statute made in the fifty-sixth year &c.* [as in the form, *ante*, (No. 42), to the end.]

(46.) Recognizance on giving notice of appeal, on 56 Geo. 3, c. 139, s. 17.(c)

County of } BE it remembered, that on the day of in the year } of the reign of our Sovereign Lady Victoria, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, A. M. of in the county aforesaid, [yeoman,] and A. S. of [weaver,] and B. S. of [carpenter,] personally came before me J. P. esquire, one of her Majesty's justices of the peace for the said county, and acknowledged themselves to owe to our said Lady the Queen, that is to say, the said A. M. the sum of 20l., and the said A. S. and B. S. the sum of 10l. each, of good and lawful money of Great Britain, to be made and levied of their goods and chattels, lands and tenements respectively, to the use of our said sovereign Lady the Queen, her heirs and successors, if the said A. M. shall make default in the condition following:

(a) See *ante*, 216. See the forms and law, *post*, "Distress by Justices' Warrant," Vol. II.

(b) See *ante*, 238.

(c) See *ante*, 216.

7. *Forms.*

Whereas the above bounden A. M. was on the day of , instant, duly convicted before J. P. and K. P. esquires, two of her Majesty's justices of the peace in and for the said county, upon the oath of O. P. overseer of the poor of the parish of in the said county, {or, as the case may be,] *for that A. P. a poor child of the parish of in the county aforesaid, was put apprentice by the churchwardens and overseers of the poor of the said parish of , by and with the consent of two of her Majesty's justices of the peace in and for the said county, unto the said A. M. then of the said parish of , and that the said A. M. afterwards removed into the said parish of W. with the said A. P. his apprentice, and where he left her and wilfully abandoned her on the , removing his residence more than forty miles from the parish where the same was when the said A. P. was bound apprentice, as well as from the said parish of W. where he so wilfully abandoned her without giving notice thereof to the churchwardens and overseers of the poor of the parish, where the said apprentice then resided and was legally settled, fourteen days previous to such removal: Now the condition of this recognizance is such, that if the above bound A. M. shall well and truly appear at the next general* [or *quarter*] *session of the peace to be holden in and for the said county, and then and there enter and prosecute an appeal against the said conviction, and abide the judgment of the Court upon such appeal, and pay the costs which may be awarded thereon, and not depart without leave of the Court, then this recognizance to be void.*

Acknowledged before me, J. P.

(47.) *Register of a Parish Apprentice, under 42 Geo. III. c. 46.(a)*

Number.	Date of Indenture.	Name of the Apprentice.	Sex.	Age.	His or her Parents' Names.	Their Residence.	Name of Persons to whom bound or assigned, as the case may be.	His or her Trade.	His or her Residence.	Term of the Apprenticeship or Assignment.	Apprentice or Assignment Fee.	Overseers Parties to the Indenture or Assignment.	Magistrates assenting.	Magistrates resident in any other County within which the place shall be situated where the child is to serve.
													(*To be signed by themselves*)	N. B. This is added in consequence of statute 56 Geo. 3, c. 139, s. 4, *ante*, 215.

(48.) Conviction under 42 Geo. 3, c. 46, s. 2. (b)

BE it remembered, that on the day of in the year of our Lord one thousand eight hundred and , A. B. is convicted before us, two of her Majesty's justices of the peace for the [specifying the offence and the time and place when and where committed, as the case may be,] *contrary to an act made in the forty second year of the reign of King George the Third, intituled* [here set forth the title of the act.] *Given under our hands and seals the day and year above mentioned.*

(a) The act gives this form, see *ante*, 238. (b) *Ibid.*

Apprehension of Offenders, see *post*, "*Arrest.*"

Approver.

AN Approver (*probator*) is a person indicted of treason or felony, and in prison for the same, who, upon his arraignment, before any plea pleaded, doth confess the indictment, and takes a corporal oath to reveal all treasons and felonies that he knoweth of, and therefore prays a coroner, before whom he is to enter his appeal or accusation against those that are partners in the crime contained in the indictment. (3 *Inst.* 129.) Who is, &c.

This accusation of himself and oath makes his accusation of another person of the same crime to amount to an indictment; and if his partners are convicted, he shall have his pardon of course. (*Id.* 129, 130.)

But justices of the peace cannot take cognizance hereof, because they have no authority by their commission to assign a coroner. (*Id.* 130.)

And besides, as it is in the discretion of the Court whether they will suffer one to be an approver, this method of late hath been seldom practised; and in many cases we have what seems to amount to the same by statute, where pardon is assured to offenders, on discovering and convicting their accomplices. (4 *Blu. Com.* 330; statutes 4 & 5 Will. III. c. 8; 6 & 7 Will. III. c. 17; 10 & 11 Will. III. c. 23, s. 5; 5 Anne, c. 31, s. 4; 29 Geo. II. c. 30.) The rewards given by these statutes were abolished by 58 Geo. III. c. 70; but by 7 Geo. IV. c. 64, s. 32, the Court have now a discretionary power of rewarding those who have been acting in the apprehension of offenders. See *post*, "*Rewards*," Vol. V. Practice as to, obsolete. Reward to.

It is the duty of magistrates, in all cases, to commit an accomplice, and not to admit him to bail, notwithstanding it may be intended to call the accomplice as a witness on the trial. (*Rex* v. *Beardmore*, 7 *Car. & P.* 497.) Should not be admitted to bail.

The practice of the London police-offices is in conformity to this principle, for it is not their custom to release an accomplice who proposes to give evidence as a witness against his associates, but to commit him for the felony; in which case, upon his fully disclosing the facts upon the trial, he will probably receive his pardon; in order, however, to avoid collusion in the testimony between the parties suspected, the accomplice is usually committed to the house of correction and the others to the county prison. (See 1 *Chit. C. L.* 83; *Rudd's case*, 1 *Leach*, 120; 1 *Cowp.* 336, S. C.)

The engagement of a magistrate to an accomplice, that if he will give his evidence he will experience favour, is merely in the nature of a recommendation to mercy, for no authority is given to a justice of the peace to pardon an offender, and to tell him that he shall be a witness against others. He is not therefore assured of his pardon, but gives his evidence *in vinculis*, in custody, and it depends upon his behaviour whether he shall or shall not be admitted to mercy. A justice has no authority to select whom he pleases to pardon or to prosecute; and a prosecutor himself has even less power or rather pretence to select than a justice of the peace. It is merely an equitable claim to the mercy of the crown, from the magistrate's express or implied promise of an indemnity upon certain conditions of a most candid disclosure. Accomplice's evidence.

An accomplice admitted as king's evidence, and performing the condition on which he is admitted as a witness, is not entitled as matter of right, to be exempt from prosecution for other offences with which he is charged, but it will be matter in the discretion of the judge whether he will recommend him for a pardon or not. (*R.* v. *Lee*, *Russ & Ry. C. C. R.* 361; *R.* v. *Brunton*, *Russ. & Ry. C. C. R.* 454; *R.* v. *Duce*, 1 *Burn's Just. by Chetwynd*, 212.) But the judges will not, in general, admit an accomplice as king's evidence, although applied to for that purpose by the counsel for the prosecution, if it appear that he is charged with any other felony than that on the trial of which he is to be a witness. (2 *C. & P.* 411.)

The confirmation of an accomplice ought to be as to some matter which goes to connect the prisoner with the transaction, and it would be highly dangerous to act on the evidence of an accomplice unconfirmed with respect to Confirmation of.

Approver.

the party accused. (*Reg.* v. *Dyke*, 8 *Car. & P.* 261; S. P. *Reg.* v. *Farlar*, 8 *Car. & P.* 106; *R.* v. *Noakes*, 5 *C. & P.* 526.)

But it seems that in strict law a jury may if they please act upon the evidence of an accomplice, without any confirmation of his statement. (*R.* v. *Hastings*, 7 *C. & P.* 152.) And if an accomplice be confirmed in his evidence against one prisoner, but not confirmed with respect to another, both may be convicted, if the jury think the accomplice worthy of credit. (*R.* v. *Dawber and others*, 3 *Stark. N. P. C.* 34; and see *R.* v. *Jones*, 2 *Camp.* 131.) It has been held that if an accomplice be confirmed as to the particulars of the story, he does not require confirmation as to the person charged. (*R.* v. *Birkett*, *R. & R.* 252.) But this doctrine no longer prevails, as such confirmation proves only the participation of the accomplice. (*R.* v. *Webb*, 6 *C. & P.* 595; *R.* v. *Wilkes*, 7 *C. & P.* 172; *R.* v. *Dyke*, 8 *C. & P.* 261; *R* v. *Farlan*, 8 *C. & P.* 108.) But where upon an indictment against principal and accessaries, the case against the principal was proved by an accomplice, who was confirmed as to the accessaries, but not as to the principal, the jury were ordered to acquit the prisoners. (*R.* v. *Wells & al. M & M.* 326; *R.* v. *Moore*, 7 *C. & P.* 270.) In the case of felony the testimony of the wife of an accomplice is not such evidence as a jury ought to rely upon as confirmation of the statement of the accomplice. (*R.* v. *Neale*, 7 *C. & P.* 168.) A prisoner who employed another person to harbour a felon, may be convicted on the uncorroborated testimony of the person who harboured him. (*R* v. *Jarvis*, 2 *M. & Rob.* 40.)

Arbitration, see *post*, "*Award.*"

Armour and Arms, see *ante*, "*Affray*;" "*Fire Arms*," Vol. III.; "*Stores*," Vol. V.

Armorial Bearings, see "*Taxes*, Vol. VI.

Army, see "*Military Law*," Vol. V.

Arrack, see "*Excise*," Vol. II.

Arraignment.

What.

IN *felonies* it is absolutely necessary the prisoner should attend his trial personally, though it is not so in misdemeanors. See *ante*, 177.

When an offender comes into Court, or is brought in by process, sometimes of *capias*, and sometimes of *habeas corpus* directed to the gaoler of another prison, the first thing that follows thereupon is his arraignment. (2 *Hale*, 216.)

Now arraignment is nothing else but calling the offender to the bar of the Court, to answer the matter charged upon him. (*Id.*)

Standing in irons.

The prisoner, on his arraignment, though under an indictment of the highest crime, must be brought to the bar without irons and all manner of shackles and bonds, unless there be a danger of escape, and then he may be brought with irons. (2 *Hale*, 219; 4 *Bla. Com* 323; 2 *Hawk.* c. 28, s. 1.)

But at this day they usually come with their shackles upon their legs, for fear of an escape, but stand at the bar unbound, till they receive judgment. (2 *Hale*, 219.)

A distinction, however, has been taken as to the standing in irons, &c. between the time of the arraignment and the trial, and it seems to be the better opinion that the prisoner is not entitled to have his fetters taken off until after he has pleaded. (*Layer's case*, 16 *St. Trials*, 94, 99; *R.* v. *Waite*, 1 *Leach*, 26; 2 *East's P. C.* 570; 2 *Hale*, 219, n. b.; 4 *Bla. Com.* 322, n. 2, *Chit. Ed.*) *Arraignment.*

There is no necessity that a prisoner, at the time of his arraignment, should hold up his hand at the bar, or be commanded so to do; for this is only a ceremony for making known the person of the offender to the Court; and if he answer that he is the same person it is all one. (2 *Hawk.* c. 28, s. 2; *R.* v. *Radcliffe*, 1 *Bla. Rep.* 3; *Fost.* 40, S. C.; 4 *Bla. Com.* 323; *Lord Stafford's case*, *T. Raym.* 408.) Holding up hand.

It is not usual at all to require this of a peer. (2 *Hale*, 219, n. a.; 2 *Hawk.* c. 28, s. 2.) Peers.

A peeress, when about to be tried by her peers, may be arraigned kneeling, and rise after joining issue. (1 *Leach*, 146.)

After this the indictment should be read to the prisoner distinctly in English, that he may understand the charge. (2 *Hale*, 219; *Dalt.* c. 185.) Reading indictment.

The indictment is, it seems, to be read, although the defendant has had a copy delivered to him. (*R.* v. *Hensey*, 1 *Burr.* 643.) The mode in which it is read is, after saying "A. B. hold up your hand," to proceed, "You stand indicted by the name of A. B., late of, &c., for that you, on, &c." and then to go through the whole of the indictment. (*Dalt.* c. 185; *post*, "*Sessions*," Vol. V.; "*Trial*," Vol. VI.; *Cro. C. C.* 7.) The indictment is to be slowly read if defendant wish it. (2 *Leach*, 711.)

As to the arraignment of a deaf and dumb prisoner, see "*Mute*," Vol. V. Deaf and dumb prisoner.

After the indictment is read, the clerk of the arraigns says, "How say you, A. B., are you guilty or not guilty?" (2 *Hale*, 119; *R.* v. *Hensey*, 1 *Burr.* 643; *Cro. C. C.* 7.) Upon this, if the prisoner confesses the charge the confession is recorded, and nothing is done till judgment. (4 *Harg. St. Trials*, 779; *Dalt.* c. 185.) But if he denies it, he answers, "Not guilty," upon which the clerk of assize, or clerk of the arraigns, replies, that the prisoner is guilty, and that he is ready to prove the accusation. (*Id.*; 4 *Bla. Com.* 339.) Asking defendant if guilty, &c.

After issue is thus joined, the clerk usually proceeded to ask the prisoner "How will you be tried?" to which the prisoner replied, "By God and my country;" to which the clerk, in the humane presumption of the prisoner's innocence, rejoins, "God send you a good deliverance." (2 *Hale*, 219; 4 *Bla. Com* 341; *Cro. C. C.* 7.)

Though the prisoner persists in saying he will be tried by his *King* and his country, and refuses to put himself on his trial in the ordinary way, it will not invalidate a conviction. (*R.* v. *Davis*, *Gow*, *C. N. P.* 219, and notes there.)

And these unnecessary forms after the plea of not guilty are abolished by 7 & 8 Geo. IV. c. 28, s. 1, which directs that when a prisoner shall plead not guilty, he shall by such plea, without any further form, be deemed to have put himself on the country for trial, and the Court shall, in the usual manner, order a jury for the trial of such prisoner accordingly.

This being done, he writes on the indictment "*po. se*," for *ponit se*, meaning that the defendant put himself upon the country, and thus the form of the arraignment concludes. (2 *Hale*, 119; *Cro. C. C.* 7.)

As to standing *mute* and allowing the plea of not guilty to be entered thereon, see 7 & 8 Geo. IV. c. 28, s. 2, *post*, "*Mute*," "*Plea*," Vol. V. Standing mute.

In prosecutions for treason, as the defendant cannot be tried immediately after arraignment, he is remanded by rule to be brought up again at some fixed period to take his trial. (4 *Harg. St. Trials*, 778.) Postponement of trial.

It was usual to postpone the arraignment of the prisoner on an indictment for murder, at common law, until a year and a day had elapsed, unless the evidence were very clear against him, and no appeal depending. (2 *Hawk.* c. 28, s. 1.) But now, by 3 Hen. VII. c. 1, the justices shall proceed to try Postponement of arraignment.

Arraignment.

him upon an indictment for murder or manslaughter, though within the year, and, if acquitted, he may, at their discretion, be detained to answer an appeal; for *autrefois acquit* upon an indictment is no bar to that vindictive proceeding. Other offences, however, remain as at common law, though it is the constant practice not to wait until the termination of the year.

Several defendants.

Where several defendants are to be charged upon the same indictment, they should be all arraigned together on the first day before any of them are brought to trial, and on the next day proceed to trial with one or more of them together, as shall be found most convenient for the purposes of justice. (*Kel.* 8.)

Several indictments.

If there be two indictments against the same person for the same offence, as for murder and manslaughter, in respect of the same death, or an inquisition of the coroner and an indictment found by the grand jury, the proper course is to arraign him upon both at the same time, and to indorse his acquittal or attainder on them, that he may not again be disturbed by another proceeding. (2 *Hale*, 228; 1 *East's P. C.* 371; *R.* v. *Culliford*, 1 *Salk.* 382.) For if he be arraigned upon one only and acquitted, he must be tried upon the other, and plead his former acquittal. (*Id.*) But if the prisoner be arraigned upon the indictment only, there ought to be an entry of *cesset processus* on the coroner's inquest, for otherwise the prisoner might be outlawed upon it. (*Id.*)

Accessaries.

As to the arraignment of accessaries, see *ante*, 28, 29.

Effect of want of, or mistake in, arraignment.

The total want or omission of the arraignment will be a sufficient ground for reversing the judgment or attainder. (2 *Hale*, 218; *Anon.* 3 *Mod.* 265.) But it is doubtful whether it is absolutely necessary, in case of an appeal at least, to state it on the record. (2 *Hawk.* c. 28, s. 6.) And it is said, that if it be stated in the record, that the defendant had oyer of the indictment, it shall be intended that he was arraigned formally upon it. (1 *Show.* 152; *Com. Dig. Indictment*, M.; and see *Gow*, 213.)

As to the other proceedings, see *post*, titles "*Sessions*," Vol. V.; "*Traverse*," "*Trial*," Vol. VI.

(1.) Proclamation for silence, to proceed on business on the arraignment of prisoners.

OYEZ. My lords the Queen's justices do strictly charge and command all manner of persons to keep silence, for they will now proceed to the pleas of the crown and arraignment of prisoners upon their lives and deaths; and all those that are bound by recognizance to give evidence against any of the prisoners which shall be at the bar, let them come forth and give their evidence, or they will forfeit their recognisance. [Then follows the usual form of arraignment as pointed out, *ante*, 265.]

(2.) Entry or description of the arraignment on the record.

AND afterwards, to wit, at the same delivery of the gaol of the said Lady the Queen of his county aforesaid, on the said Friday, the 6th day of August, in the said second year of the reign of the said Lady the Queen, before the said justices of the Lady the Queen last above named, and others their fellows aforesaid, here cometh the said P. H. under the custody of the said W. B. Esquire, sheriff of the county aforesaid (in whose custody in the gaol of the county aforesaid, for the cause aforesaid, he had been before committed), being brought to the bar here in his proper person by the said sheriff, to whom he is here also committed. And forthwith being demanded concerning the premises in the said indictment above specified and charged upon him, how he will acquit himself thereof, he saith that he is not guilty thereof, and thereof for good and evil he puts himself upon the country. And J. B. Esquire, clerk of the assize for the county aforesaid, who prosecutes for the said Lady the Queen in this behalf, doth the like. Therefore, &c.

Array, *Challenge to, of Jurors*, see "*Jurors*," Vol. III.

Arrest without Warrant.

THIS title is to be understood of arrests in *criminal* cases only, and not in civil cases; also to arrests without warrant. As to arrests under a warrant, see "*Warrant*," Vol. VI.

In law, an arrest doth signify the restraint of a man's person, depriving him of his own will and liberty, and binding him to become obedient to the will of the law; and it may be called the beginning of imprisonment. (*Lamb.* 95; and see further, *post*, 282.) What an arrest.

Concerning arrest in *criminal* cases, it will be shown—

I. *Who may or may not be arrested*, 267.

II. *For what an Arrest may be made*, 268.

1. *Where Party found actually committing an Offence*, 268
2. *On Suspicion of having committed an Offence*, 270.

III. *By whom may be made*, 272.

1. *By Justices of the Peace*, 272.
2. *By Sheriffs and Coroners*, 273.
3. *By Constables*, 273.
4. *By Watchmen, Beadles, &c.* 275.
5. *By Private Persons*, 275.

IV. *Time and Place of*, 277.

V. *Manner of*, 278.

VI. *What is to be done after*, 279.

As to obstructing an arrest, see *post*, "*Assault in aggravated Cases.*"
As to rewards for apprehending offenders, see *post*, "*Rewards*," Vol. V.

I. Who may or may not be Arrested.

All persons are in general liable to an arrest when accused of capital or violent offences. (4 *Bla. Com.* 289.) Who liable to.

Generally a peer or member of parliament shall have the privilege of peerage and parliament for himself and his servants to be freed from arrests; but for treason, felony and breach of the peace, there can be no privilege. (4 *Inst.* 24, 25; 1 *Bla. Com.* 145; 11 *Harg. St. Tr.* 305; *Fortes.* 359.) Peers. Members of parliament.

Bodies corporate, acting in a way that would render an individual liable to arrest, cease to retain, of course, their corporate character, and become individually responsible. Bodies corporate.

Stat. 9 Geo. IV. c. 31, s. 23, enacts, "That if any person shall arrest any clergyman upon any *civil* process while he shall be performing divine service, or shall, with the knowledge of such person, be *going to* perform the same, or *returning* from the performance thereof, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall suffer such punishment by fine or imprisonment, or by both, as the Court shall award." But this does not prohibit the arrest of clergymen in criminal cases, in which they may be arrested like other individuals. In *Goddard* v. *Harris*, 7 *Bingh.* 320; 5 *M. & P.* 122, S. C., the Court discharged a clergyman arrested in his way to the altar, on civil process, but refused to give him the costs of the application, it not appearing that the arrest was with the concurrence of the plaintiff or his attorney. Clergymen.

A married woman may be arrested on a criminal charge, the same as if she were a *feme sole*. (*R.* v. *Taylor*, 3 *Burr.* 1681; 1 *Hawk.* c. 1.) Feme covert.

1. *Who may be Arrested.*

Persons charged in execution.

In the case of *R.* v. *Woodham*, 2 *Stra.* 828, upon a motion for an information against the defendant, who was a justice of the peace, it was holden that a person in execution in the Queen's Bench may be there charged criminally by a justice of the peace's warrant; but that no such justice can take a prisoner of this Court out of the custody of the Court, and send him to the county gaol.

The Court, however, will grant a *habeas corpus* to the warden of the Fleet to take the body of a debtor confined there before a magistrate, to be examined from time to time respecting a charge of felony or misdemeanor. (*Ex parte Griffiths*, 5 *B. & Ald.* 730; see *post*, "*Habeas Corpus*," Vol. III.)

When the party in custody on a civil action is thus to be proceeded against criminally, the practice is for the magistrate before whom the complaint is laid to take the information of the accuser and witnesses, and to issue his warrant, which is lodged with the keeper of the place of confinement where the defendant is kept in prison. This officer, on the termination of the civil imprisonment, sends for a constable, who takes the party before a justice of the peace, by whom the accuser, witnesses and prisoner are examined, and the latter is discharged, bailed or committed as on an original accusation. When the party is already in gaol on a criminal charge, and fully committed for trial, it is not usual to bring him from his first custody before a magistrate on a subsequent charge; but the examination of witnesses is taken as in ordinary cases, and a warrant of detainer is sent to the gaoler in whose custody he remains. By this means it will appear on the calendar that he is charged with two offences, and if acquitted on that for which he was first committed, his discharge will be prevented, and, if the offence was committed in another county, he may be sent thither by *habeas corpus* to take his trial at the assizes. (1 *Chit. C. L.* 63.)

II. For what an Arrest may be made.

And herein of an arrest,—1st. Where a party is found actually committing an offence; and—2nd. Where he is merely suspected of having committed an offence.

1. Where Party found actually committing an Offence.

At common law.

By the Common Law.]—By the common law any person may do any thing reasonably necessary to prevent the perpetration of a crime, and he may detain the offender until it may be fairly presumed he has changed his purpose. (2 *Hawk.* c. 12, s. 19; 1 *Hale*, 589; 2 *Roll. Abr.* 559; *Com. Dig. Pleader*, 3 M. 22; *R.* v. *Hunt*, *R. & M. C. C.* 93.)

In a case where the defendants broke and entered the plaintiff's house to prevent him from murdering his wife, the Court of Common Pleas held that they were justified. (*Per Chambre*, J. *Handcock* v. *Baker and others*, 2 *Bos. & Pull.* 260.)

Any person may apprehend a thief in the mainour, that is, with stolen goods actually in his possession or the like. (1 *Show.* 24.)

Any person may without warrant apprehend and carry before a magistrate a party about to expose an infant and leave it to perish; (1 *Leon.* 317; *Com. Dig. Pleader*, 3 M. 22;) or a party playing with false dice, or other indictable fraud affecting the public. (*Sir W. Jones*, 249; *Com. Dig. Pleader*, 3 M. 22.)

If a man be found committing a felony in the night, any one may apprehend and detain him until he can be carried before a magistrate. (*R.* v. *Hunt*, *R. & M. C. C.* 93.)

It seems also that a man may be arrested on fresh pursuit without warrant when found committing a felony, though before his arrest he escape to some distance and has given over his intention to commit the felony. (See *R.* v. *Howarth*, *R. & M. C. C.* 207, *post*, 280; *sed vide* 2 *Hawk.* c. 12; 1 *East's P. C.* c. 5, s. 72; *R.* v. *Dyson*, 1 *Stark.* 246.)

But no person can in general be apprehended without warrant for a mere

misdemeanor unattended with violence, as perjury or libel; (*R.* v. *Wilkes*, 2 *Wils.* 159; 2 *Salk.* 698; *Fortes.* 140;) and no private person can apprehend another for a bare breach of the peace after it is over, and where there is no probability of its being renewed, without a warrant, nor could a constable do so at common law, unless the breach were in his view. (2 *Inst.* 52; 2 *Hawk.* c. 12, s. 21; 1 *East's P. C.* 300; *Bac. Abr. Trespass* (3 D.); *R.* v. *Dyson*, 1 *Stark.* 246.)

2. *For what may be made.*

Before a person interferes to prevent others from fighting, he should first notify his intention to prevent a breach of the peace. (2 *Hawk.* c. 12, s. 19; 1 *Hale*, 589; *R.* v. *Rickets*, 3 *Campb.* 68.)

But it seems that where the circumstances are such that a man must know why a person is about to apprehend him, he need not be told why, and the arrest will be legal and the resistance illegal as much as if he had been told. (*R.* v. *Howarth*, *R. & M. C. C.* 207.)

A party cannot be imprisoned for a mere *trespass* for which an indictment will not lie. (See *Green* v. *Bartram*, 4 *C. & P.* 308; *R.* v. *Storr*, 3 *Burr.* 1701, 1703, 1707; *R.* v. *Wilson*, 8 *T. R.* 357; and see *Williams* v. *Glenister*, 6 *B. & C.* 699, *post*, 274, 276.)

Malicious injuries.

Under the Malicious Injuries Act, 7 & 8 *Geo. IV. c.* 30.]—The 7 & 8 Geo. IV. c. 30, s. 28, enacts, "That any person *found committing* any offence against this act, whether the same be punishable *upon indictment* or *upon summary conviction*, may be immediately apprehended without a warrant by any peace officer, or the owner of the property injured, or his servant, or any person authorised by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law."

To justify a party in apprehending on this enactment, he must find the prisoner in the actual commission of the offence, or take him on quick pursuit, and he must take him directly to a magistrace, and if he take him elsewhere he loses the protection of the act. (*R.* v. *Curran*, 3 *C. & P.* 397; *Hanway* v. *Boultbee*, 4 *C. & P.* 350.) See further the case of *R.* v. *Howarth*, *R. & M. C. C.* 207, *post*, 273, as to the meaning of the words "found committing."

Larceny.

Under the Larceny Consolidation Act, 7 & 8 *Geo. IV. c.* 29.]—The 7 & 8 Geo. IV. c. 29, s 63, enacts, "That any person *found committing* any offence punishable either *upon indictment* or *upon summary conviction* by virtue of this act, *except* only the offence of angling in the day-time, may be immediately apprehended without a warrant by any peace officer, or by the owner of the property on or with respect to which the offence shall be committed, or by his servant, or any person authorised by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law."

With respect to felonies, this provision makes no alteration; but it extends the power of arrest to various misdemeanors. It is taken from the 1 Geo. IV. c. 56, s. 3.

In order to justify an arrest under this act, in an action for false imprisonment, the plea should substantially disclose all that would be required to be stated in an indictment under the act. (*Mathews* v. *Biddulph*, 4 *Scott, N. R.* 54; and see the cases above cited.)

Game.

Under the Game Act.]—By the Game Act, 9 Geo. IV. c. 69, s. 2, persons found committing any offence against it may be apprehended by any person. (See "*Game*," Vol. III.)

Smuggling.

Smuggling.]—By the 3 & 4 Will. IV. c. 53, s. 53, persons making fires or signals to smuggling vessels may be apprehended by any person. And see further as to the apprehension of offenders against the customs and excise laws, *post*, "*Excise and Customs*," Vol. II.

Vagrants.

Vagrants, &c.]—The 5 Geo. IV. c. 83, contains provisions for arresting idle and disorderly persons, rogues and vagabonds. (See *post*, "*Vagrants*," Vol. VI.)

2. *For what may be made.*

In a recent case it was held, that a man may be arrested under the 5 Geo. IV. c. 83, s. 4, 6, as a person found in a dwelling-house, &c. with intent to commit a felony, if he is seen in the dwelling-house but gets out of it and is taken on fresh pursuit, and it makes no difference that he was not seen getting out of the house, and was found concealing himself, to avoid being apprehended, upon other premises near. (*R.* v. *Howarth, R. & M. C. C.* 207; see *R.* v. *Curran*, 2 *C. & P.* 397; *Hanway* v. *Boultbee*, 4 *C. & P.* 350; *supra.*)

It was also there held, that to make such an arrest legal it is not necessary that the person should have at the time he is arrested a *continuing* purpose to commit the felony, and that he may be arrested though that purpose is wholly ended. (*Id.*)

Highway and Turnpike Acts.

Under Highway and Turnpike Acts.]—The 5 & 6 Will. IV. c. 50, s. 79, relative to highways in general, and the 3 Geo. IV. c. 126, s. 140, relative to turnpike roads in general, contain clauses empowering surveyors, &c. to secure transient offenders against those acts. See *post*, "*Highways*," Vol. III.

Metropolis Road Act.

By the statute 7 Geo. IV. c. 43, s. 73, the Metropolis Road Act, it is enacted, "That the said watchmen and supervisors of the watch shall, during the time they shall be stationed on the said roads, and at all times coming to and going from their duty, use their best endeavours to assist all and every person or persons passing along the said roads, or the footpath adjoining, who shall be any ways assaulted, attacked or ill-treated, and to prevent all mischiefs by fire, and all murders, burglaries, or robberies, and all other outrages, disorders, and misdemeanors, as well on the said roads and the footpaths adjoining, as in all houses and other buildings or grounds by the sides of or near the said roads; and for that purpose it shall be lawful for the said watchmen and supervisors, or any of them, to apprehend and secure all night-walkers, malefactors, rogues, vagabonds, and other disorderly persons who shall be found loitering, wandering, misbehaving themselves, or committing any disorder or offence on the said roads, or refusing to give a good account of themselves, or whom the said watchmen or supervisors shall have reason to suspect of any evil intentions or designs, and to search every such person, or the loading of any horse, ass, mule, cart, or other carriage, which they shall suspect to have any stolen goods thereon or therein, and shall and may confine and secure every such person, and such horse, ass, mule, cart, or other carriage, until such person can be conveniently conveyed before a justice of the peace to be examined and dealt with according to law; and all persons are hereby authorised and required to aid and assist any such watchman or supervisor in securing any such offender or person as aforesaid."

By sect. 74 of the same statute, watchmen and supervisors of the watch are put on the same footing as constables; and by sect. 155, *any person* may apprehend offenders against that act and take them to a constable or officer."

Police Acts.

Police Acts.]—As to arrests allowed by the Metropolitan Police Acts, see *post*, "*Police*," Vol. V.; "*Thames*," Vol. VI.; and *post*, 274.

As to arrests allowed by the Rural Police Act, see *post*, "*Constable*."

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2. On Suspicion of having committed an Offence.

On suspicion of guilt.

In every case of treason or felony actually committed, a party may be arrested by any person, if there be reasonable ground to suspect him guilty. (2 *Hale*, 72; 2 *Hawk.* c. 12, 13, s. 15; *Mure* v. *Kaye*, 4 *Taunt.* 43; *Guppy* v. *Brittlebank*, 5 *Price*, 525; *Beckwith* v. *Philby*, 6 *B. & Cres.* 635.)

And it seems that for every misdemeanor, or other indictable offence, and which subjects the offender to corporal punishment, though it does not amount to an actual breach of the peace, the supposed offender may on a regular *warrant* of a justice be arrested, on the ground that the law impliedly gives power to issue a warrant when it gives jurisdiction over the offence; (*Bane* v. *Methuen*, 2 *Bingh.* 65; 9 *Moore*, 161, S.C.;) and it has been con-

sidered that perjury and libels, (*Butt* v. *Conant*, 4 *Moore*, 165; 1 *B.* & *B.* 548, S. C.; *Fortesc.* 37, 358; 1 *Chit. C. L.* 13,) and nuisances when persisted in, (*Hall's case*, *Vent.* 169; 1 *Mod.* 76, S. C.,) subject the offender to such criminal process. 2. *For what may be made.*

But as we have just seen, no person can in general be arrested without warrant for a mere misdemeanor, unattended with violence, after its commission, as perjury or libel, *ante*, 269; and it is very unusual for justices out of sessions to grant warrants in such cases, unless the offence be of such a magnitude as requires a warrant. (See *Butt* v. *Conant*, 1 *Moore*, 195; 1 *Brod.* & *B.* 548, S. C.)

And clearly, as a general rule, a private individual cannot arrest another without warrant on the ground of *suspicion* of his having been guilty of a *misdemeanor*; (*Fox* v. *Gaunt*, 3 *B.* & *Ad.* 798;) and the same rule also, it seems, applies to constables and other conservators of the peace.

In the case of a man apprehending a person offering goods for sale or pawn, where there is reasonable suspicion of their having been stolen, there is an express enactment that he shall be indemnified, though afterwards it appears that no felony was committed. Thus by the statute 7 & 8 Geo. IV. c. 29, (the Larceny Consolidation Act,) s. 63, any person to whom any property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to *suspect* that any such offence (*i. e.* any offence punishable either *upon indictment* or upon *summary conviction* under that act,) has been committed on or with respect to such property, is thereby *authorised* and if in his power is *required*, to apprehend and forthwith to carry before a justice of the peace the party offering the same, together with such property, to be dealt with according to law.

The question as to what is a reasonable and probable ground for suspicion, is a mixed proposition of law and fact. Whether the circumstances alleged to show it reasonable or not are true and existed, and the inferences drawn from them warranted, is a matter of fact for the consideration of the jury, but whether, supposing them true, they amount to a reasonable ground for suspicion, is a question of law for the opinion of the judge. (*Panton* v. *Williams*, 1 *G.* & *D.* 504; 2 *Ad.* & *Ell.* (N. S.) 69; and the cases there cited.) Grounds of suspicion.

The grounds must be such that any reasonable person, acting without passion or prejudice, would fairly have suspected the party arrested of being the person who committed the offence. (*Allen* v. *Wright*, 8 *C.* & *P.* 522.) A bare surmise is plainly insufficient. (*Davis* v. *Russell*, 5 *Bing.* 364; 2 *M.* & *P.* 590, S. C.; 4 *Inst.* 144.)

The following causes of suspicion have been generally agreed to justify the arrest of an innocent person for *felony*:—

(1.) The common fame of the country; but it seems, that it ought to appear upon evidence, in an action brought for such arrest, that such fame had some probable ground. (2 *Hawk.* c. 12, s. 9.) Common fame.

(2.) Being found in such circumstances as induce a strong presumption of guilt; as coming out of a house wherein murder has been committed, with a bloody knife in one's hand; or being found in possession of any part of goods stolen, without being able to give a probable account of coming honestly by them. (*Id.* s. 12.) Circumstances of guilt.

(3.) The behaving one's self in such a manner as betrays a consciousness of guilt; as where a man accused of felony, on hearing that a warrant is taken out against him, doth abscond. (*Id.* s. 13.) Flight.

But the party who flies from an arrest for a capital offence, is not thereby guilty of a capital offence, but only liable to forfeit his goods, when such flight is found against him by the coroner's inquest. (2 *Hawk.* c. 17, s. 13.)

(4.) The being found in company with one known to be an offender, at the time of the offence, or generally at other times keeping company with persons of scandalous reputation. (2 *Hawk.* c. 12, s. 11; 2 *Inst.* 52.) Evil company.

(5.) The living an idle, vagrant and disorderly life, without having any visible means to support it. (2 *Hawk.* c. 12, s. 10; and see *post*, title "*Vagrant*," Vol. VI.) Living idle.

(6.) The being pursued by hue and cry. (2 *Hawk.* c. 12, s. 14.) Hue and cry.

2. *For what may be made.*

For if a felony be done, and one is pursued upon hue and cry, that is not of ill fame, suspicious, unknown nor indicted, he may be attached and imprisoned by the law of the land. (2 *Inst.* 42.)

And though generally no such cause of suspicion as any of the above mentioned will justify an arrest by a private individual where in truth no such crime hath been committed; yet it will be justified in the case of hue and cry, though no crime has been committed. (2 *Hawk.* c. 12, s. 16.)

Distinction on arrest by private individuals, and arrest by constable on suspicion.

There is a material distinction between arrests *without warrant* by private individuals and arrests by peace officers on *suspicion* of an offence. In order to justify the former in causing the imprisonment of a person without warrant, he must not only make out a *reasonable ground of suspicion*, but must prove that a *felony* has been actually *committed*, except in the case of hue and cry, or an indictment found against the party; whereas a *constable* having reasonable ground, on a charge preferred *by another* person, to suspect that a felony has been committed, is authorised to arrest the suspected party without warrant, and take him before a magistrate or other proper authority, although no felony has been committed. (*Beckwith* v. *Philby*, 6 *B. & Cres.* 637.; 9 *D. & R.* S. C.; *Samuel* v. *Payne*, *Doug.* 359; *White* v. *Taylor*, 4 *Esp. Rep.* 80; *Cald.* 291; *Hobbs* v. *Branscomb*, 3 *Camp.* 420; *Stonehouse* v. *Elliot*, 6 *T. R.* 316.) If indeed a constable of *his own head* takes a person into custody on suspicion, he must, like a private individual, prove that a crime was actually committed by some one. (*Hobbs* v. *Branscomb*, 3 *Campb.* 420.)

III. By whom the Arrest may be made.

In criminal cases, a person may be apprehended and restrained of his liberty, not only by process out of some Court, or warrant from a magistrate, but frequently by justices, constables, watchmen, or private persons, without any warrant or precept.

And it seems an arrest may be made without warrant, though there be no reason to suspect an escape. (*Davis* v. *Russell*, 5 *Bing.* 354; 2 *Moo. & P.* 590, S. C.)

1. By Justices of Peace.

By justices of the peace.

If a justice see a felony, or other breach of the peace, committed in his presence, he may in his own person apprehend the offender. And he may also, by word of mouth, command any one to arrest another who shall be guilty of any felony, or actual breach of the peace, in his presence, and such command is a good warrant without writing. (2 *Hale*, 86.)

Any justice or the sheriff may take of the county any number that he shall think meet, to pursue, arrest, and imprison traitors and felons, or such as break, or go about to break, or disturb, the queen's peace, and every man being required, ought to assist and aid them, on pain of fine and imprisonment. (*Dalt. J.* c. 171; 2 *Hale*, 87.)

If the magistrate was not present when a crime has been committed, he ought not, upon mere discretion, to send the party accused to prison, but upon due consideration of evidence adduced before him. And it was observed by Chief Justice *Pratt*, in *R.* v. *Wilkes*, 2 *Wils.* 158, that in case a magistrate has notice, or a particular knowledge, that a person has been guilty of an offence, yet it is not a sufficient ground for him to commit the criminal, but in that case he is rather a witness than a magistrate, and ought to make oath of the fact before some other magistrate, who should thereupon act the official part, by granting a warrant to apprehend the offender, it being more fit that the accuser should appear as a witness, than act as a magistrate.

A magistrate ought never to act as such in his own case. (*Dalt.* c. 173; *Anon.* 1 *Salk.* 396; *post*, "*Justices*," Vol. III.)

For a contempt of court.

If a contempt be committed in the face of a court, (as by rude and contumelious behaviour, by obstinacy, perverseness, or prevarication, by breach of the peace, or any wilful disturbance whatever,) the judge may order the

offender to be instantly apprehended and imprisoned at his, the judge's discretion, without any further proof or examination. (2 *Hawk.* c. 22; 4 *Bla. Com.* 282, 283; *Spilsbury* v. *Micklethwaite*, 1 *Taunt.* 146; *R.* v. *James*, 5 *B. & Ald.* 894; 1 *D. & R.* 559, S. C.; *Cropper* v. *Horton*, 8 *D. & R.* 166.) 3. *By whom.*

In a modern case it was held the exhibiting in an assize town an inflammatory publication respecting a crime about to be tried at the assizes was not a contempt which the judge of assize could interfere to stop by committing the party exhibiting it. (*R.* v. *Gilham*, *M. & M. C. N. P.* 165.)

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2. By Sheriffs and Coroners.

A *sheriff* may apprehend and commit to prison all persons who break the peace or attempt to break it, and may bind any one in a recognizance to keep the peace; and he may and is bound *ex officio* to pursue and take all traitors, murderers, felons, and rioters, and all persons above fifteen are required to be assisting him therein upon his summons, otherwise they may be fined and imprisoned. (2 *Hale*, 87; 4 *Bla. Com.* 289; 2 Hen. V. c. 8.) By sheriffs.

If a sheriff be assaulted in the execution of his duty, he may apprehend the offender and keep him in prison for a reasonable time to be carried before a magistrate. (2 *Hale*, 87.)

A *coroner* is a conservator of the peace in relation to all felonies, and may arrest, or cause another to arrest, any felon. (2 *Hale*, 88; 4 *Bla. Com.* 289.) By coroners.

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3. By Constables.

A *constable* is a conservator of the peace, and may at common law apprehend a party guilty of treason or felony without any warrant. (4 *Bla. Com.* 289; 1 *Hale*, 587; 1 *East's P. C.* 303.) And in general this common law authority of a constable is applicable to tithing men, headboroughs, and borsholders. (2 *Hale*, 95; *Selw. N. P.* 3d ed. 830, n.) By constables. For felony.

He may also apprehend a supposed offender for a felony without warrant, upon a reasonable charge made by a third party, and this although upon investigating the charge it turn out that no felony has been committed. (1 *East's P. C.* 300; *Ledwith* v. *Catchpole*, *Cald.* 291; *White* v. *Taylor*, 4 *Esp.* 80; *M'Clougan* v. *Clayton*, *Holt's C. N. P.* 470; *Davis* v. *Russell*, 5 *Bing.* 354; 2 *Moo. & P.* 590, S. C.; *Beckwith* v. *Philby*, 6 *B. & C.* 637; *Samuel* v. *Payne*, *Dougl.* 359; *Cowles* v. *Dunbar*, 2 *Car. & P.* 565; *R.* v. *Thompson*, *R. & M.* 80.) The charge need not be a formal and accurate one. (*R.* v. *Ford*, *R. & Ry. C. C.* 329.) But there must in all cases exist a reasonable charge and suspicion. And it seems that a constable is not justified in apprehending and imprisoning a person on suspicion of having received stolen goods on the mere assertion of one of the principal felons. (*Isaacs* v. *Brand*, 2 *Stark. Rep.* 167.) On suspicion of felony.

It is said that in all cases of a charge made by another person, the person suspecting ought to be present at the arrest; for the justification of the constable must be that he did aid the other in taking the party suspected. (2 *Hale*, 91.)

In general, however, a constable cannot by the common law, any more than a private person, *of his own accord*, and on his *own suspicion*, without any express charge or warrant, justify an arrest of a supposed offender for a felony, unless he can show that a felony has been *actually committed*, by some one, as well as a reasonable ground for suspecting the party arrested of it. (2 *Inst.* 52; 1 *Hale*, 90; *White* v. *Taylor*, 4 *Esp.* 80; *M'Cloughan* v. *Clayton*, *Holt's C. N. P.* 478; and see *Parton* v. *Williams*, 3 *B. & Ald.* 330; and as to what is a reasonable ground for suspicion, see *ante*, 271.) There are, however, authorities in favour of an exception to this rule in the case of night-walkers, and persons reasonably suspected in the night of felony. (*Lawrance* v. *Hedger*, 3 *Taunt.* 14; 1 *East's P. C.* 303; 3 *Hawk.* c. 12, s. 20; 2 *Hale*, 89; 2 *Inst.* 52; *Bac. Abr. Constable*, (C).

A constable may arrest any one for a breach of the peace *in his presence*, and keep him in his house or the stocks until he can bring him before a ma- For breach of the peace.

3. *By whom.* gistrate. (1 *Hale*, 587; 2 *Hawk.* c. 13, s. 8; see *Cook* v. *Nethercote*, 6 *C. & P.* 741.)

A constable also has by virtue of his office authority to interpose upon his own view for the purpose of *preventing* a breach of the peace or quelling an affray, and all persons who assist constables in such interposition, and by the constable's request, are protected. (1 *East's P. C.* 303.)

Also where an offence is *threatened* in his *presence* a constable may, to prevent the offence, arrest the party menacing, and detain him in custody till the threat is over, or carry him as soon as he can conveniently before a magistrate. (2 *Hale*, 88; 1 *East's P. C.* 306; *Cook* v. *Nethercote*, 6 *C. & P.* 741; *Timothy* v. *Simpson*, 1 *C. M. & R.* 760, *post*, 276; *Howell* v. *Jackson*, 6 *C. & P.* 723; *Baynes* v. *Brewster*, 1 *Gale & D.* 669.)

So he may apprehend any person who encourages a prisoner in his custody to resist, (*White* v. *Edmunds*, *Peate*, 89,) or otherwise obstruct him in the execution of his duty, (*Levy* v. *Edwards*, 1 *C. & P.* 40,) or any one joining in the offence. (*Lewis* v. *Arnold*, 4 *C. & P.* 354.)

But a constable has not without warrant any authority to arrest upon a charge of a mere breach of the peace *after* it is over. (*Selw. N. P.* 3d. ed. 830; 2 *Inst.* 52; 2 *Hawk.* c. 12, s. 20, c. 13, s. 8; *Strickland* v. *Pell*, 2 *Lord Raym.* 1301; *Cowper* v. *Henley*, 2 *Esp.* 540; and see *Matthews* v. *Biddulph*, 4 *Scott, N. R.* 54.) And in a recent case, where a constable without warrant took a man in custody upon a charge of his having assaulted and ill used another, the charge not being made in the presence of the alleged offender, the arrest was considered illegal; (*R.* v. *Curran*, *R. & M. C. C.* 132;) and the alleged offender having escaped, and stabbed an assistant of the constable in his attempt to retake him, it was held it would not have been murder had he killed him, but only manslaughter. (*Id.*)

Where A. went to a house at night, demanding to see the servant. He was told to depart and would not. A constable was sent for, and A. went from the house to the garden. When the constable arrived A. said that if a light appeared at the windows he would break them, upon which the constable took him into custody; it was held that the constable was not justified in so doing. (*R.* v. *Bright*, 4 *C. & P.* 387.)

A constable may be justified in removing a person from a church for disturbing the congregation in time of divine service, although no part of such service was actually going on at the time, but he has no right to detain such person in custody afterwards for the purpose of taking him before a magistrate. (*Williams* v. *Glenister*, 2 *B. & C.* 699.) And it seems that the churchwardens have the same power. (*Burstow* v. *Henson*, 10 *M. & W.* 105.)

For misdemeanor. And generally speaking, a constable has not, without warrant, any authority to arrest a person on a charge of misdemeanor after it is over. And in this respect there is no distinction between one kind of misdemeanor and another, such as breach of the peace, and fraud, &c. (See *Fox* v. *Gaunt*, 3 *B. & Ad.* 798; *Matthews* v. *Biddulph*, 4 *Scott, N. R.* 54; 1 *Dowl. N. S.* 216, S. C.)

By statutes. By the *Malicious Injuries Act*, 7 & 8 Geo. IV. c. 30, s. 28, and the *Larceny Consolidation Act*, 7 & 8 Geo. IV. c. 29, s. 63, the *Game Act*, 9 Geo. IV. c. 69, s. 2, the *Smuggling Act*, 3 & 4 Will. IV. c. 53, s. 53, power is given to constables, peace officers, and others, to apprehend persons found committing offences under those acts, and see also the provisions of the Vagrant Act, *post*, "*Vagrant*," Vol. VI.

The 2 & 3 Vict. c. 47, s. 63, (the Metropolitan Police Act,) authorises constables, belonging to the Metropolitan Police District, to apprehend offenders without a warrant, see "*Police*," Vol. V. And see the Rural Police Act, tit. "*Constable*."

He should notify his authority. Where a constable acts without warrant, by virtue of his office of constable, he should, unless the party be previously acquainted with it, notify that he is constable, or that he arrests in the Queen's name, and for what. (See 1 *Hale*, 458, 589; 1 *Hawk.* 31, s. 49, 50; *Mackally's case*, 9 *Co.* 69; "*Homicide*," Vol. III.) And this applies more particularly to a special bailiff. (2 *Russ.* 737.) But it will, it should seem, be sufficient, if from the circumstances

the offender may collect he is a constable: and if he show his staff of office it will suffice. (1 *Hale*, 460; *Fost.* 310; 1 *Russ.* 738.) And in the case of an arrest by a private person, it has been held, that where the circumstances are such that a man must know why a person is about to apprehend him, he need not be told, and the arrest will be legal and the resistance illegal, as much as if he had been told. (*R.* v. *Howarth*, *R. & M. C. C.* 207.)

3. *By whom.*

If upon a reasonable charge of felony or other crime for which a constable may arrest without warrant, the constable refuse to arrest or make hue and cry he may be indicted and fined. (*Cro. Eliz.* 654; 2 *Hale*, 90; 1 *East's P. C.* 301; 2 *Hawk.* c. 13, s. 7.)

May be indicted for neglect.

It is much the best for the constable in all cases, not requiring immediate interference, to obtain a magistrate's warrant before apprehending a party, and if he does he will be entitled to the benefit of the 24 Geo. II. c. 44. s. 8, which protects him when acting under a warrant on his granting on request a copy thereof. (See "*Constable*," *post*, Vol. I.)

Best for constable to have a warrant.

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4. By Watchmen, Beadles, &c.

Watchmen, patrols, and beadles have authority at common law to arrest and detain in prison, for examination, persons walking in the streets at night whom there is reasonable ground to suspect of felony, although there is no proof of a felony having been committed. (*Lawrence* v. *Hedger*, 3 *Taunt.* 14; 2 *Hale*, 96, 98; 1 *East's P. C.* 303; 2 *Inst.* 52; and see 5 Geo. IV. c. 83, s. 3; "*Vagrant*," Vol. VI.; also the Police Acts, "*Police*," Vol. V.; and *ante*, 274.)

By watchmen, beadles, &c.

In *R.* v. *Bootie*, 2 *Burr.* 164, is an indictment against a constable for suffering a street-walker, taken up by a watchman, to escape.

The Metropolis Road Act gives various powers to watchmen in apprehending individuals. (7 Geo. IV. c. 142, s. 73, 74; and see title "*Highways*," Vol. III.)

Other statutes give the same power to watchmen while on duty as constables have to apprehend persons suspected of a felony. (7 & 8 Geo. IV. c. 29, s. 63, *ante*, 274; "*Police*," Vol. V.)

A watchman having apprehended a party may discharge himself from liability for an escape by delivering him to a constable, or he may himself take him before a magistrate. (*Dalt. J.* c. 104; *R* v. *Bootie*, 2 *Burr.* 164.)

Watchmen may be appointed by constables as their assistants, subject to the custom of the place for the appointment of watchmen; and a watchman thus appointed has for the time being the authority of the constable as his deputy. (1 *Bla. Com.* 4th ed. 292; 1 *Chit. C. L.* 24.)

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5. By Private Persons.

All persons who are *present* when a felony is committed, or a dangerous wound given, are *bound* to apprehend the offender, on pain of being fined and imprisoned for their neglect, unless they were under age at the time. (2 *Hawk.* c. 12, s. 1.)

By private persons when enjoined.

Also every private person is bound to assist an officer demanding his help for the taking of a felon, or the suppression of an affray, (*Id.* s. 12,) and may be indicted if he refuses without lawful excuse. (*Reg.* v. *Brown*, 1 *C. & Mar.* 314.)

And it is the duty of all private persons to arrest without warrant any person detected in the *attempt* to commit a felony. (*R.* v. *Hunt*, *R. & M. C. C.* 93; *R.* v. *Howarth*, *R. & M. C. C.* 207.) And though the offender run away, and give over his intention of committing the felony, still it seems, on fresh pursuit, he may be apprehended by any one. (*R.* v. *Howarth*, *R. & M. C. C.* 207.)

We have already seen that if a felony has been actually committed by some one, a private person *may* arrest, or direct a peace officer to arrest a party whom he has *reasonable grounds for suspecting* to have been guilty of it, though in fact such party be really innocent; but he is not absolutely *bound*

When permitted.

3. *By whom.*

to do so like a peace officer; and he does so at his peril, for if these grounds for suspecting the party be not reasonable, or there has been no felony committed, the person arresting is guilty of a false imprisonment, and liable accordingly. (See *ante*, 271.)

Where an indictment is found against a party, a private individual may arrest him; for in this case he does not act on his own suspicion, but upon the finding of the fact by the grand inquest on oath, which is suspicion grounded on high authority, and is a charge against the party on record. (*Dalt.* c. 170, s. 5; 1 *Hawk.* c. 28, s. 12; 1 *East's P. C.* 301.)

Any person may, it is said, legally arrest in the night time a suspicious night-walker, though he be quite innocent. (1 *East's P. C.* 303. Per *Lawrence*, J., in *Lawrence* v. *Hedger*, 3 *Taunt.* 15.)

He may arrest a common notorious cheat going about the country with false dice, and being actually caught playing with them, in order to take him before a justice. (*Jones*, 249; *Cro. Car.* 274; and see 2 *Hawk.* c. 12, s. 20.)

Any person may justify breaking and entering a party's house, and imprisoning him, to prevent him from murdering his wife, who cries out for assistance. (*Handcock* v. *Baker*, 2 *B. & P.* 260.)

So any one may arrest a lunatic who seems disposed to do mischief. (*Bac. Ab. Trespass* (D. 3.)

So any person may arrest another for the purpose of putting a stop to a breach of the peace committed in his presence. (*Ante*, 274; 2 *Hawk.* c. 13, s. 8.) Care must be taken, however, that what had occurred did actually amount to a breach of the peace. Where a man and his wife refused to go out of the shop of a baker, and continued to abuse him in relation to an alleged overcharge, until a crowd of 100 to 150 persons collected round the shop, and obstructed the public passage: it was held, that the baker was justified in giving the man and his wife into custody, and that their conduct amounted to a breach of the peace, and that trespass would not lie. (*Cohen* v. *Huskisson*, 2 *M. & W.* 477; *Ingle* v. *Bell*, 1 *M. & W.* 516.) But proof of annoyance and disturbance by a person present at a meeting, such as crying "Hear, hear," and putting questions to a speaker, and making observations on his statement, will not justify the chairman of the meeting in giving such person in custody. (*Wooding* v. *Oxley*, 9 *Car. & P.* 1.) Nor is it a sufficient plea to an action for false imprisonment that the defendant was possessed of a house, and that the plaintiff was then making a great disturbance therein, and refused to depart when requested, and was in a great heat and fury, ready and desirous to make an affray, and cause a breach of the peace, whereupon the defendant gave the plaintiff into custody. (*Wheeler* v. *Whiting*, 9 *C. & P.* 269.)

But a private person, no more than a constable, cannot without warrant apprehend another for a misdemeanor or bare breach of the peace after it is over. (*Ante*, 274.) It seems, however, that he may arrest if there are good and reasonable grounds for apprehending that an affray or other breach of the peace will be continued or renewed. "It is clear (said *Parke*, B. in *Timothy* v. *Simpson*, 1 *C. M. & R.* 762,) that any person present may arrest the affrayer, at the moment of the affray, and detain him till his passion has cooled and his desire to break the peace has ceased, and then deliver him to a peace officer. And if that be so, what reason can there be why he may not arrest an affrayer after the actual violence is over, but whilst he shows a disposition to renew it by persisting in remaining on the spot where he has committed it? Both cases fall within the same principle, which is, that for the sake of the preservation of the peace any individual who sees it broken may restrain the liberty of him whom he sees breaking it, so long as his conduct shows that the public peace is likely to be endangered by his acts. In truth, whilst those are assembled together who have committed acts of violence, and the danger of their renewal continues, the affray itself may be said to continue; and *during the affray* the constable may not merely on his own view, but *on the information and complaint of another*, arrest the offender, and of course the person so complaining is justified in giving the charge to the constable." And see *Baynes* v. *Brewster*, 1 *G. & Dav.* 669.

By the Vagrant Act, 5 Geo. IV. c. 83, s. 6, any person whatever may apprehend an offender under that act, and convey him before a justice, or deliver him to a constable for that purpose. (See "*Vagrant*," Vol. VI.) 3. *By whom.*

Persons found committing an offence against the Malicious Injuries Act, may be apprehended without warrant by any peace officer, the owner of the property, his servant, or person authorised by him. So, with respect to offences against the Larceny Act, the Game Act, and the Smuggling Act, the offender may be apprehended by any person. (See *ante*, 274.)

By the Larceny Act, 7 & 8 Geo. IV. c. 29, s. 63, where any property is offered to be sold or pawned to any person, if he has reasonable cause to suspect the party offering it, such person is not only *authorised* but *required* (if in his power) to arrest the party, and carry him before a justice.

Under the Police Acts private persons may also arrest in certain cases without warant. (*Post*, "*Police*," Vol. V.)

Before a private person interferes to prevent a breach of the peace, as an affray, he is bound to notify his intention of so doing, otherwise the parties engaged may imagine that he comes to act as a party. (1 *East's P. C.* 306; *Fost.* 310.) But where the circumstances are such that a man must know why a person is about to arrest him, he need not be told, and the arrest will be legal, and the resistance illegal, as much as if he had been told. (*R.* v. *Howarth*, *R. & M. C. C.* 207.) Notifying authority.

It is always safest for a private person to obtain a warrant when time will allow, because where the arrest is under a warrant no action of trespass, but only an action on the case, lies, and the latter cannot be sustained unless the plaintiff can show that the charge was without probable cause as well as malicious; and if the magistrate should erroneously issue his warrant, the party accusing will not in general be liable as a trespasser. (*West* v. *Smallwood*, 3 *M. & W.* 418; *Leigh* v. *Webb*, 3 *Esp. Rep.* 166; *Belk* v. *Broadbent*, 3 *T. R.* 185; *Boote* v. *Cooper*, 1 *T. R.* 535.) But an arrest, when a warrant ought previously to have been issued, will not be rendered legal by a subsequent issuing of that authority. (*Bac. Ab. Trespass*, D. 3.) Safest to obtain a warrant.

In *Fox* v. *Gaunt*, 3 *B. & Adol.* 798, Lord *Tenterden* remarked, that in cases of misdemeanor it was much better that parties should apply to a magistrate for a warrant than take the law into their own hands, which they were too apt to do.

IV. Time and Place of Arrest.

A person charged on a criminal account may be apprehended at any time in the day or night. (9 *Co. Rep.* 66; *Davis* v. *Russell*, 5 *Bing.* 354; 2 *B. Moore*, 590, S. C.) Time of arrest.

The statute 29 Car. II. c. 7, s. 6, prohibits arrests on Sunday, except in the cases of treasons, felonies, and breaches of the peace. (See "*Lord's Day*," Vol. III.)

No place affords protection to offenders against the criminal law, and they may be arrested any where and whoever they may be. (See *Bac. Ab. Trespass*, D. 3.) Place of arrest.

If a person having committed a felony abroad come here, he may be arrested here, and conveyed and given up to the authorities of the country, against the laws of which the offence was committed. (*Mure* v. *Kaye*, 4 *Taunt.* 34.)

In a recent case where a party against whom a true bill for perjury had been found, and a warrant for her apprehension granted, was apprehended abroad, and brought here in custody and committed to prison for want of bail, the Court refused to discharge her on the ground that she had been improperly apprehended in a foreign country. (*Ex parte Scott*, 4 *Man. & R.* 361; 9 *Barn. & Cres.* 446, S. C.)

V. The Manner of an Arrest.

Notifying authority.

As to the necessity of notifying constable's authority, see *ante*, 274; or a private person's, *ante*, 275.

Manner of arrest, and what constitutes one.

In making the arrest, the constable or party making it should actually seize or touch the offender's body, or otherwise restrain his liberty. The mere requiring the party to go before the justice is no arrest or imprisonment. (*Dalt.* 170; *Berry* v. *Adamson*, 6 *B. & Cres.* 528; *Gage* v. *Radford*, 3 *C. & P.* 464.) For bare words will not make an arrest, without laying hold on the person, or otherwise confining him. But if an officer come into a room, and tell the party he arrests him, and lock the door, this is an arrest; for he is in custody of the officer. (*Genner* v. *Sparkes*, 1 *Salk.* 79; 2 *Hawk.* c. 19, s. 1; *Williams* v. *Jones*, *Cas. temp. Hardw.* 301; *Grainger* v. *Hill*, 4 *Bingh. N. C.* 212; and see *Arrowsmith* v. *Le Mesurier*, 2 *N. R.* 211; *Bridgett* v. *Coyney*, 1 *Man. & Ryl.* 211, 215; *M. & M.* 244.) So if the officer or other person say to a party, "I arrest you," and the party acquiesce and go with him, this will be a good arrest. (*Rupen* v. *Lucas*, 1 *C. & P.* 153.)

Taking the power of the county.

A private person cannot raise power to arrest or detain a felon. (1 *Hale*, 601.)

But any justice, or the sheriff, may take of the county any number that he shall think meet, to pursue, arrest, and imprison traitors, murderers, robbers, and other felons; or such as do break, or go about to break, or disturb the queen's peace: and every man, being required, ought to assist and aid them, on pain of fine or imprisonment. (*Dalt.* c. 171; and *Reg.* v. *Brown*, 1 *C. & Mar.* 314.)

It is not justifiable for a justice, sheriff, or other officer, to assemble the *posse comitatus*, or raise a power or assembly of people, upon their own heads, without just cause. (*Id.*)

But where a justice, sheriff, or other officer, is enabled to take the power of the county, it seemeth they may command and ought to have the aid and attendance of all knights, gentlemen, yeomen, husbandmen, labourers, tradesmen, servants, and apprentices, and all other persons being above the age of fifteen years, and able to travel. (*Id.*)

Women, ecclesiastical persons, and such as be decrepit or diseased, shall not be compelled to attend them. (*Id.*)

And in such case it is referred to the discretion of the justice, sheriff, or other officer, what number they will have to attend on them, and how and after what manner they shall be armed or otherwise furnished. (*Id.* See further, *post*, "*Hue and Cry*," Vol. III.)

Breaking outer doors.

It seems to be the better opinion that a *private individual*, in order to justify breaking open doors *without warrant*, must in general prove the actual guilt of the party arrested, and that it will not suffice to show that a felony has actually been committed by another person, or that reasonable ground of suspicion existed; but that an *officer*, acting *bonâ fide* on the positive charge of another, will be excused, and the party making the accusation will alone be liable. (*Dougl.* 358; *Dick. J. Arrest*, III.; 1 *Hale*, 583; 2 *Hale*, 92; and the cases and law fully collected in 1 *Chit. C. L.* 53.)

But the breaking an outer door is, in general, so violent, obnoxious and dangerous a proceeding, that it should be adopted only in extreme cases, where an immediate arrest is requisite.

In the case of a misdemeanor a demand of admittance should always be first made before breaking open outer doors. (*Lannock* v. *Brown*, 2 *B. & Ald.* 592; 2 *Hawk.* c. 14, s. 1.) No precise form of words of demand is necessary.

In some extreme cases even a private individual may break and enter the house of another in order to prevent him from murdering another, who cries out for assistance. (*Handcock* v. *Baker*, 2 *B. & P.* 260.)

When an affray is made in a house in the view or hearing of a constable, he may break open the house in order to suppress it; (2 *Hale*, 95; 1 *Hawk.* c. 63; 2 *Hawk.* c. 14;) and the like where those who have made an affray in

his presence, fly to a house and are immediately pursued by him. (2 *Hawk.* c. 14, s. 8.) 5. *Manner of.*

So if there be a disorderly noise or disturbance in a house at an unseasonable time of *night*, and especially in an inn, a constable or his watch may break into it to see and suppress the disorder. (2 *Hale*, 95.)

So when a person escapes from a lawful arrest, and shelters himself in a house, the constable may break into it and retake him, whatever the cause of the arrest may have been. (2 *Hawk.* 87.) But if it be not on fresh pursuit, the officer, it seems, should have a magistrate's warrant. (1 *East's P. C.* 324.)

An officer or party who gains admittance into the house, under the above circumstances, may, if necessary to regain his liberty, break open the outer door. (*Id.* See *Pugh* v. *Griffiths*, 7 *Ad. & Ell.* 827.)

As to how far outer doors may be broken open *under a warrant*, see *post*, "*Warrant*," Vol. VI., where the law as to breaking open doors is more fully treated of.

VI. What is to be done after the Arrest.

When a *constable* arrests a party for treason or felony, he must take him before a magistrate to be examined as soon as he *reasonably* can. (*Com. Dig. Imprisonment*, H. 4; *Wright* v. *Court*, 4 *B. & Cres.* 596; 6 *D. & R.* 623, S. C.) Where a constable detained a party three days, in order that the person, whose goods had been stolen, might have an opportunity of collecting his witnesses and bringing them to prove the felony, it was held he was not justified in so doing. (*Wright* v. *Court*, 4 *B. & Cres.* 596; 6 *D. & R.* 623, S. C.) By constables.

Though the arrest be at night, or at any other time, when it is not possible or seasonable to take before a magistrate, it seems a constable is justified in a case of treason or felony in taking the party out of his house to a gaol or other place for safe custody, until he can take him before a magistrate. (*Davis* v. *Russell*, 2 *B. Moore*, 590; 5 *Bing.* 354, S. C.)

If the party resist his apprehension or attempt to escape, it seems the constable may handcuff him, or use any other reasonable and necessary means to prevent his escaping, otherwise not. (*Wright* v. *Court*, 4 *B. & Cres.* 596; 6 *D. & R.* 623, S. C.)

So if there be danger of a present rescue, or if the party be sick, then the constable may keep him in a house or other place of security until such time as it may be reasonable to take him before a magistrate. (2 *Hale*, 120.)

And see further as to rescue, *post*, "*Escape*," Vol. II.; "*Rescue*," Vol. V.

If the constable or his watch hath arrested affrayers, or persons drinking in an alehouse disorderly at an unseasonable time of night, he may put the persons in the stocks, or in a prison, if there be one in the vill, till the heat of their passion or intemperance is over, though he deliver them afterwards, or till he can bring them before a justice. (2 *Hale*, 95.)

Where an arrest has been made without a warrant the constables may in some cases take the party's word for his appearance before a magistrate; and this is frequently done where the charge is for an assault of a trifling nature, and the defendant is of good repute, and there is no probability of his absconding. (See *Hardy* v. *Murphy*, 1 *Esp.* 295; *Arrowsmith* v. *Le Mesurier*, 2 *N. R.* 211; 1 *Ch. C. L.* 59.) As to how far this may done where there is a warrant, see *post*, "*Warrant*," Vol. VI.

When the prisoner is brought before the magistrate, he is still considered to be in the custody of the officer, until he has been either discharged, bailed, or committed to prison. (2 *Hale*, 120.)

It seems a *gaoler* will be protected in receiving a party into custody, although it appear he was wrongfully taken; because it is his duty to receive persons brought by a proper officer, without inquiring into the legality of the arrest. (*Sir T. Jones*, 214; *Brandling* v. *Kent*, 1 *T. R.* 60; *Hobbs* v. *Branscomb*, 3 *Campb.* 420. See further, *post*, "*Gaol*," Vol. III.) By gaolers.

When a *private person* has apprehended another for treason or felony, he should deliver him over to a constable, or carry him before a magistrate or By private persons.

6. *What to be done after.*

to any gaol in the county. (1 *Hale*, 589; 2 *Hale*, 77; 2 *Hawk.* c. 13, s. 7; *R. & M. C. C.* 93; *Com. Dig. Imprisonment*, H. 4.) It is rarely the case that a private person carries the party to gaol. He cannot apprehend and discharge the party at his own pleasure; except perhaps in the case of an affray or breach of the peace, when it seems he may detain the offender until his passion is over, or till there be no opportunity for his doing the threatened mischief. (2 *Hawk.* c. 13, s. 8; see *R.* v. *Curran*, 3 *C. & P.* 397; 5 *East*, 294.) Neither can he, it seems, apprehend and deliver the party over to a constable only, but he must follow up the charge by attending before the magistrate, and then only he ceases to be an actor. The law gives no authority even to a justice to detain a person suspected, but for *reasonable* time till he may be examined. (*Com. Dig. Imprisonment*, H. 5; *Davis* v. *Capper*, 10 *B. & Cres.* 28; 5 *Man. & R.* 53, S. C.; *post*, "*Examination*," Vol. II.)

Escapes.

As to escapes, see *post*, Vol. II. title "*Escape*."

If a party imprisoned obtain his release by undue means, as by fraudulently writing a letter in the name of a magistrate authorising his discharge, he may be indicted for forgery at common law. (*R.* v. *Harris*, 6 *C. & P.* 129.)

Arrest of Judgment, see "*Indictment*," "*Judgment*," Vol. III.

Arsenal, *setting fire to, &c.*, see "*Ships*," "*Stores*," Vol. V.

Arson, see *post*, "*Burning*;" "*Malicious Injuries to Property*," Vol. V.

Articles of the Peace, see "*Surety for Peace*," Vol. V.

Articles of War, see "*Evidence*," Vol. II.; "*Military Law*," Vol. V.

Articulo Mortis, *Declarations in*, see "*Evidence*," Vol. II.

Artificers, see "*Manufacturers*;" "*Servants*," Vol. V.

Asses, see "*Cattle and Animals*," *post*.

Assault & Battery in General.

As to Aggravated Assaults in *Particular* Cases, see *post*, 291.

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I. What an Assault.

An assault, (*assultus*, from the French *assayler*,) is an attempt or offer, with force and violence, to do a corporal hurt to another, whether from malice or wantonness; as by striking at him with or without a weapon, though the party striking misses his aim; so drawing a sword, throwing a bottle or glass, with intend to wound or strike, presenting a gun or pistol at a person within the distance to which the gun or pistol will carry, though they were in fact not loaded, (*R.* v. *St. George*, 9 *C. & P.* 483,) or pointing a pitchfork at a person standing within reach; holding up one's fist at him, in a threatening or insulting manner, or with such other circumstances as denote at the time an intention (coupled with a present ability) of using actual violence against his person, will amount to an assault. (1 *Hawk.* c. 62, s. 1, 2; *Bull. N. P.* 15; 1 *Selw. N. P.* 27; 1 *East's P. C.* 406; 3 *Bla. Com.* 120.) What an assault.

From hence it clearly follows that one charged with an assault and battery may be found guilty of the assault, and yet acquitted of the battery; but every battery includes an assault: therefore on an indictment for assault and battery, in which the assault is ill laid, if the defendant be found guilty of the battery it is sufficient. (1 *Hawk.* c. 62, s. 1.)

Every unlawful imprisonment includes an assault. (1 *Hawk.* c. 60, s. 7; 4 *Bla. Com.* 218.)

Mere words will not amount to an assault, though perhaps they may in some cases serve to explain a doubtful action. (1 *Hawk.* c. 62, s. 1; *Bull. N. P.* 15; *Tuberville* v. *Savage*, 1 *Mod.* 3.)

In an action for an assault, the declaration stated, that the defendant assaulted the plaintiff, and also then presented a certain pistol loaded with gunpowder, ball, and shot, at the plaintiff, and threatened and offered therewith to shoot the plaintiff and blow out his brains. It was proved, that the parties, being on board a ship, the defendant (who was the captain) went into his cabin, and brought out a pistol, and cocked it at the plaintiff's head, saying, that if the plaintiff was not quiet he would blow his brains out: and it was held, that if the defendant, at the time he presented the pistol, used words showing that it was not his intention to shoot the plaintiff, this would be no assault. (*Blake* v. *Barnard*, 9 *Car. & P.* 626.)

If a man strike at another, but at such a distance that he cannot by possibility touch him, it is no assault. (*Com. Dig. Battery*, (C.)) But if A. advances in a threatening attitude with his fists clenched towards B., with an intention of striking him, so that his blow would have almost immediately reached B. if he had not been stopped by a third person: this would be an assault in point of law, though at the particular moment when A. was stopt, he was not near enough for his blow to take effect. (*Stephens* v. *Myers*, 4 *C. & P.* 349.)

So riding after a person and obliging him to run away into a garden to avoid being beaten is an assault. (*Martin* v. *Shoppee*, 3 *C. & P.* 373.)

If a master takes indecent liberties with a female scholar, without her consent, though she does not resist, it is an assault. (*R.* v. *Nichol*, *R. & R. C. C.* 130.)

So making a female patient strip naked, under the pretence that the defendant, a medical man, could not otherwise judge of her illness, was held an assault, he himself having taken off her clothes; the jury in that case finding that the stripping of her was wholly unnecessary, and that the prisoner had no belief that it would assist him in judging of her case. (*R.* v. *Rosinski*, *R. & M. C. C.* 19.)

And where the master of an union workhouse inflicts personal chastisement on a female pauper in an indecent manner, he is guilty in law of an assault, even though the extent of the correction be within the limits of moderation. (*Reg.* v. *Miles*, 6 *Jur.* 243.)

So it is an assault in parish officers to cut off the hair of a pauper in the poor-house by force against her will. (*Forde* v. *Skinner*, 4 *C. & P.* 239.)

On an indictment for assaulting a female child with intent to abuse and carnally to know her, the jury found that the prisoner assaulted the child with

1. *What an Assault.*

intent to abuse her, but negatived the intention charged carnally to know her. *Holroyd*, J. held that the averment of intention was divisible, and sentenced the prisoner to twelve months' imprisonment. (*R.* v. *Dawson*, 3 *Stark.* 62. and see *R.* v. *Evans*, *id.* 35.)

Putting a deleterious drug into coffee in order that another may take it, is, if it be taken, an assault upon the person who takes it. (*Reg.* v. *Button*, 8 *Car. & P.* 660.)

If one has an idiot brother who is bed-ridden in his house, and keeps him in a dark room without sufficient warmth or covering, this of itself will neither be an assault nor an imprisonment. (*R.* v. *Smith*, 2 *C. & P.* 449.)

It is an indictable offence to expose a person of tender years under the defendant's care to the inclemency of the weather. (*R.* v. *Ridley*, 2 *Campb.* 650, 3; *ante*, 195.)

To support an indictment for an assault, such an assault must be shown as could not be justified, if an action were brought for it, and leave and license or other defence pleaded. (*Reg.* v. *Meredith*, 8 *Car. & P.* 589.) And therefore an attempt to commit the misdemeanor of having carnal knowledge of a girl between the ages of ten and twelve, is not an assault, as the consent of the girl puts an end to the charge of assault. (*Id.*)

II. What a Battery, &c.

What a battery.

Battery (from the Saxon *batte*, a club, or *beaten*, to beat, from whence cometh also the word *battle*,) seemeth to be, when any injury whatsoever, be it never so small, is actually done to the person of a man in an angry, or revengeful, or rude, or insolent manner, as by spitting in his face, or throwing water on him, (*Pursill* v. *Home*, 8 *Ad. & Ell.* 602,) or any way touching him in anger, or violently jostling him out of the way, and the like. (1 *Hawk.* c. 62, s. 2; *Rawlings* v. *Till*, 3 *M. & W.* 28.)

The injury need not be effected directly by the *hand* of the party. Thus an assault and battery may be committed by encouraging a dog to bite, by riding over a person, or by wilfully driving a cart against the carriage of another person, and thereby causing bodily injury to the persons in it. (*Hopher* v. *Reeve*, 7 *Taunt.* 698; 1 *Russ.* 863; *Deacon's C. D.* 62.)

Neither need the assault and battery be immediate, as where one pushes a drunken man against another, and thereby hurts him, this is an assault and battery; otherwise, if the real intention was to assist the drunken man, or to prevent him from going along the street without help, and in so doing a hurt ensued. (*Short* v. *Lovejoy*, *Bull. N. P.* 16.) So in the case of a lighted squib thrown in a market-place from one to another to avoid injury till it struck a party, the first thrower would be guilty of an assault and battery. (*Scott* v. *Shepherd*, 2 *Bla. Rep.* 892.)

Striking a horse whereon a person is riding and whereby he is thrown is a battery on him. (*Dodwell* v. *Burford*, 1 *Mod.* 24; *W. Jones*, 444.)

What a wounding.

A *wounding* is where the violence is such that the flesh is opened; a mere scratch may constitute a wounding. As to what is a wounding within the 9 Geo. IV. c. 31, s. 12, see *post*, "*Malicious Injuries to Persons*," Vol. V. 8—9.

It has been said that an imprisonment necessarily includes a battery; (*Onley* v. *Flower*, 2 *Selw. N. P.* Imprisonment, I.; *B. N. P.* 22;) but this seems very questionable. (*Emmett* v. *Lye*, 1 *New Rep.* 255.)

What an imprisonment.

Every restraint or confinement of the person, whether it be in a common prison or in a private house, or by a forcible detaining in the public streets, will be an imprisonment (2 *Inst.* 589; *Com. Dig. Imprisonment, G.*) Actual contact is not necessary to constitute an imprisonment. (*Grainger* v. *Hill*, 4 *Bing. N. C.* 212.) Where a warrant or process is used merely as a summons, and the party voluntarily goes before the magistrate or with the officer, this is not it seems an imprisonment, (*ante*, 278); but it is otherwise where the party goes by compulsion. (*Chim* v. *Morris*, 2 *C. & P.* 361; *Pocock* v. *Moore*, *Ry. & M. C. N. P.* 321.) In a case where a man, who had an idiot bro-

ther bedridden in his house, kept him in a dark room without sufficient warmth or clothing, it was holden not to be an imprisonment. (*R.* v. *Smith*, 2 *C. & P.* 449.)

2. *What a Battery, &c.*

III. In what cases justified or excused.

Self-Defence.]—Even a maihem is justifiable if committed in a party's own defence. (*Dance* v. *Lucy*, 1 *Sid.* 246; 1 *Rol. Rep.* 19; *Cockcroft* v. *Smith*, 2 *Salk.* 642; 1 *Ld. Raym.* 177, S. C.; *Anon.* 3 *Salk.* 46.) But a person struck has merely a right to *defend* himself, and strike a blow in his defence, but he has no right to revenge himself; and if, when all the danger is past, he strikes a blow, not necessary, he commits an assault and battery. (*Reg.* v. *Driscoll*, 1 *Car. & M.* 214; *R.* v. *Milton*, *M. & M.* 107.) And in no case should the battery be more than is necessary for self-defence. (*Bull. N. P.* 18.) Self-defence.

The mere offer of a person to strike another is sufficient to justify the latter's striking him; he need not stay till the other has actually struck him. (*Bull. N. P.* 18; 2 *Roll. Abr.* 547, *l.* 37.)

It was resolved in *Frances* v. *Ley*, *Cro. Jac.* 367, that when a person is assaulted or beaten in a church or churchyard, it is not lawful for him to return blows in his own defence, as he may elsewhere. (And see 1 *Hawk.* c. 23, s. 28.)

So one who is guilty of the offence cannot excuse himself by showing that the person struck by him made the first assault, if that assault was justifiable. (1 *Hawk.* c. 21, s. 4; *Com. Dig. Pleader*, 3 M. 15; *Leeward* v. *Basilee*, 1 *Salk.* 407; 1 *Ld. Raym.* 62, S. C.; *Carth.* 280.)

Defence of Relations, Servants, &c.]—A husband may justify a battery in defence of his wife, a wife in defence of her husband, a parent in defence of his child, a child in defence of his parent, a master in defence of his servant, and a servant in defence of his master. (2 *Roll. Abr.* 546, D.; 1 *Hawk.* c. 60, s. 23, 24; *Tickell* v. *Road*, *Lofft*, 215.) Defence of relations, servants, &c.

But in all these cases the battery must be such only as was necessary to the defence of the party or his relation; for if it were excessive, if it were greater than was necessary for mere defence, the prior assault will be no justification. (*Bull. N. P.* 18; *Weaver* v. *Bush*, 8 *T. R.* 78; 1 *East's P. C.* 406.) Thus a man cannot justify a maihem for every assault, as if A. strike B., B. cannot justify drawing his sword and cutting off A.'s hand. (*Per cur. Cooke* v. *Beal*, 1 *Ld. Raym.* 177.)

When a person does not stand in either of these relations he cannot justify an interference *in behalf* of the party injured; but merely as an indifferent person to preserve the peace. (*Post*, 284.)

Therefore a servant cannot justify beating another in defence of his master's *son*, though he were even commanded to do so by the master, because he is not a servant to the son; and for the like reason a tenant may not beat another in defence of his landlord. (1 *Hawk.* c. 60, s. 24.)

Defence of Property.]—A party may justify a battery by showing that he committed it in defence of his possession; as for instance, to remove the prosecutor out of his close or house; (*Lutw.* 1435; *Hard.* 358;) or out of a public-house, if the party be misconducting himself; (*Howell* v. *Jackson*, 6 *C. & P.* 723; *Moriarty* v. *Brooks*, *Id.* 684;) or to prevent him from entering the defendant's close or house; (2 *Rol. Abr.* 548, *l.* 25;) to restrain him from taking or destroying his goods, &c.; (*Id.* 549, *l.* 7;) from taking or rescuing cattle, &c. in his custody upon a distress; (*Id. l.* 10; 2 *Bro. Ent.* 260;) or to retake personal property improperly detained or taken away; (*Weaver* v. *Bush*, 8 *T. R.* 78; 2 *Roll. Rep.* 56, 208; *Rex* v. *Milton*, *M. & M.* 107;) or the like. Defence of property.

In the case of a trespass in law, merely *without actual force*, the owner of

3. *When Justifiable.*

the close, &c. must first *request* the trespasser to depart, before he can justify laying his hands on him for the purpose of removing him; and even if he refuse, he can only justify so much force as is necessary to remove him. (*Weaver* v. *Bush*, 8 *T. R.* 78; 2 *Roll. Abr.* 548, *l.* 35, 45; *Green* v. *Goddard*, 2 *Salk.* 641; *Skin.* 387.) But if the trespasser use *force*, then the owner may oppose force to force; (*Green* v. *Goddard*, 2 *Salk.* 641; *Weaver* v. *Bush*, 8 *T. R.* 78; *Tulley* v. *Heed*, 1 *C. & P.* 6;) and in such a case, if he be assaulted or beaten, he may justify even a wounding or maihem, in self defence, as above mentioned. In answer to a justification in defence of his possession, it may be shown that the battery was excessive. (*Skin.* 387; *Lutw.* 1436; *R.* v. *Milton*, *M. & M.* 107.) Or that the party assaulted, or some one by whose authority he acted, had a right of way or other easement over the close, or the like. (See *Jervis's Arch. C. L.* 9th ed. 491.)

Moderate correction.

Moderate Correction.]—A parent may justify the correcting of his child, or a master the correcting of an apprentice, seaman, or scholar; the correction being moderate and done in a proper manner. (*Com. Dig. Pleader*, 3 M. 19; 1 *Hawk.* c. 60, s. 23; c. 62, s. 2.) As to what is not a moderate correction, see *ante*, "*Apprentice*," 193, 194; *post*, "*Servants*," Vol. V.

A military officer may order a correction for disobedience of orders. (*Lane* v. *Degberg*, *Bull. N. P.* 19; 2 *C. & P.* 148.) But he must in no case be guilty of any unnecessary injury to the offender, or he would be liable. (*Wall* v. *Macnamara*, 1 *T. R.* 536; *Swinton* v. *Molley*, 1 *T. R.* 537; *ante*, 283.)

Under authority of law.

Under Authority of Law.]—It is a sufficient justification to show that the assault was done under the authority of the law, with or without legal process, no greater assault being committed than was necessary. (See 2 *Roll. Abr.* 546; 2 *Stra.* 1049.)

A person may, it seems, if it be necessary to do so, lay hands on another in order to serve him with process. (*Harrison* v. *Hodgson*, 10 *B. & Cres.* 445.)

So a person may lay hands upon another to prevent him from fighting or committing a breach of the peace. (*Com. Dig. Pleader*, 3 M. 16; *Burfoot* v. *Reynolds*, 2 *Stra.* 953.) Or to prevent him from rescuing goods taken in execution; (3 *Lev.* 113;) or from taking away heiress; (*R.* v. *Milton*, *M. & M.* 107;) or the like. (1 *Mod.* 168.)

Churchwardens and private persons are justified in gently laying their hands on those who disturb the performance of any part of divine service, and turning them out of the church. (1 *Hawk.* c. 63, s. 28; and see *Williams* v. *Glenister*, 2 *B. & Cres.* 699; 4 *D. & R.* 217, S. C.; *Burton* v. *Henson*, 10 *M. & W.* 105.)

Misadventure.

Misadventure.]—It is a sufficient excuse or justification to show, that the assault or battery happened by misadventure. Therefore where in throwing down skins into a man's yard, the wind took one of them and blew it aside, whereby another man's eye was put out, it was held he could not be indicted for an assault. (*R.* v. *Gill*, 1 *Str.* 190.) So if by a sudden fright a horse runs away with his rider and runs against a man, it is no assault. (*Gibbons* v. *Pepper*, 4 *Mod.* 405.) But if the running away of the horse were occasioned by its being improperly whipped by a third person, such third person would be guilty of an assault; and if death ensued, the offence would amount to manslaughter. (*Bac. Ab. Assault and Battery*, *B.*) If a soldier hurt another by accident in discharging his gun in exercise, he would not be liable to an indictment. (*Weaver* v. *Ward*, *Hob.* 134.)

There are many cases of accidents which cannot be set up as a defence in *an action* for a battery, that would certainly be a good defence upon an *indictment;* in civil cases the accident must have been *inevitable* and without any fault to operate as an excuse. (2 *Rol. Ab.* 548; *Weaver* v. *Ward*, *Hob.* 134; *Moore*, 864, S. C.; 2 *Bla. Rep.* 896; 1 *Stra.* 595; *Wakeman* v. *Robinson*, 1 *Bing.* 213.)

But in criminal cases, the intention with which the act was done must always

be taken into consideration, and it may be taken as a general rule that the same facts which would make a killing homicide by misadventure, will be a good defence to an indictment for a battery. See "*Homicide*," Vol. III.

3. *When justifiable.*

Amicable Contest.]—It is a good justification to prove that the alleged battery was merely an amicable contest; as that he wrestled with the prosecutor for a wager. (*Com. Dig. Pleader*, 3 M. 18; *Bac. Abr. Assault and Battery*, B.) So, that it happened by accident whilst the defendant was engaged in some sport or game, which was neither unlawful nor dangerous, as with swords or the like. As to pugilistic fights, see *post*, "*Fighting*;" "*Homicide*," Vol. III.

Amicable contest.

IV. Indictment and Punishment for; Compounding of.

There is no doubt but that the wrong-doer is subject both to an action at the suit of the party, wherein he shall render damages, and also to an indictment at the suit of the queen, wherein he shall be fined according to the heinousness of the offence. (1 *Hawk.* c. 62, s. 4.)

Action or indictment for.

The Court in which the action is brought will not in general compel the plaintiff to stay the proceedings either in the action or the prosecution by indictment. (*Jones* v. *Clay*, 1 *Bos. & P.* 191. See *post*, "*Nolle Prosequi*," Vol. V.)

But in general the adoption of both proceedings is considered vexatious, and the Court will not pass judgment for the assault while an action for the same assault is depending, and although at the time of the defendant's being brought up the prosecutor offer to discontinue the action. (*R.* v. *Mahon*, 4 *Ad. & Ell.* 575.) The pendency of the indictment may also in some cases induce the jury to give smaller damages in the action.

A party may be prosecuted on one indictment for assaulting two or more persons. (*R.* v. *Benfield*, 2 *Burr.* 984.)

A private assault is not inquirable in the leet, not being a common nuisance, as all affrays are. (1 *Hawk.* c. 63, s. 1.)

Whatever is a legal justification or excuse for assault may, upon an indictment for the assault, be given in evidence under the general issue. (1 *Hawk.* c. 62, s. 3; 1 *East's P. C.* 406.)

Punishment for.]—The offence of a common assault is a misdemeanor, and is punishable on indictment by fine or imprisonment, or both, according to the more or less aggravated nature of the case. The offender may also be ordered to find sureties to keep the peace.

How punished.

The Court have no power (except in some aggravated cases provided for by the 9 Geo. IV. c. 31; or by the 7 Will. IV. & 1 Vict. c. 85) to order the defendant to be kept to hard labour, or subjected to personal correction.

It is an aggravation of the offence on account of the person on whom or the place where the same is committed; as where a man assaults or threatens another for suing him; a counsel or attorney for being employed against him; a juror for his verdict; or a gaoler, constable, or other ministerial officer for keeping him in custody, and properly executing his duty. (4 *Bla. Com.* 126.)

A defendant indicted for any felony which includes an assault on the person, may now, by 7 Will. IV. & 1 Vict. c. 85, s. 11, be acquitted of the felony and found guilty of an assault only, and in such case may be sentenced to imprisonment with hard labour.

Punishment on indictment for a felony, including an assault.

The following is the enactment of that section, "That on the trial of any person for any of the offences thereinbefore mentioned, or *for any felony whatever*, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony and to find a verdict of guilty of assault, against the person indicted, if the evidence shall warrant such finding; and when such verdict shall be found, the Court shall have power to

4. *Indictment for.*

imprison the person so found guilty of an assault for any term not exceeding three years."

Under this enactment, the prisoner ought not to be convicted of an assault which is quite distinct from and independent of the felony charged; and on such an indictment the prisoner ought only to be convicted of an assault which is involved in the felony itself. (*R.* v. *St. George*, 9 *C. & P.* 483; S. P. *R.* v. *Cuttridge*, 9 *C. & P.* 471.) And he may be convicted of the assault, if the indictment contain any one good count, although all the other counts may be bad. (*R.* v. *Nicholls*, 9 *C. & P.* 269.) A. presented a loaded pistol at B., but was prevented from pulling the trigger, and it was held that A. could be properly convicted of this assault, on an indictment for feloniously attempting to discharge loaded arms at B. (*R.* v. *St. George*, 9 *C. & P.* 483.) So a prisoner who is tried for manslaughter on the coroner's inquisition, may be convicted of an assault under the above section. (*R.* v. *Pool*, 9 *C. & P.* 728.) And on an indictment for abduction, on the stat. 9 Geo. IV. c. 31, s. 19, if the jury should not be satisfied that the prisoner was actuated by motives of lucre, and they be satisfied that the prisoner used force to the person of the lady in taking her away, and that he took her away against her consent, they may convict him of an assault. (*R.* v. *Barratt*, 9 *C. & P.* 387.) In another case, a party was indicted for a highway robbery, accompanied by violence, under the stat. 7 Will. IV. & 1 Vict. c. 87, s. 3: the jury pronounced the following verdict:—"We find the prisoner guilty of an assault, but without any intention to commit any felony:" it was held that such special finding did not take the case out of the operation of the above act, and the prisoner was sentenced under it to imprisonment, with hard labour, for the assault. (*R.* v. *Ellis*, 8 *C. & P.* 654.) But it seems that a charge of administering wrong medicine does not of necessity include a charge of assault, so as to convict the party under the act. (*Edsall* v. *Russell*, 6 *Jur.* 996.) The act applies to offences committed before it passed. (*Reg.* v. *Hagan*, 8 *C. & P.* 167.)

Compounding of or referring to arbitration.

Compounding, &c. of.]—There does not appear any objection to compounding or referring to arbitration a prosecution for a common assault. (See 1 *Moore*, 120; *post*, "*Award.*")

In cases where the offence more immediately affects the individual, the defendant is sometimes permitted by the Court, even after conviction, to speak with the prosecutor before any judgment is pronounced, and a trivial punishment (generally a fine of a shilling) is inflicted, if the prosecutor declares himself satisfied. (4 *Bla. Com.* 363, 364; *Baker* v. *Townshend*, 1 *Moore*, 120.)

And where the defendant was convicted on an indictment for ill-treating a parish apprentice, and at the recommendation of the Court of quarter sessions gave security for the fair expenses of the prosecution, upon an understanding that the Court would abate the period of his imprisonment, the security was held to be legal and binding. *Et per* Lord *Ellenborough*, C. J.—"The security in question, given with the sanction of the Court, is rather to be considered as part of the punishment suffered by the defendant in expiation of his offence, in addition to the imprisonment inflicted upon him. If we had seen any ground for suspecting the authority of the Court had been used as an instrument of oppression or extortion, we should have watched the case very jealously; but nothing of that sort appears." (*Beeley* v. *Wingfield*, 11 *East*, 46.)

V. Proceedings for, before Justices, under 9 Geo. 4, c. 31.

For a common assault, a party may be fined by justices.

By the 9 Geo. IV. c. 31, s. 27, justices of the peace are empowered to fine for common assaults. The enactment is as follows:—"And whereas it is expedient that a summary power of punishing persons for common assaults and batteries should be provided, under the limitations hereinafter mentioned:" be it therefore enacted, "that where any person shall unlawfully assault, or

beat, any other person, it shall be lawful for two justices of the peace, upon complaint of the party aggrieved, to hear and determine such offence, and the offender, upon conviction thereof before them, shall forfeit and pay such fine as shall appear to them to be meet, not exceeding, together with costs, (if ordered,) the sum of five pounds, which fine shall be paid to some *one of the* overseers of the poor, or to some other officer of the parish, township, or place, in which the offence shall have been committed, to be by such overseer, or officer, paid over to the use of the general rate of the county, riding, or division, in which such parish, township, or place shall be situate, whether the same shall or shall not contribute to such general rate; and the evidence of any inhabitant of the county, riding, or division, shall be admitted in proof of the offence, notwithstanding such application of the fine incurred thereby; and if such fine as shall be awarded by the said justices, together with the costs, (if ordered,) shall not be paid, either immediately after the conviction, or within such period as the said justices shall at the time of the conviction appoint, it shall be lawful for them to commit the offender to the common gaol, or house of correction, there to be imprisoned for any term not exceeding two calendar months, unless such fine and costs be sooner paid; but if the justices, upon the hearing of any such case of assault or battery, shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall *forthwith* make out a certificate under their hands, stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred."

5. Proceeding for, before justices, under 9 Geo. 4, c. 31.

Application of fine.

Inhabitant witness.

Commitment for non payment.

If magistrates dismiss complaint, they to certify same.

By sect. 28, "If any person against whom any such complaint shall have been preferred, for any common assault or battery, shall have obtained such certificate as aforesaid, or having been convicted shall have paid the whole amount adjudged to be paid under such conviction, or shall have suffered the imprisonment awarded for non-payment thereof, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause."

Certificate or conviction shall be a bar to other proceedings.

Sect. 29. "In case the justices shall find the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is, from any other circumstances, a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereupon, and shall deal with the case, in all respects, in the same manner as they would have done before the passing of this act: provided also, that nothing herein contained shall authorise any justices of the peace to hear and determine any case of assault or battery, in which any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any court of justice."

Aggravated cases not within the act;

nor questions of title, &c.

Sect. 33. "And for the more effectual prosecution of offences punishable upon summary conviction by virtue of this act, be it enacted, that where any person shall be charged on the oath of a credible witness before any justice of the peace with any such offence, the justice may summon the person charged to appear before any two justices of the peace at a time and place to be named in such summons, and if he shall not appear accordingly, then (upon proof of the due service of the summons upon such person by delivering the same to him) the justices may either proceed to hear and determine the case *ex parte*, or may issue their warrant for apprehending such person and bringing him before them, or the justice before whom the charge shall be made may, if he shall so think fit, issue such warrant in the first instance without any previous summons."

Power to summon, &c. offender.

Proceeding ex parte.

Warrant for apprehension.

Sect. 34. "The prosecution for every offence punishable on summary conviction by virtue of this act shall be commenced within three calendar months after the commission of the offence, and not otherwise."

Limitation for proceedings.

Sect. 35. "The justices before whom any person shall be summarily convicted of any offence against this act may cause the conviction to be drawn up in the following form of words, or in any other form of words to the same effect as the case shall require, that is to say:—Then follows the form of the conviction, which see *post*, (No. 7.)

Form of conviction.

5. *Proceeding for, before justices, under 9 Geo. 4, c. 31.*

Certiorari.

Conviction, &c. not to be quashed for want of form, &c.

Provisions extended to assaults on board merchant-ships.

Sect. 36 enacts, "That no such conviction shall be quashed for want of form, or be removed by *certiorari* or otherwise into any of his majesty's superior courts of record; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same."

By sect. 38, the act shall not extend to Scotland or Ireland.

By the 7 & 8 Vict. c. 112, s. 44, reciting the passing of the above act, and that it is expedient that the provisions of the said act should be extended to similar offences committed on board ships belonging to subjects of her Majesty, it is enacted, "That in the case of any assault or battery committed on board any ship belonging to any subject of her Majesty in any part of the world, it shall be lawful for any two justices of the peace in any part of her Majesty's dominions, or the territories under the government of the East India Company, residing at or near any port or place at which the said ship may arrive or touch, upon complaint of the party aggrieved, to hear and determine any such complaint, and to proceed and make such adjudication thereon as by the said act any two justices are empowered to do in the cases of assaults and batteries in England; and the fine or forfeiture to be imposed in any such case shall be payable to the Seamen's Hospital Society: Provided always, that such complaint shall be made and prosecuted within three months after such alleged assault or battery, or within three months after the arrival of the ship at her final port of destination in the united kingdom, or within three months after the respective parties shall be within the jurisdiction of such justices as aforesaid."

Construction of act.

The above provisions do not appear to prevent the prosecutor from going to the sessions and preferring his indictment in the first instance; but if he lay his complaint before a magistrate, and the case be heard before two magistrates, they may, provided it be not one of the cases within the 29th section, above stated, either fine the offender in any sum not exceeding 5*l.* or may dismiss the case, giving the accused a certificate that is to have the effect of discharging him from all future proceedings, civil or criminal, for the same assault; or if the magistrates think it a case proper for an indictment, they may act as they would have done before this statute. (*Carr. C. L.* 341.)

The complaint must be made on oath. And a warrant to bring the offender before the justices must state the complaint to have been upon oath or it will be bad. (See *Caudle* v. *Seymour*, 1 *Q. B.* 889; 1 *Gale & D.* 454, S. C.)

Where two justices convicted a defendant summarily as of a common assault, where it appeared by the deposition that the defendant had laid hands on the prosecutor in an indecent manner, but without violence, a *certiorari* being moved for on the ground that the offence, if committed, was accompanied by a felonious attempt, and therefore within section twenty-nine of the above act, the Court refused to interfere, inasmuch as no excess of jurisdiction appeared on the face of the conviction, and the evidence (of which the magistrates were the judges) did not clearly show an intention to *commit felony;* and *semble*, that although this had appeared by the deposition, and the conviction had been consequently illegal, the Court of Queen's Bench would not have interposed by *certiorari*. (*Anonymous*, 1 *B. & Ad.* 382.)

The certificate of the justices should be applied for without any delay. Where two justices, on the 29th of November, dismissed a charge of assault, on the ground that the offence was "not proved," and did not give their certificate of such dismissal, under section twenty-seven, until the 10th January following; it was held, that the certificate had not been granted "*forthwith*," within the meaning of section twenty-seven, and was therefore no bar to an indictment for the same assault. (*Reg.* v. *Robinson*, 4 *Per. & D.* 391; 12 *Ad. & E.* 672, S. C.) And where a plea to an indictment for an assault alleged that the defendant had been brought before two justices for the same assault, and that the justices, deeming the offence not to be proved, "forthwith" gave the defendant a certificate of such dismissal; and the replication traversed the giving of the certificate *modo et formâ;* it was held, (*dubitante Coleridge*, J.) that the time of giving the certificate (*inter alia*) was put in issue. (*Ib.*)

When the justices dismiss the complaint on any of the grounds authorised by section 27, the certificate of dismissal should set forth such grounds, otherwise the certificate will not be a bar to future proceedings. And where in such a case, the venue or the declaration was in Surrey, and the plea stated, that the complaint was dismissed by justices of Surrey, it was held to appear sufficiently, that the assault was committed in the same county, so as to give jurisdiction to such justices. (*Skuse* v. *Davis*, 10 *Ad. & E.* 635.)

5. *Proceedings for, before justices, under 9 Geo. 4, c. 31.*

In an action for the same assault in respect of which the justices have granted a certificate, a party cannot avail himself of this certificate as a defence unless it be specially pleaded. (*Harding* v. *King*, 6 *C. & P.* 427.)

VI. Forms.

(1.) Warrant for an assault. (a)

County of } To A. C. the constable of in the said county, and to all other constables of the said county, and others whom this may concern.

WHEREAS complaint hath been made before me, J. P. Esquire, one of her Majesty's justices of the peace in and for the said county, upon the oath of A. B. of in the said county [labourer], that C. D. of aforesaid [butcher], on the day of did violently assault and beat him the said A. B. at aforesaid, in the county aforesaid: These are therefore, in her Majesty's name, to command you forthwith to apprehend the said C. D. and to bring him before me to answer unto the said complaint, and to be further dealt with according to law. Given under my hand and seal the day of

(2.) Commitment for an assault and for want of sureties.

—— (to wit.) To constable, and all other her Majesty's officers of the peace whom these may concern, and to the keeper of in the county of .

WHEREAS C. D. was this day brought and charged before me, E. F., one of her Majesty's justices of the peace for the said county of on the oath of A. B. with assaulting and beating the said A. B., and with committing divers misdemeanors against her Majesty's peace. And whereas the said C. D. hath refused [or neglected] (although by me required) and doth refuse [or neglect] to find sureties as well for his personal appearance at the next [general quarter] sessions of the peace, which shall be holden in and for the said county of to answer the premises, as also in the meantime to keep her Majesty's peace to all her liege subjects, particularly towards the said A. B.: These are, therefore, in her Majesty's name, to command you the said constable, or other peace officer, safely to convey the said C. D. and deliver him to the keeper aforesaid, requiring you the said keeper to receive and safely to keep the said C. D. until he shall find such sureties, or otherwise be discharged by due course of law. Given under my hand and seal this day of aforesaid, one thousand eight hundred and . E. F. (L. S.)

(3.) Indictment for assaulting with a whip.

—— to wit. THE jurors for our Lady the Queen upon their oath present, that C. D. late of the parish of in the county of labourer, on the day of in the year of the reign of our Lady the now Queen Victoria, at the parish aforesaid, in the county aforesaid, with force and arms, to wit, with a certain horsewhip which he the said C. D. then had and held in his right hand, at the parish aforesaid, in the county aforesaid, made an assault upon A. B. then and there being in the peace of God and our said Lady the Queen, and him the said C. D. then and there did beat, strike and whip several times with the said [horsewhip], giving to the aforesaid A. B. divers severe and violent blows and strokes by the same [whip], and then and there otherwise greatly ill-treated the said A. B.; to the great damage of the said A. B., and against the peace of our said Lady the Queen, her crown and dignity. [Add a count for a common assault like the next form.]

(4.) Indictment for a common assault.

—— to wit. THE jurors for our Lady the Queen upon their oath present, that C. D. late of the parish of in the county of labourer, on the day of in the year of the reign of our Lady the now Queen Victoria, at the parish aforesaid, in the county aforesaid, in and upon A. B., then and there being in the peace of God and of our Lady the Queen, with force and arms an assault did

(a) See *Candle* v. *Seymour*, *ante*, 288.

6. *Forms.*

make, and him the said A. B. then and there did beat, wound and ill-treat, and then and there to him other wrongs and injuries did, to the great damage and hurt of the said A. B., to the evil example of all others, and against the peace of our Lady the Queen, her crown and dignity. [If the assault be of an aggravated nature, state the facts attending it in one count, and add another count like the above.]

(5.) Indictment for an assault and false imprisonment.

—— *to wit. THE jurors for our Lady the Queen upon their oath present, that C. D. late of the parish of in the county of labourer, on the day of in the year of the reign of our Lady the now Queen Victoria, with force and arms at the parish aforesaid, in the county aforesaid, in and upon one A. B. in the peace of God and of our Lady the Queen then and there being, did make an assault; and him the said A. B. did then and there beat, wound and ill-treat, and him the said A. B. then and there unlawfully and injuriously, and against the will of the said A. B., and against the laws of this realm, did imprison, and keep and detain in prison for a long space of time, to wit, for the space of twelve hours then next following, and other wrongs to the said A. B. then and there did to his damage, and against the peace of our Lady the Queen, her crown and dignity.* [Add a count for a common assault, as *sup.*]

(6.) Complaint on 9 Geo. 4, c. 31, for an assault and battery.

—— *to wit. BE it remembered, that on, &c. at, &c. A. B. of, &c. personally cometh before us, J. P. and S. P. two* [or *me, J. P. one, &c.*] *of her Majesty's justices of the peace for the said county, and complaineth to and informeth us* [or *me*] *on oath that A. O. of, &c. on, &c. at, &c. did unlawfully assault and beat the said A. B. Whereupon the complainant prayeth that the said A. O. may be summoned to answer the said complaint according to the said statute.*

Taken and sworn before us [or *me*] *the*
day of 18 *J. P.*
S. P.

(7.) Conviction on 9 Geo. 4, c. 31, for an assault. (*a*)

—— *BE it remembered, that on the day of in the year of our Lord at in the county of* [or *riding, division, liberty, city, &c.* as the case may be,] *A. O. is convicted before us* [naming the justices,] *two of her Majesty's justices of the peace for the said county* [or *riding, &c.*] *for that he the said A. O. did* [specify the offence, and the time and place when and where the same was committed, as the case may be]; *and we, the said justices, do, according to and under and by virtue of the said statute, adjudge the said C. D. for his said offence to forfeit and pay the sum of £ and also to pay the sum of 12s. 6d. for costs, and in default of immediate payment of the said sums, to be imprisoned in the common gaol in and for the said county of for the space of , unless the said fine and costs should be sooner paid; and we do also adjudge the said A. O. for his said offence to be imprisoned in the and there kept to hard labour for the space of* [or *we adjudge the said A. O. for his said offence to forfeit and pay the sum of*] [here state the amount of the fine imposed,] *and also to pay the sum of for costs; and in default of immediate payment of the said sums, to be imprisoned in the for the space of unless the said sums shall be sooner paid;* [or *and we order that the said sums shall be paid by the said A. O. on or before the day of*] *and we direct that the said sum of* [i. e. the amount of the fine] *shall be paid to of aforesaid, in which the said offence was committed, to be by him applied according to the directions of the statute in that case made and provided; and we order that the said sum of for costs shall be paid to C. D.* [the party aggrieved.] *Given under our hands and seals the day and year first above mentioned.*

(8.) Certificate upon complaint being dismissed.

WE, two of her Majesty's justices of the peace for the county of to wit. do hereby certify that on the day of in the year of our Lord at in the said county of A. O. of the parish of, &c. in the said county, was brought before us, the said justices, and charged by one A. B. with having unlawfully assaulted and beaten him the said J. C. on the day of at the parish of, &c. in the said county, and that we, the said justices, having heard what the said A. B. had to allege in that behalf, and the evidence adduced by him in support of the said charge, and having also heard what the said A. O. then and there alleged in his defence, did then and there adjudge that [here state the ground of dismissal] *the said*

(*a*) The act gives the form, see *ante*, 288.

offence was not proved [or *that the said A. O. was lawfully justified in committing the said assault and battery*, or *that the said assault and battery were so trifling as not to merit any punishment*], *and that we did then and there accordingly, on the ground aforesaid, dismiss the said complaint. Given under our hands, this day of .*

R. J.
J. T.

6. *Forms.*

Reg. v. } *THAT defendant doth not intend that our said Lady the Queen will further prosecute the said indictment, because he saith that on the day of* A. D. 184 *at the (town hall) of in the county of before, &c. (two justices of the said county of) the defendant, by the name, &c., was brought before the said justices, charged in a certain information, upon the oath of the said, &c.* [prosecutor], *with having, on, &c. assaulted, &c., and that the said justices, upon hearing the said complaint, deemed and adjudged the offence not to be proved* [or state any other ground of dismissal], *and thereupon, on the ground aforesaid, dismissed the said complaint, and forthwith made out a certificate, under their hands, stating the fact and grounds of such dismissal, and delivered it to defendant as by the certificate now shown to the Court will more fully and at large appear, which said judgment and dismissal still remain in full force and effect, and not in the least reversed or made void: and the defendant saith that the said assault, &c. in respect whereof the said* [prosecutor] *had so complained before the said justices against him the defendant, and in respect of which the said justices had so adjudicated as aforesaid, was and is the same identical assault, &c. mentioned and charged against him the defendant in the said indictment. And this the defendant is ready to verify. Therefore he prays judgment, and that by the Court here he may be dismissed and discharged from the premises in the said indictment specified.*

(9.) Plea to an indictment for assault, that the prosecutor had complained under the 9 Geo. 4, c. 31, and the justices dismissed the complaint.

Assaults in Particular Cases.

THE legislature has in many cases of aggravated assaults imposed a severer punishment than that which could be inflicted at common law, and in some cases has made the assault a felony.

We will proceed to consider of them, and

Herein of assaults,

1. *To rob, and Menaces to Steal*, 291.
2. *To commit a Felony,—on Peace Officers, Revenue Officers, and to raise Wages*, 293.
3. *In endeavour to save Shipwrecks, or escape from Wrecks, &c.* 296.
4. *On Seamen to prevent Working, and Assaults to Stop Grain, &c.* 298.
5. *Other particular Assaults*, 299.

As to assaults on gamekeepers, &c. see *post*, "*Game*," Vol. III.

As to assaults by shooting, stabbing, or poisoning, or sending explosive substances, or throwing destructive substances, see *post*, "*Malicious Injuries to Persons*," Vol. V.

I. Assaults to rob and Menaces to Steal.

By the 7 Will. IV. & 1 Vict. c. 87, s. 6, it is enacted, "That whosoever shall assault any person with intent to rob shall be guilty of felony, and being convicted thereof, shall (save and except in the cases where a greater punishment is provided by this act) be liable to be imprisoned for any term not exceeding three years."

Assault with intent to rob.

Sect. 7 enacts, 'That whosoever shall, with menaces or by force, demand any property of any person with intent to steal the same, shall be guilty of

Demanding property with menaces, &c.

1. *To rob, &c.* felony, and being convicted thereof, shall be liable to be imprisoned for any term not exceeding three years."

As to the offence of an assault with intent to rob, *the accused being armed*, or for an assault with intent to rob, *together with one or more person or persons*, as provided against by sect. 3 of the act, and also as to the offence of robbery in general, see "*Robbery*," Vol. V. As to the offence of obtaining money, &c. by threats, see "*Threats*," Vol. VI.

Punishment.

In addition to the punishment of imprisonment for any term not exceeding three years, as provided by the above sect. 6, hard labour, and solitary confinement, or either, (such confinement not to exceed one month at any one time, nor three months in any one year) may be added. (7 Will. IV. & 1 Vict. c. 87, s. 10, see "*Larceny*," Vol. III.)

Conviction for assault only.

The offender may be convicted of the assault only. (7 Will. IV. & 1 Vict. c. 15, s. 11, *ante*, 285.)

Form of indictment and proof of assault to rob.

Where the offence of robbery was not completed by taking and carrying away, or there seems no prospect of substantiating it by evidence, the defendant should be indicted under the above act for an assault with intent to rob. (1 *East's P. C.* 411, 440.)

A count for robbery cannot be added to a count for an assault with intent to rob; if it be, the prosecutor will be put to his election. (*R.* v. *Gough*, 2 *M. & M.* 71.)

It was held, on an indictment on 7 Geo. II. c. 21, (repealed by 4 Geo. IV. c. 54,) for an assault with intent to rob, that it should charge the assault to be unlawful and malicious as well as felonious, unless it also lay a felonious demand of goods in a forcible and violent manner. (*R.* v. *Pegge*, 1 *East's P. C.* 420.) Also that it must charge the prisoner made the assault with intent to *rob*, and not merely to steal the goods of the prosecutor. (*R.* v. *Montello*, 2 *Leach, C. C.* 702; 1 *East's P. C.* 420, S. C.)

The cases of *R.* v. *Jackson*, 1 *Leach's C. C.* 267; 1 *East's P. C.* 419, S.C.; *R.* v. *Johnson*, *R. & R. C. C.* 492; deciding that the indictment must state that the assault was made with an offensive weapon, or that a demand was made of money or goods, are not applicable to a prosecution under the above act.

In *R.* v. *Thomas*, 1 *Leach*, 330; 1 *East's P. C.* 417, it was holden, that an indictment, which alleged the assault to have been made upon J. N., was not supported by proof that the assault was made upon the driver of the post-chaise in which J. N. was; but this indictment was framed upon the repealed statute, 7 Geo. II. c. 21, which made it felony for any person with an offensive weapon to assault any other person, with intent to rob *such* person; and the decision would not, as it seems, be applicable to the present statute, which is more general, if the jury were satisfied that the chaise was stopped in furtherance of an intention to rob J. N. (*Arch. C. L. by Jervis*, 9th edit. 265.)

The intent.

It is a question for the consideration of the jury on a review of all the facts connected with the assault whether the prisoner had any intention to rob; no actual demand of money is necessary to support the indictment. (*R.* v. *Trusty*, 1 *East's P. C.* 418; *R.* v. *Sherwin*, *id.* 421.) Where A. was decoyed into a house and chained down to a seat, and compelled to write an order for the payment of money and an order for the delivery of deeds; and the paper on which he wrote remained in his hand half an hour, but he was chained all the time; it was held that this was not an assault with intent to rob. (*R.* v. *Edwards*, 6 *C. & P.* 521.)

Form of indictment for, and proof of menaces to steal.

To support an indictment for demanding property with menaces or force, with intent to steal the same, a demand of the property stated in the indictment with menaces or force must be proved, and demand in words is not necessary, gestures or any other mode would suffice. (*R.* v. *Jackson*, 1 *Leach*, 269.)

Where an indictment stated that the defendant "feloniously, by menaces, did demand the monies of the said J. N.," it was holden to be insufficient, because it did not state from whom he had demanded them. (*R.* v. *Dunkley*, 1 *Mood. C. C.*)

If a person with menaces demand a sum of money of another, and that other does not give it to him because he has it not with him, this is a felony within the statute; but if the person demanding the money knows that the money is not then in the possession of the party, and only intends to obtain an order for the payment of it, it is otherwise. (*R.* v. *Edwards*, 6 *C. & P.* 513.) 1. *To rob, &c.*

[Commencement as usual, as *ante*, 9,] *that the said C. D. on the day of , A. D. at the parish of in the said county, in and upon* [*the said*] *A. B. feloniously did make an assault, with intent then and there the monies and chattels of the said A. B. from the person and against the will of the said A. B. feloniously and violently to steal, take, and carry away; against the form of the statute in such case made and provided. And you the said keeper, &c.* [conclude as usual, as *ante*, 9, to the end.] (1.) Commitment for an assault with intent to rob.

—— *to wit. THE jurors for our Lady the Queen upon their oath present, that C. D. late of the parish of in the county of labourer, on the day of in the year of the reign of our Lady the now Queen Victoria, at the parish aforesaid, in the county aforesaid, with force and arms, in and upon one A. B. in the peace of God and of our said Lady the Queen, then and there being, feloniously did make an assault, with intent the monies, goods and chattels of the said A. B. from the person and against the will of the said A. B. then and there feloniously and violently to steal, take, and carry away; against the form of the statute in that case made and provided, and against the peace of our Lady the Queen her crown and dignity.* (2.) Indictment for a like offence.

[Commence as in the preceding form,] *in the county aforesaid, with menaces* [or *by force*, or *with menaces and force*] *did feloniously demand of A. B. the money* [any property] *of him the said A. B., with intent the said money,* [*chattel*, or *valuable security*] *from the said A. B. then and there feloniously to steal, take, and carry away; against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.* (3.) Indictment for demanding money, &c. with menaces or by force, with intent to steal the same.

[The chattel, money, or valuable security demanded must be stated according to the fact. If the demand were of a specific chattel or valuable security, it may be stated thus: "*a certain chattel, to wit, ,*" or "*a certain valuable security, to wit, .*"]

II. Assaults to commit a Felony; on Peace Officers, Revenue Officers; to raise Wages.

By 9 Geo. IV. c. 31, s. 25, "Where any person shall be charged with and convicted of any of the following offences as misdemeanors; that is to say, of any assault with intent to commit felony; of any assault upon any peace officer or revenue officer, in the due execution of his duty, or upon any person acting in aid of such officer; of any assault upon any person, with intent to resist or prevent the lawful apprehension or detainer of the party so assaulting, or of any other person, for any offence for which he or they may be liable by law to be apprehended or detained; or of any assault committed in pursuance of any conspiracy to raise the rate of wages; in any such case the court may sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years; and may also (if it shall so think fit) fine the offender, and require him to find sureties for keeping the peace." Assaults with intent to commit felony. Assaults on peace or revenue officers. Assaults in pursuance of a conspiracy to raise wages.

By the Metropolitan Police Act, 2 & 3 Vict. c. 47, s. 18, persons assaulting or resisting officers in the execution of their duty, or aiding or inciting therein, are subject to a penalty of not more than 5*l.*; or, in the discretion of the magistrate before whom he shall be convicted, may be imprisoned for any time not more than one calendar month. (See "*Police*," Vol. V.) Assaulting police.

By the 1 & 2 Will. IV. c. 41, s. 11, persons convicted before two justices of assaulting or resisting special constables are subject to a penalty of £20, in Assaulting special constables.

2. *To commit felony. On constables, &c.*

addition to the usual punishment for assaulting constables. (See further title, "*Constable*," *post*.)

Assault to commit rape.

When the offence of rape was not completed, or there was no prospect of substantiating it by evidence, the defendant should be indicted for an assault with intent to commit a rape, and defendant may be punished, as directed by the above act, with hard labour, &c. But care must be taken not to indict for the misdemeanor when the evidence will prove the felony; for if this should appear on the trial, the defendant must be acquitted. (*R.* v. *Harmwood*, 1 *East's P. C.* 411, 440; see *post*, "*Rape*," Vol. V.) Under a count for an assault with intent to commit a rape, defendant may be convicted of an assault with an intent to abuse simply. (*R.* v. *Dawson*, 3 *Stark.* 62.) If a master take indecent liberties with a female scholar without her consent, though she does not resist, he is liable to be punished as for an assault with intent to commit a rape. (*R.* v. *Nichol*, *R. & R. C. C.* 130; and see further, *ante*, 281.) To prove the intent evidence of previous attempts to commit the same offence is not admissible. (*R* v. *Lloyd*, 7 *C. & P.* 318.) A boy under the age of fourteen cannot be convicted of the offence. (*R.* v. *Eldershaw*, 3 *C. & P.* 396.) And evidence is not admissible to show that in point of fact he could commit the offence. (*R.* v. *Phillips*, 8 *C. & P.* 736.) As to the rules of evidence on examining the prosecutrix, see *post*, "*Evidence*," Vol. II.; "*Rape*," Vol. V.

(1.) Commitment for an assault to commit a felony.

[Commencement as usual, as *ante*, p. 9,] *that the said C. D. on the day of , A. D. , at the parish of , in the county of , unlawfully did assault one A. B. with intent* [here state the felony generally, and if the offence be a felony created by statute, add, *against the form of the statute in such case made and provided.*] *And you the said keeper, &c.* [conclude as usual, as *ante*, p. 9, to the end.]

(2.) The like, to commit a rape.

[Commencement as usual, as *ante*, p. 9,] *that the said C. D. on the day of , A. D. , at the parish of in the county of , did assault one A. B. with intent her the said A. B. violently and against her will then and there feloniously to ravish and carnally to know, and against the form of the statute in such case made and provided. And you the said keeper, &c.* [as usual, as *ante*, p. 9, to the end.]

(3.) The like, to commit sodomy. (*a*)

[Commencement as usual, as *ante*, p. 9,] *that the said C. D. on the day of , A. D. , at the parish of , in the said county, did assault one A. B. with intent that detestable and abominable crime called buggery, with the said A. B. then and there feloniously, wickedly, diabolically and against the order of nature to do and commit. And you the said keeper, &c.* [as usual, as *ante*, p. 9, to the end.]

(4.) The like, carnally to know a girl under ten years. (*b*)

[Commencement as usual, as *ante*, p. 9,] *that the said C. D. on the day of , A. D. , at the parish of , in the said county, did assault one A. B. a girl under the age of ten years, to wit, of the age of nine years, with intent her the said A. B. then and there feloniously and unlawfully carnally to know and abuse; against the form of the statute in such case made and provided. And you the said keeper, &c.* [as usual, as *ante*, p. 9, to the end.]

(5.) The like, for assaulting a peace-officer or revenue officer, in execution of his duty.

[Commencement as usual, as *ante*, p. 9,] *that the said C. D. on the day of , A. D. , at the parish of , in the said county, in and upon one A. B.* [*a constable*, or *an officer of excise, &c.*] *did make an assault, and him the said A. B. did beat, he the said A. B. being then in the execution of his duty as such* [*constable*, or *officer of excise, &c.*] *as aforesaid; against the form of the statute in such case made and provided. And you, the said keeper, &c.* [as usual, as *ante*, p. 9, to the end.]

(*a*) As to the offence of sodomy, see "*Sodomy*," Vol. V.

(*b*) As to the offence of carnally knowing children, see *post*, "*Children*," Vol. I.

2. *To commit felony. On constables, &c.*

[Commencement as usual, as *ante*, p. 9,] *that the said C. D. on the day of , A. D. , at the parish of , in the said county, unlawfully did assault one A. B. with intent then and there to resist and prevent the lawful [apprehension* or *detention] of the said C. D.* [or *of one E. F.*] *for [felony]; against the form of the statute in such case made and provided. And you the said keeper, &c.* [as usual, as *ante*, p. 9, to the end.]

(6.) The like, for assault to resist apprehension.

[Commencement as usual, as *ante*, p. 9,] *that the said C. D. on the day of , A. D. , at the parish of , in the said county, on, &c. at, &c. unlawfully did assault one A. B. in pursuance of a conspiracy between the said A. B. and others to raise the rate of their wages; against the form of the statute in such case made and provided. And you the said keeper, &c.* [as usual, as *ante*, p. 9, to the end.]

(7.) The like, for assault in pursuance of a conspiracy to raise wages. (a)

(8.) Indictment for an assault to commit a felony, as murder. (b)

—— *to wit. THE jurors for our Lady the Queen upon their oath present, that C. D. late of the parish of , in the county of , labourer, on the day of , in the year of the reign of our Lady the now Queen Victoria, with force and arms at the parish aforesaid, in the county aforesaid, in and upon one A. B. in the peace of God and our Lady the Queen then and there being, did make an assault, and him the said A. B. then and there did beat, wound and illtreat, with intent [him the said A. B. then and there feloniously, wilfully, and of his malice aforethought, to kill and murder,] against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.* [Add a count for a common assault, as *ante*, 289, (No. 4.)]

(9.) Indictment for an assault with intent to commit a rape. (c)

—— *to wit. THE jurors for our Lady the Queen upon their oath present, that C. D. late of the parish of , in the county of , labourer, on the day of , in the year of the reign of our Lady the now Queen Victoria, in and upon one A. B. in the peace of God and our Lady the Queen, then and there being, did make an assault, and her the said A. B. then and there did beat, wound and illtreat, with intent her the said A. B. violently and against her will then and there feloniously to ravish and carnally know, to the great damage of the said A. B. and against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.* [Add a count for a common assault, as *ante*, 289, (No. 4.)]

(10.) Indictment for assault carnally to know a child under ten years. (d)

—— *to wit. THE jurors for our Lady the Queen upon their oath present, that C. D. late of, &c. on, &c. with force and arms at, &c. in and upon one A. B. an infant under the age of ten years, to wit, of the age of eight years, in the peace of God and our Lady the Queen then and there being, did make an assault, and her the said A. B. then and there did beat, wound and ill-treat, with intent her the said A. B. then and there feloniously and unlawfully carnally to know and abuse, to the great damage of the said A. B., against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.* [Add a count for a common assault, as *ante*, 289, (No. 4.)]

(11.) Indictment for an assault to commit sodomy.

—— *to wit. THE jurors for our Lady the Queen upon their oath present, that C. D. late of, &c. on, &c. with force and arms at, &c. in and upon one A. B. in the peace of God and our Lady the Queen then and there being, did make an assault; and him the said A. B. then and there did beat, wound and ill-treat, with intent that detestable and abominable crime, (not to be named among Christians,) called buggery, with the said A. B. then and there feloniously, wickedly, diabolically, and against the order of nature, to commit and do, to the great damage of the said A. B.*

(a) As to the offence of conspiracy, see *post*, "*Conspiracy*," Vol. I.

(b) As to the offence of murder, see *post*, "*Homicide*," Vol. III.

(c) As to the offence of rape, see *post*, "*Rape*," Vol. V.

(d) The 9 Geo. IV. c. 31, s. 17, *post*, "*Children*," makes the carnally abusing a girl under *ten* years of age a felony, and a girl between ten and twelve years of age a *misdemeanor* only. An assault, therefore, of the above nature upon a girl between ten and twelve years of age is not an offence under the foregoing 25th section of the act.

2. *To commit Felony. On constables, &c.*

and against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. [Add a count for a common assault, as *ante*, 289, (No. 4.)]

(12.) Indictment for assaulting a constable in the execution of his office.

—— *to wit. THE jurors for our Lady the Queen upon their oath present, that C. D. late of, &c. on, &c. with force and arms, at, &c. in and upon one A. B. (then being a peace officer, to wit, one of the constables of the parish of in the county aforesaid, and in the due execution of his duty as such peace officer then and there being,) did make an assault, and him the said A. B. so being in the due execution of his said duty as aforesaid, then and there did beat, wound, and ill-treat, to the great damage of the said A. B., and against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.* [Add a count for a common assault, as *ante*, 289, (No. 4.)]

(13.) Indictment for assaulting a revenue officer in the execution of his duty.

—— *to wit. THE jurors for our Lady the Queen upon their oath present, that C. D. late of, &c. on, &c. with force and arms, at, &c. in and upon one A. B. then and there being a revenue officer, to wit, a , and then and there being in the due execution of his duty as such revenue officer, did make an assault, and him the said A. B. so being in the execution of his duty as aforesaid, then and there did beat, wound, and ill treat, to the damage of the said A. B. and against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.*

(14.) Indictment for an assault to resist the apprehension of an offender.

—— *to wit. THE jurors for our Lady the Queen upon their oath present, that C. D. late of, &c. on, &c. with force and arms, at, &c. in and upon one A. B. in the peace of God and of our Lady the Queen then and there being, did make an assault, and him the said A. B. did then and there beat, wound, and ill-treat, with intent in so doing to resist and prevent the lawful apprehension and detainer of him the said C. D.* [or *of one E. F.*] *for a certain offence for which he the said C. D.* [or *E. F.*] *was then and there liable to be apprehended and detained by the said A. B., that is to say, for* [here state the offence generally, as you would in a commitment;] *against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.* [Add a count for a common assault.]

(15.) Indictment for an assault in pursuance of a conspiracy to raise wages. (*a*)

—— *to wit. THE jurors for our Lady the Queen upon their oath present, that C. D. late of, &c. labourer, E. F. late of the same place, labourer, and G. H. late of the same place, labourer, on, &c. at, &c. did amongst themselves conspire, combine, confederate, and agree together to raise the rate of wages then usually paid to workmen and labourers, in the art, mystery, and business of cotton spinners, and that the said C. D., E. F., and G. H., in pursuance of the said conspiracy, on the day and year aforesaid, with force and arms, at, &c. aforesaid, in and upon one A. B. in the peace of God and of our Lady the Queen then and there being, then and there did make an assault, and him the said A. B. then and there did beat, wound, and ill-treat, and other wrongs to the said A. B. then and there did, to the great damage of the said A. B., and against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.* [Add a count stating that the defendants assaulted A. B. *in pursuance of a certain conspiracy before then entered into by the said C. D., E. F., and G. H. to raise the rate of wages, of workmen and labourers in the art, mystery, and business of cotton spinners;* also a count for a common assault, as *ante*, 289, (No. 4.)]

III. Assaults, &c. in Endeavour to save Shipwrecked Property, or Escape from Wrecks.

Assaults on officers, &c. saving wreck.

By the 9 Geo. IV. c. 31, s. 24, "If any person shall assault and strike, or wound any magistrate, officer, or other person whatsoever, lawfully authorised, on account of the exercise of his duty in or concerning the preservation of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water, every such offender, being convicted thereof, shall be liable to be transported beyond the seas for the term of seven

years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction for such term as the Court shall award."

3. *In saving Wrecks, &c.*

This act repeals so much of the 26 Geo. II. c. 19, as relates to any person who shall be assaulted, beaten, and wounded in the exercise of his duty in the salvage of any vessel, goods, or effects as therein-mentioned. Under this act, to constitute an offence, it is not necessary that the person must have been assaulted, beaten, *and* wounded, as was requisite under the 26 Geo. II.

Impeding persons endeavouring to escape from wrecks.

By the 7 Will. IV. & 1 Vict. c. 89, s. 7, it is enacted, "That whosoever shall by force prevent or impede any person endeavouring to save his life from any ship or vessel which shall be in distress, wrecked, stranded, or cast on shore, (whether he shall be on board or shall have quitted the same,) shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

The imprisonment under this section may be with or without hard labour, and with or without solitary confinement, not exceeding one month at any one time, nor three months in any one year. (7 Will. IV. & 1 Vict. c. 89, s. 12.) This offence is not triable at quarter sessions. (5 & 6 Vict. c. 38, s. 1.) The accused, if acquitted of the felony, may be found guilty of an assault. (*Ante*, 285.)

(16.) Commitment for assault on magistrates, &c. in saving a wreck.

[Commencement as usual, as *ante*, p. 9,] *that the said C. D. on, &c. at, &c. in the said county, unlawfully did assault one A. B. and him the said A. B. did then and there strike and beat,* [or *wound*,] *on account of the exercise of his the said A. B.'s duty in and concerning the preservation of a certain vessel then and there in distress,* [of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water,] *he the said A. B. being then and there a magistrate,* [or *officer*, or *person*,] *lawfully authorised in that behalf: against the form of the statute in such case made and provided. And you the said keeper, &c.* [as usual, as *ante*, p. 9, to the end.]

(17.) Indictment for a like offence.

—— *to wit. THE jurors for our Lady the Queen upon their oath present, that before and at the time of the committing of the offence hereinafter mentioned, on the day of in the year of the reign of our sovereign Lady Victoria, at the parish of in the county of one J. P. then and there being a magistrate,* [magistrate, officer, or other officer whatsoever lawfully authorised,] *was then and there engaged in the exercise of his duty as such magistrate, in and concerning the preservation of a certain vessel,* [of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water,] *then and there wrecked, stranded, and cast on shore, the said J. P. being then and there lawfully authorised thereunto, and that C. D. late of the parish aforesaid, in the county aforesaid, labourer, then and there well knowing the premises, in and upon the said J. P. then and there unlawfully did make an assault, and him the said J. P. then and there unlawfully did strike and wound on account of the exercise of the said duty of him the said J. P. in and concerning the preservation of the said vessel so wrecked, stranded, and cast on shore as aforesaid; against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.* [Add a count for a common assault, as *ante*, 289, (No. 4.)]

(18.) Indictment for impeding persons escaping from wrecks.

—— *to wit. THE jurors for our Lady the Queen upon their oath present, that before and at the time of committing the felony hereinafter mentioned, on the day of in the year of the reign of our sovereign lady Victoria, at the parish of , in the county of , a certain vessel* [ship or vessel] *was then and there stranded and cast on shore* [in distress, or wrecked, stranded, or cast on shore] *and that A. B. late of the parish aforesaid, in the county aforesaid, labourer, with force and arms, at the parish aforesaid, in the county aforesaid, one C. D. then and there endeavouring to save his life from the said ship so stranded and cast ashore, then and there feloniously and by force did prevent and impede* [prevent or impede], *against the form of the statute in that case made and provided, and against the peace of our Lady the Queen, her crown and dignity.*

IV. Assaults on Seamen, &c. to prevent Working, and Assaults to obstruct Selling, &c. of Grain.

Assault on seaman to prevent him working.

Assaults to obstruct buying, &c. of grain, &c.

By 9 Geo. IV. c. 31, s. 26, "If any person shall unlawfully, and with force, hinder any seaman, keelman, or caster, from working at or exercising his lawful trade, business, or occupation, or shall beat, wound, or use any other violence to him, with intent to deter or hinder him from working at or exercising the same; or if any person shall beat, wound, or use any other violence to any person, with intent to deter or hinder him from selling or buying any wheat or other grain, flour, meal, or malt, in any market or other place, or shall beat, wound, or use any other violence to any person having the care or charge of any wheat or other grain, flour, meal, or malt, whilst on its way to or from any city, market-town, or other place, with intent to stop the conveyance of the same, every such offender may be convicted thereof before two justices of the peace, and imprisoned and kept to hard labour, in the common gaol or house of correction, for any term not exceeding three calendar months: provided always, that no person who shall be punished for any such offence, by virtue of this provision, shall be punished for the same offence by virtue of any other law whatsoever."

Repeal as to assaults on seaman, &c.

This act repeals so much of the stat. 33 Geo. III. c. 67, "As relates to any seaman, keelman, caster, ship-carpenter, or other person who shall prevent, hinder, or obstruct or assault, beat, wound, or do any bodily violence or hurt to any seaman, keelman, caster, or ship-carpenter as therein particularly mentioned." And this repeal appears to extend to sections 2 and 3 of that statute.

This provision is a substitution for sections 2 and 3 of the stat. 33 Geo. III. c. 67. Under that statute the first offence was punishable with imprisonment for not less than six months nor more than twelve, and it was imperative on the Court to transport the offender for a second or other subsequent offence; and by that statute prosecutions must have been commenced within twelve months, which is not so under the present provisions. (*Car. C. L.* 342.)

Repeal as to assaults to obstruct sale of grain.

This act repeals also so much of the stat. 11 Geo. II. c. 22, "as relates to any person who shall beat, wound, or use any other violence to any person or driver, and so much thereof as makes any second offence felony; and it also repeals so much of the stat. 36 Geo. III. c. 9, "as relates to any person who shall beat, wound, or use any other violence to any person or driver, and so much thereof as makes any second offence felony."

As to assaulting commanders of ships to prevent them fighting, see "*Piracy*," Vol. V.

As to forcing seamen on shore, see "*Seamen*," Vol. V.

(19.) Warrant against a person for preventing the buying, &c. of corn.

County of } *To the constable of in the said county.*

WHEREAS information and complaint have been made unto us, J. P. and K. P. Esquires, two of her Majesty's justices of the peace in and for the said county, upon the oath of A. I. of in the said county, that A. O. of in the said county, [labourer,] did on the day of at in the said county, wilfully and maliciously beat, wound, and use other violence, [or as the case may be,] *to him the said A. I. with intent to hinder him from buying corn in the market of* [or as the case may be,] *contrary to the statute in that case made and provided: These are therefore in her Majesty's name to command you forthwith to apprehend the said A. O. and to bring him before us the said justices to answer the said complaint, and to be further dealt with according to law. Herein fail you not. Given under our hand seals the day of .*

A conviction for this offence may be readily framed from the above form, and the general form of conviction given by the statute, as *ante*, 290.

(20.) Commitment for such offence.

County of } *To the constable of in the said county, and to the keeper of the house of correction at in the said county.*

WHEREAS A. O. of in the said county, [*labourer,*] *hath this day been duly*

convicted before us, J. P. and K. P. Esquires, two of her Majesty's justices of the peace in and for the said county, upon the oath of A. I. of in the said county, [*yeoman,*] *for that he the said A. O. on the day of now last past, at in the said county, did wilfully and maliciously beat, wound, and use other violence to him the said A. I. with intent to hinder him from buying corn,* [or *from exporting corn from, &c.* as the case may be,] *in the market of* [or as the case may be,] *contrary to the statute in that case made and provided: These are therefore to command you, the said constable, to convey the said A. O. to the house of correction at in the said county, and to deliver him to the keeper thereof, together with this precept: And we do also hereby command you the said keeper of the said house of correction to receive the said A. O. into your custody in the said house of correction, and him there safely to keep to hard labour for the space of* [not more than three nor less than one] *months: And we do further order that you, the said keeper, do publicly and openly whip the said A. O. in the said town of in the said county, on the day of next, between the hours of and of the same day.* [This latter clause only to be inserted where the act is done to prevent exportation.] *Herein fail you not. Given under our hands and seals the day of*

4. *On Seamen, &c.*

V. Conviction for an Assault on a Trial for Felony.

Before the 7 Will. IV. & 1 Vict. c. 85, upon the trial of an indictment for felony, the prisoner must either have been convicted of the felony or acquitted. But now, by sect. 11 of that act, "on the trial of any person for any of the offences hereinbefore mentioned, (see them under title "*Malicious Injuries to the Person*," Vol. V.) or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding; and when such verdict shall be found, the Court shall have power to imprison the person so found guilty of an assault for any term not exceeding three years."

On trial for felony defendant may be convicted of an assault.

Punishment for.

By sect. 8, "where any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the Court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the Court in its discretion shall seem meet." (See *Anon.* 2 *Moo. C. C.* 40; 1 *Russ. C. & M. by Greaves*, 778, n. (*m*).)

Imprisonment.

Solitary confinement.

Hard labour.

A party may be convicted of an assault, under the above enactment, upon an indictment for rape; (*Anon.* 2 *Moo. C. C.* 40;) and this although he be under fourteen, and therefore incompetent to commit a rape; (*Reg.* v. *Brimilow*, 2 *Moo. C. C.* 122; 9 *C. & P.* 366, S. C.;) or although it turn out that the prosecutrix consented, supposing the prisoner to be her husband. (*Reg.* v. *Saunders*, 8 *C. & P.* 265; *Reg.* v. *Williams*, 8 *C. & P.* 286; 1 *Russ. C. & M. by Greaves*, 778.)

Decisions on the act.

So a party may be convicted under the above enactment upon an indictment for murder; (*Reg.* v. *Gould*, 9 *C. & P.* 364; *Reg.* v. *Phelps*, 1 *Russ. C. & M. by Greaves*, 779;) or robbery; (*R.* v. *Ellis*, 8 *Car. & P.* 654; *Reg.* v. *Pool*, 9 *C. & P.* 728;) or upon an indictment under the 1 Vict. c. 85, s. 2, for causing a bodily injury dangerous to life; (*Reg.* v. *Cruse*, 8 *C. & P.* 541; 2 *Moo. C. C.* 53;) or for stabbing with intent to maim, &c.; (*Reg.* v. *Nicholls*, 9 *C. & P.* 267; *Reg.* v. *Archer*, 1 *C. & K.* 174;) or upon an indictment for carnally knowing and abusing a child under the age of ten years. (*Reg.* v. *Folkes*, 2 *Moo. C. C.* 460; but see *Reg.* v. *Banks*, 8 *C. & P.* 574; *Reg.* v. *Martin*, 2 *Moo. C. C.* 123; 9 *C. & P.* 213, S. C.)

On an indictment for manslaughter, by beating, it appeared that the de-

5. *Conviction for an Assault on a Trial for Felony.*

ceased had died of a dislocation of the vertebræ, two days after fighting with the prisoner; it was held that if the jury were not satisfied that the death of the deceased was caused by the prisoner, they might find the latter guilty of an assault, under the above enactment, and that with a view to a conviction on it, it was immaterial that the deceased was the challenger in the fight, and that it did not appear which party struck the first blow. (*R.* v. *Lewis*, 1 *Car. & Kir.* 419.)

So he may be convicted, under the above enactment, of an assault, on an indictment for abduction, if the jury are not satisfied that the prisoner took the female away from motives of lucre. (*R.* v. *Barratt*, 9 *C. & P.* 387.)

A party may be convicted of an assault upon an inquisition for manslaughter, alleging the death to be caused by striking, although there be no evidence of the cause of death. (*Reg.* v. *Pool*, 9 *C. & P.* 728.)

But on an indictment for administering poison with intent to murder, where the prisoner did no more than leave the poison in a position for the prosecutor to take, it was considered that he could not be convicted of an assault under the above enactment; (*R.* v. *Draper*, 1 *Car. & Kir.* 176;) and it would seem he could not have been convicted of the assault, though with his own hand he had delivered the poison to the prosecutor. (See *R.* v. *Dilworth*, 2 *Moo. C. C.* 531.)

Upon an indictment for felony the jury cannot convict of an assault, which is a completely separate and distinct assault. (*Reg.* v. *Guttridge*, 9 *Car. & P.* 471.)

It must be an assault involved in, and connected with, the felony charged. (*Reg.* v. *Guttridge*, 9 *C. & P.* 471; and see *R.* v. *St. George*, *id.* 483; *R.* v. *Phelps*, 1 *Russ. C. & M. by Greaves*, 781.)

The jury can only convict where the crime charged includes an assault against *the person*. They cannot, therefore, convict of an assault upon an indictment for an unnatural crime committed upon an animal. (*Reg.* v. *Eaton*, 8 *Car. & P.* 417.)

Though the indictment for the felony be against several defendants, some of them may be convicted of the felony, and another of an assault, under the above enactment. (*R.* v. *Archer*, 1 *Car. & Kir.* 174.)

Assemblies, see "*Riot*," Vol. V.; "*Disorderly Houses*," Vol. II.; "*Petition*," Vol. V.

Assizes.

Assize, what.

ASSISE (*assessio*) anciently signified in general a Court where the judges or assessors heard and determined causes, and more particularly upon writs of assize brought before them by such as were wrongfully put out of their possession, which writs heretofore were very frequent; but now men's possessions are more easily recovered by ejectments and the like; yet still the

Old commission of.

judges in their circuits have a commission of assize directed to themselves and the clerk of assize, to take assizes, and to do right upon such writs. *Assizes.*

To which commission of assize four other commissions are now superadded; to wit, Commissions of.

1. A commission of *general gaol delivery*, directed to the judges and the clerk of assize associate, which gives them power to try every prisoner in the gaol, committed for any offence whatsoever, but none but prisoners in the gaol.(*a*) General gaol delivery.

2. A commission of *oyer and terminer*, directed to the judges and many other gentlemen of the county, by which they are empowered to hear and determine treasons, felonies, and other misdemeanors by whomsoever committed, whether the persons to be tried be in gaol or not in gaol. Oyer and terminer.

In *R.* v. *Carlisle*, 4 *C. & P.* 415, the Court of Queen's Bench refused to grant a habeas corpus to discharge out of custody a person who had been convicted of libel at the commission of *oyer and terminer* at the Old Bailey, on the ground that when the verdict was returned only one commissioner was present instead of two, as required by law. It is questionable, however, whether such a circumstance may not be assigned as error.

3. A commission or writ of *nisi prius*, directed to the judges and clerk of assize, by which civil causes brought to issue in the Courts above are tried in the vacation by a jury of twelve men of the county where the cause of action arises; and on return of the verdict of the jury to the Court above, the judges there give judgment. Nisi prius.

These causes, by the course of the Courts, are usually appointed to be tried at Westminster in some Easter or Michaelmas Term by a jury returned from the county wherein the cause is to be tried, but with this proviso, (*nisi prius*) *unless before* the day prefixed the judges of assize come into the county in question; this they are sure to do in the preceding vacation.

The old commission of assize and the commission of *nisi prius* are constantly accompanied by writs of associatur, in pursuance of the statutes 13 Edw. I. c. 30; 27 Edw. I. c. 4; 12 Edw. II. c. 3, whereby certain persons (usually the clerk of assize and his subordinate officers) are directed to associate themselves with the justices and serjeants, who are required to admit the said persons into their society, in order to take the assizes, &c., that a sufficient supply of commissioners may never be wanting. But to prevent the delay of justice by the absence of any of them, there is also issued as of course a writ of *si non omnes*, directing, if all cannot be present then, that any two of them (a judge or serjeant being one) may proceed to execute the commission. (2 *Hale*, 39; 2 *Hawk.* c. 28; 4 *Bla. Com.* 269; *Deacon, C. D.* 75.) Writs of association and si non omnes.

4. A *commission of the peace* in every county of their circuit. Commission of the peace.

By the precept for the general gaol delivery before mentioned, the sheriff is commanded to attend there in person with his under-sheriff, and to give notice to all justices of the peace, mayors, coroners, escheators, stewards, and also to all chief constables and bailiffs of hundreds and liberties, that they be then and there in their own persons with their rolls, records, indictments, and other remembrances, to do those things which to their offices in that behalf appertain to be done. Who to attend there.

By virtue whereof all justices of the peace, mayors, and others above-mentioned, of that county where the judges have their assizes, are bound to be present; and if they make default without lawful impediment, the judges may set a fine upon them for their neglect. (*Cro. Circ. C.* 3; 4 *Bla. Com.* 270.)

Also by ancient custom, (that is, by the common law of the land,) before Constables' presentments.

(*a*) At Stafford Lent Assizes, 1810, *Wood*, B. ordered eight prisoners against whom no bills had been preferred, and who were committed for trial at the general quarter sessions of the peace to be discharged out of custody; observing, that every prisoner had a right to be tried by the first competent tribunal, and that he was bound by his commission to deliver the gaol. (1 *Burn's J. Chetw. ed.* tit. *Assize.*)

Assizes.

the coming of the judges, the high constables issue their warrants to the petty constables, headboroughs, borsholders, &c. to make presentments of all crimes and offences cognizable at the assizes, to the intent (as it seemeth) that the judges thereby may have a general information and knowledge how the peace hath been kept; which presentments, being delivered to the high constables, are by them delivered into Court, and make up part of the rolls and other remembrances above mentioned. Which said warrants of the high constables perhaps may be best drawn up in the words of the commission of oyer and terminer, which is the largest of all the five commisssions above-mentioned; and see the forms thereof, *post*, "*Constable*," Vol. I. (Some of the presentments of constables heretofore made are abolished by the 7 & 8 Geo. IV. c. 38, which see *post*, that title.)

Jurisdiction of justices at.

The same persons being entrusted with all these commissions of assize, may proceed by one where they have no jurisdiction by another, and may execute them at the same time. (2 *Hale*, 34; 2 *Hawk.* c. 5, s. 21; 4 *Bla. Com.* 270.)

The commissions of assize and *nisi prius* are principally of a civil nature, but the justices have also under them, by virtue of several statutes, a criminal jurisdiction; and where an indictment of treason, felony or misdemeanor is removed out of the county by *certiorari*, the record is sent down by *nisi prius* to be tried; and the judges of *nisi prius* may, upon that record, proceed to trial, judgment and execution, as if they were justices of gaol delivery by virtue of the stat. 14 Hen. VI. c. 1. (2 *Hale*, 39 to 42; 3 *Bla. Com.* 40.)

Upon an indictment found at the sessions and transmitted to the assizes by the justices at session, though they be not returned by *certiorari*, the judges of assize should try them. (*R.* v. *Wetherell*, *Russ. & R. C. C.* 381.)

Judges may act where they reside or were born.

By 49 Geo. III. c. 91, the judges may act in counties in which they reside or were born.

Assizes but one day in law, &c.

The assizes are but one day in law and the entry of every proceeding at them refers to the first day of the assize; and see *R.* v. *Fletcher*, *Russ. & R. C. C.* 58.

Time of holding assizes.

The assizes are held before the Queen's commissioners, among whom are usually two of the judges of the Courts at Westminster, twice in every year, in every county of the kingdom, except the four northern ones, where they are held only once, and London and Middlesex, where they sit no less than eight times, in consequence of the number of offences which arise in the vicinity of the metropolis. The assizes in other counties are commonly held in the respective vacations after Hilary and Trinity Terms; and in the counties attached to the home circuit, it is usual to hold a third assize after Michaelmas Term to try prisoners.

Place of holding assizes.

6 Ric. 2, c. 5.

11 Ric. 2, c. 11.

By the 3 & 4 Will. IV. c. 71, intituled "*An Act for the Appointment of convenient Places for the holding of Assizes in England and Wales*," reciting that "by a statute made in the sixth year of the reign of King Richard the Second it was ordained that the justices assigned to take assizes and deliver the gaols should hold their sessions in the principal and chief towns of every of the counties where the shire courts of the same counties should be holden: and whereas by a statute made in the eleventh year of the same reign, reciting so much of the said statute of the sixth year as is hereinbefore recited, and stating that the said statute was in part prejudicial and grievous to the people of divers counties in England, it was provided that the Chancellor of England for the time being should have power thereof to make and provide remedy, by advice of the justices, from time to time when need should be, notwithstanding the said statute: and whereas the places at which the assizes are now held in various counties of England and Wales are inconvenient to the inhabitants thereof, and it would conduce to the more cheap, speedy and effectual administration of justice to appoint other places instead thereof for the holding of assizes; but doubts may be entertained whether that object can be fully effected by virtue of the statutes hereinbefore referred to:" it is enacted, that "so much of each of the said statutes as is hereinbefore recited shall be and the same is hereby repealed."

Recited statutes in part repealed.

Assizes.

By sect. 2, "His Majesty, by and with the advice of his most honourable Privy Council, shall have power from time to time to order and direct at what place or places in any county in England or Wales the assizes and sessions under the commissions of gaol delivery, and other commissions for the dispatch of civil and criminal business, shall be holden, and to order and direct such assizes and sessions for the dispatch of criminal and civil business to be holden at more than one place in the same county on the same circuit, and to order and direct the assizes and sessions under such commissions for the dispatch of criminal business to be holden for the whole county at one place, and for the dispatch of civil business at one or more place or places in such county, on the same circuit; and further to order and direct any special commissions of oyer and terminer and gaol delivery to be holden at any one or more places in any such county."

His Majesty in Council may direct at what places in any county assizes and sessions of gaol delivery shall be held, and that they may be holden in more than one place in a county on the same circuit.

Sect. 3. "In case his Majesty, by and with the advice of his most honourable Privy Council, shall think fit to order and direct that the assizes or any such special commissions shall be holden at more than one place in any one county, it shall be lawful for his Majesty, by and with the advice aforesaid, to divide any such county for the purposes of this act, and to make rules and regulations touching the venue in all cases, civil and criminal, then pending or thereafter to be pending and to be tried within any division of such county so to be made as aforesaid; and touching the liability and attendance of jurors, whether grand jurors, special jurors, or common jurors, at the assizes and sessions as aforesaid, or at any sessions under any special commissions to be holden within any such division; and touching the use of any house of correction or prison as a common gaol, and the government and keeping thereof; and touching the alterations of any commissions, writs, precepts or other proceedings whatsoever for carrying into effect the purposes of this act; and touching any other matters that may be requisite for carrying into effect the purposes of this act; and all such rules and regulations shall be of the like force and effect as if the same had been made by the authority of parliament, and shall be notified in the London Gazette, or in such other manner as his Majesty, by and with the advice of his most honourable Privy Council, shall think fit to direct."

Power to divide counties for the purpose of holding assizes in different divisions of the same county.

Sect. 4. "His Majesty shall have power from time to time, for the purpose of carrying this act into effect, to order and direct that the Court of Common Pleas at Lancaster shall be holden at any one or more places in the county palatine of Lancaster, as he shall think fit, and to divide the said county palatine for the purpose of the trial of civil causes and the transaction of other civil business in the said Court, and to make the like rules and regulations touching the venue in civil cases to be tried within any division of the said county, and the liability and attendance of jurors, whether special or common, at the Court to be held within any such division, and touching the alterations of commissions, writs, precepts, or other proceedings for carrying into effect the purposes of this act, and touching any other matter that may be requisite for carrying into effect the purposes of this act; and all such rules and regulations shall be of the like force and effect as if the same had been made by the authority of parliament, and shall be notified in the London Gazette, or in such other manner as his Majesty shall think fit."

Power to direct the Court of Common Pleas at Lancaster to be holden at any one or more places in the county, and to divide the county for that purpose.

By 2 & 3 Vict. c. 72, intituled "*An Act for enabling Justices of Assize and Nisi Prius, Oyer and Terminer, and Gaol Delivery, to hold Courts for Counties at large in adjoining Counties of Cities and Towns, and conversely,*" (24th August, 1839,) reciting "That it would facilitate the dispatch of business if her Majesty's justices of assize were authorised to hold the assizes of and for the counties at large in England and Wales, and also of and for any county of a city, county of a town, borough, or other jurisdiction locally situate within or adjacent to such county at large, in any court house or other building, whether in or belonging to such county at large, or in or belonging to such county of a city, county of a town, borough, or other jurisdiction, indiscriminately: it was therefore enacted, that it shall be lawful for her Majesty's justices of assize, or other her Majesty's commissioners by whom any Court

2 & 3 Vict. c. 72.

Justices of assize may hold Courts either in counties at large or in adjoining counties of cities or towns.

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shall be holden by virtue of any of her Majesty's commissions of assize or nisi prius, oyer and terminer, or general gaol delivery, to hold such Court for any county at large in England and Wales, and also for any county of a city, county of a town, borough, or other jurisdiction locally situate within or adjacent to such county at large, in any court house or other building, whether in or belonging to such county at large, or in or belonging to any such county of a city, county of a town, borough, or other jurisdiction, indiscriminately, and also from time to time, as often as they shall see fit, by proclamation in open Court, to adjourn any such Court from the court house or other building wherein they shall then be holding the same to such other court house or building as they may deem convenient, whether in and belonging to such county at large, or within and belonging to such county of a city, county of a town, borough, or other jurisdiction locally situate within or adjacent to the same as aforesaid; and all jurors, prosecutors, witnesses, and other persons who may have been required to appear before the said justices and commissioners in any cause, criminal or civil, shall give attendance before the said justices and commissioners wherever the said Court shall be holden as aforesaid, and there shall do all such things as they ought to have done before and at the Courts holden before such justices and commissioners if this act had not been made, and in default thereof shall be subject to such and the same penalties and forfeitures for such their default; and all evidence given and all things done at any such Court shall be deemed, and in all indictments, pleadings, rules, and entries shall be alleged, to have been given and done respectively within the county at large, or within the county of a city, county of a town, borough, or other jurisdiction (as the case may be) within which such Court would have been holden if this act had not been made: provided always, that nothing herein contained shall authorise the holding of any such Court in any place more than three miles distant from the county, city, town, borough, or other jurisdiction for which such Court is holden."

Proviso.

When Court may direct issue to be tried by jury of adjoining county, &c.

Stat. 38 Geo. III. c. 52, s. 1, reciting that "Whereas there exists in the counties of cities and of towns corporate within this kingdom an exclusive right that all causes and offences which arise within their particular limits should be tried by a jury of persons residing within the limits of the county of such city or town corporate; which ancient privilege, intended for other and good purposes, has in many instances been found by experience not to conduce to the ends of justice; and that it will tend to the more effectual administration of justice in certain cases, if actions, indictments and other proceedings, the causes of which arise within the counties of cities and towns corporate, were tried in the next adjoining counties," enacts, "That from and after the 1st of June, 1798, in every action, whether transitory or local, which shall be prosecuted or depending in any of his Majesty's Courts of Record at Westminster; and in every indictment removed into the King's Bench by *certiorari;* and in every information filed by his Majesty's Attorney or Solicitor-General; or by the leave of the Court of King's Bench; and in all cases where any person or persons shall plead to or traverse any of the facts contained in the return to any writ of *mandamus*, if the *venue* of such action, indictment or information, be laid in the county of any city or town corporate within that part of Great Britain called England, or if such writ of *mandamus* be directed to any person or persons, body politic or corporate, that it shall be lawful for the Court in which such action, &c. and other proceeding shall be depending, at the instance of the prosecutor or plaintiff, or of any defendant, to direct the issue or issues joined in such action, &c. to be tried by a jury of the county next adjoining to the county of such city or town corporate; and to award proper writs of *venire* and *distringas* accordingly, if the said Court shall think it fit so to do."

Sect. 2. Indictments for offences committed within the county of any city or town corporate, may be preferred to the jury of the county next adjoining.

Sect. 3. Indictments found by the grand jury, or inquisitions taken before the coroner of the county of a city or town corporate, may be ordered by the Court to be filed with the proper officer of the next adjoining county, and defendants may be removed to the gaol thereof. (See "*Indictment*," Vol. III.)

Assizes.

By the 2 & 3 Vict. c. 22, intituled "*An Act to enable Justices of Assize on their Circuits to take Inquisition of all Pleas in the Court of Exchequer of Pleas which shall be brought before them without a special Commission for that Purpose,*" and reciting "that by the statute commonly called *The Statute of Westminster the Second,* passed in the thirteenth year of the reign of King Edward the First, the justices of assize on their several circuits are empowered to take inquisitions of all pleas in the Courts of Queen's Bench and Common Pleas: and that it was expedient to extend the said power to pleas in the Court of Exchequer, in order to put an end to the practice which has hitherto obtained of issuing a separate commission from the said Court upon each record brought therefrom before the judges of assize: it was enacted, that from and after the passing of this act it shall be lawful for all justices of assize, and they are hereby authorised and empowered, on their respective circuits, to try causes and take inquisitions of pleas pending in the Court of Exchequer of Pleas which shall be brought before them, and to proceed thereon in like manner as they can or may do in respect of causes and pleas pending in the Courts of Queen's Bench and Common Pleas under and by virtue of the said act, or by any other law, statute, or usage whatsoever; and that it shall not be necessary hereafter to issue any commission from the said Court of Exchequer of Pleas for that purpose."

Stat. West. 2, 13 Edw. I. c. 30.

Justices of assize may try causes, &c. pending in the Exchequer without a special commission.

By 3 Geo. IV. c. 10, intituled "*An Act to enable, in certain cases, the opening and reading of Commissions under which the Judges sit upon the Circuits after the Day appointed for holding Assizes,*" sect. 1, it is enacted, "That whenever it shall so happen that commissions of assize shall not be opened and read in the presence of one of the quorum commissioners at any place specified for holding the assize on the very day appointed for such purpose, it shall and may be lawful to open and read the same in the presence of one of the quorum commissioners therein named on the following day, or if the following day shall be on a Sunday, or any other day of public rest, then on the succeeding day; and such opening and reading thereof shall be as effectual to all intents and purposes as if the same had been opened and read in the presence of one of the quorum commissioners on the very day appointed for that purpose, and shall be deemed and taken to be an opening and reading thereof on the day for that purpose appointed; and all records and other proceedings under or relating to any commission which may be opened and read by virtue of this act, shall and may be drawn up, entered, and made out under the same date, and in the same form in all respects as if such commission had been opened and read on the day originally appointed for that purpose: provided always, that the judges and quorum commissioners are hereby directed and required to have such commissions opened and read on the very days appointed for that purpose, unless the same shall be prevented by the pressure of business elsewhere, or by some unforeseen cause or accident."

Opening the commission.

When not opened, &c. on the day, same may be opened, &c. on following day, &c.

Must be opened on day appointed, if not prevented.

Sect. 2. "In every case in which it shall happen that any such commission shall be opened and read under the provisions of and according to this act, the quorum commissioner before whom the same shall be opened and read shall under his hand and seal certify to the lord chancellor, lord keeper, or lords commissioners of the great seal for the time being, that the said commission was so opened, and the cause of the delay of opening and reading the same, which certificate shall be enrolled in the High Court of Chancery."

Cause of delay to be certified to lord chancellor, &c.

As to the holding the assizes in Chester and Wales, see the 1 Will. IV. c. 70, *post*, "*Wales*," Vol. VI.

Assizes in Chester and Wales.

The 2 Will. IV. c. 47, relates to the holding the assizes in Norfolk and Norwich.

Assizes in Norfolk.

Stat. 19 Geo. III. c. 74, s. 70, made perpetual by 39 Geo. III. c. 46, reciting "That the Courts of assize, nisi prius, oyer and terminer, and gaol delivery, for several counties at large, are often held in or near cities or towns that are counties of themselves, and at the same time with the like Courts for the said cities or towns; and inconveniences frequently arise in transacting the business of the several Courts, for that the lodgings of the judges are

Lodgings of judges.

Assizes.

Judges may act in, though out of proper county.

situate either only in the county at large, or only in the county of such city or town," enacts, "That whenever the said Courts for any county at large in England shall be held in or near any city or town which is also a county of itself, with the like or any of the like Courts for the said city or town, the lodgings of the judges shall be construed and taken to be situate both within the county at large, and also within the county of such city or town, for transacting the business of the assizes for such county at large, and for the county of such city or town during the time that such judge or judges shall continue therein for the execution of their several commissions."

Shire hall, &c.

As to the judges' lodgings and other matters relative to the shire-hall, see the 7 Geo. IV. c. 63, and 2 & 3 Vict. c. 69, *post*, "*Shire-hall*," Vol. V.

Attachment.

THIS word, as a law term, we have immediately from the French *attacher*, to tye, or make fast. The Italian word is *attacare;* the Spanish, *attacar;* and the Saxon *tæcan*, to take.

It signifies the taking of a man's body by commandment of a writ or precept; and is properly grantable in cases of contempts, against which for the most part all courts of record generally, but more especially those of Westminster Hall, and above all, the Court of Queen's Bench, may proceed in a summary manner, according to their discretion. (2 *Hawk.* c. 22, s. 1; 5 *Bla. Com.* 286.)

In the case of *R.* v. *Bartlett*, 2 *Sess. Cas.* 176, it is said that generally the sessions have not a power to award an attachment: but the Court said they would not determine how it would have been, if they had committed the person for contempt; but the ordinary and proper method is by indictment.

As each Court, however, is in general considered to be a proper judge of its own contempts (*Crosby's Case*, 3 *Wils.* 199), the Court of Queen's Bench will not grant an attachment for a contempt to an inferior jurisdiction, but leave it to be punished by that Court against which the contempt has been committed. (*R.* v. *Birchett*, 1 *Stra.* 567; 2 *Hawk.* c. 22, s. 2; *R.* v. *Mile End*, 1 *Ld. Raym.* 676.)

When an order, however, is confirmed by the Court above, an attachment lies for non-performance of it; and therefore the Court will not take security of the party for performance of it. (*Q.* v. *Chaffey*, 2 *Ld. Raym.* 858; 1 *Bott*, 472.)

If a witness neglect to obey a subpœna to attend before the grand jury, on an affidavit that he was material to the prosecutor's case, and was duly served with the subpœna, the Court of Queen's Bench will grant an attachment against him, on which he may be taken and committed till after the trial of the offender, when an order will be made for his discharge. (*R.* v. *Ring*, 8 *T. R.* 585; *R.* v. *Willett*, 6 *T. R.* 295; *R.* v. *Dixon*, 3 *Burr.* 1687; *R.* v. *Donnell*, 1 *Ad. & Ell.* 598. And see further, *post*, "*Costs*," Vol. II. p. 173; "*Evidence*," Vol. II. p. 447.)

Attainder.

THE difference between a man attainted and convicted is, that a man is said to be convicted before he hath judgment, as if a man be convicted by verdict or confession, and when he hath his judgment upon the verdict or confession, then he is said to be attainted. (1 *Inst.* 390 b.)

That is to say, his blood is become (*attinctus*) *tainted*, stained, or corrupted; insomuch that by the common law, in cases of treason or felony, his

children or other kindred cannot inherit his estate, nor his wife claim her dower; and the same cannot be restored or saved but by act of parliament; and therefore, in divers instances, there is a special provision by act of parliament that such or such an attainder shall not work corruption of blood, loss of dower, nor disherison of heirs. (1 *Inst.* 391 b.)

Attainder.

By stat. 54 Geo. III. c. 145, intituled "*An Act to take away corruption of blood save in certain cases*," it is enacted, "That no attainder for felony which shall take place from and after the passing of this act, save and except in the cases of the crime of high treason, or of the crimes of petit-treason or murder, or of abetting, procuring, or counselling the same, shall extend to the disinheriting of any heir, nor to the prejudice of the right or title of any person or persons other than the right or title of the offender or offenders during his, her, or their natural lives only; and that it shall be lawful to every person or persons, to whom the right or interest of any lands, tenements, or hereditaments, after the death of any such offender or offenders, should or might have appertained if no such attainder had been, to enter into the same."

As to attainder in general, see 1 *Ch. C. L.* 723 to 742; as to when it ensues (*Id.* 723); the meaning and effect of (*Id.* 725); its consequences in forfeiture of real property (*Id.* 727; *Doe* d. *Evans* v. *Evans*, 5 *B. & Cres.* 584; 8 *D. & R.* 399, S. C.; *Doe* d. *Griffiths* v. *Pritchard*, 5 *B. & Adol.* 765; 2 *Nev. & M.* 489, S. C.); in forfeiture of personal property (1 *Chit. C. C. & Id.* 730); in forfeiture as altered by statutes (*Id.* 733); to what time the forfeiture relates (*Id.* 735); what to be done with the felon's goods (*Id.* 736); of the loss of dower by (*Id.* 738); corruption of blood by (*Id.* 740; see also *Deacon, Crim. Law Dig.* tit. *Attainder.*)

During the abeyance of a barony descendible to the heirs of the body, one of the co-heirs was attainted for treason. After the passing of an act to restore in blood the sons and daughters of the party attainted, A. claimed through the co-heir who was so attainted, B. through another co-heir: it was held, that it was competent to determine the abeyance in favour of A. or in favour of B. (*Camoy's Peerage*, 5 *Bing.* 754.)

The statute 4 & 5 Will. IV. c. 23, alters the law as to the escheat and forfeiture of real and personal property held in trust, &c.

As to the competency of an attainted witness, see *post*, "*Evidence*," Vol. II.

It may be as well to observe, that a felon attainted and ordered to be transported for a certain term of years, was not (under the 8 Geo. III. c. 15) restored to his civil rights till after the expiration of the term for which he was ordered to be transported. Therefore, as by his attainder all personal property and rights of action accruing to him (either before or after the attainder) were vested in the crown without office found, the attainder of such a person was held to be well pleaded to an action brought by him on a bill of exchange, which had been indorsed by him after his attainder and before the term of his transportation had expired; (*Bullock* v. *Dods*, 2 *B. & A.* 258;) but now, by the 5 Geo. IV. c. 84, s. 26, the 8 Geo. III. c. 15, is repealed; and though a felon may not have served the whole period of the term for which he was transported, yet if he shall receive any remission of part of the term of his transportation, from the governor or lieutenant governor of New South Wales, or any other colony, he may now, whilst lawfully residing in any place, under such sentence or remission, lawfully sue for the recovery of any property acquired by him since his conviction, not only in the colonial courts, but in those of any part of her Majesty's dominions. (See *Deacon's C. L. Dig.* 83.)

As to the plea of *autrefois attaint*, see *post*, "*Autrefois Attaint*."

Attaint, see "*Jurors*," Vol. III.

Attaint of jurors is abolished by 6 Geo. IV. c. 50, s. 60.

Attempts and Solicitations to commit Crimes.

Solicitations.

AT common law it is a misdemeanor to *incite* another to the commission of any indictable offence, though the solicitation does not succeed; (*R.* v. *Higgins*, 2 *East's Rep.* 5; *Schofield's case*, *Cald.* 397; and see *R.* v. *Sutton*, 2 *Stra.* 1074;) as soliciting a servant to steal his master's goods, or the like. (*Id.*; *sed vid. R.* v. *Collingwood*, 6 *Mod.* 289.)

But as the offence of an illegal solicitation rests in tendency only, a greater degree of particularity is requisite in the indictment, in stating the manner and means of the solicitation, for by these alone can the defendant's criminality be tried. (1 *Stark. C. L.* 133.)

It is a misdemeanor to solicit a member of the privy council to accept a bribe for the disposal of an office; (*R.* v. *Vaughan*, 4 *Burr. R.* 2494; and see *R.* v. *Pollman*, 2 *Camp.* 229; *R.* v. *Plympton*, 2 *Ld. Raym.* 1377;) or to offer a bribe to a juryman; (*Young's case*, 2 *East*, 14, 16;) or a voter at an election of members of parliament; (4 Burr. 2500; and see *post*, "*Bribery*," Vol. II.)

Attempts.

It also seems that an *attempt* to commit a felony is a misdemeanor, and every attempt (not every intention) to commit a misdemeanor is a misdemeanor; (*R.* v. *Higgins*, 2 *East*, 8; *Reg.* v. *Martin*, 9 *C. & P.* 215; S. P. *Reg.* v. *Martin*, 9 *C. & P.* 213;) and an attempt to commit a statuteable misdemeanor is as much a misdemeanor as an attempt to commit a common law misdemeanor. (*Schofield's case*, *Russ. & R. C. C.* 107, n.; and see *R.* v. *Butler*, 6 *C. & P.* 368; *R.* v. *Roderick*, 7 *C. & P.* 795.)

An attempt to provoke another to send a challenge is a misfeasant. (*R.* v. *Phillips*, 6 *East*, 464.)

So is an attempt to *suborn* a person to commit *perjury* a misdemeanor. (*Anon. Cald.* 400; *R.* v. *Higgins*, 2 *East*, 14.)

So are all attempts tending to the prejudice of the community indictable. (*Per Lawrence*, J., *R.* v. *Higgins*, 2 *East*, 8.)

On a prosecution for a misdemeanor in inciting another to commit felony, it is not necessary for the prosecutor to show negatively that the felony was not completed, in order to sustain the charge for misdemeanor only; but he may leave it for the defendant to show, if he think fit, that the misdemeanor was merged in the greater offence; and in the absence of such proof, he may be convicted of the solicitation. (See *per Lord Mansfield*, *Cald.* 400; *R.* v. *Higgins*, 2 *East*, 8.)

Many attempts to commit offences are by statutes made felonies; as attempts to murder or do bodily harm by poisoning, stabbing, shooting, drowning, sending explosive substances, &c. See the title "*Malicious Injuries to Persons*," Vol. V.; and as to assaults with intent to commit a felony, see *ante*.

Punishment.

The punishment is by fine or imprisonment, or both.

By the 3 Geo. IV. c. 114, the Court may sentence a person having attempted to commit felony, to "imprisonment with hard labour, for any term not exceeding the term for which such Court may now imprison for such offences, either in addition to or in lieu of any other punishment which may be inflicted on any such offenders by any law in force before this act."

Costs of prosecution.

The expenses of a prosecution for an attempt to commit a felony are allowed by 7 Geo. IV. c. 64, s. 23, *post*, "*Costs*," Vol. II.

(1.) Indictment for soliciting a servant to embezzle his master's goods.

—— *to wit. THE jurors for our Lady the Queen upon their oath present, that C. D. late of the parish of, in the county of , labourer, on the day of , in the year of the reign of our Lady the now Queen Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, did wickedly and unlawfully solicit and incite one A. B. [a domestic servant of one E. F.] feloniously to take, steal, and carry away divers, to wit, [six silver spoons] of the value of [fourteen shillings,] of the goods and chattels of [his master] the said E. F. and to deliver to him the said C. D. the said [spoons,] against the peace of our Lady the Queen, her crown and dignity.*

(2.) Indictment for soliciting a person to commit perjury by swearing a child to an innocent person.

—— *THE jurors for our Lady the Queen upon their oath present that A. B. late of the parish of , in the county of , labourer, did on , at , unlawfully and wickedly solicit, instigate, persuade, and procure one E. F. to go before J. P. one of the justices of our Lady the Queen assigned to keep the peace of our said Lady the Queen in and for the said county; and that she the said E. F., in consequence of such solicitation, instigation, persuasion, and procurement, did go in her own proper person before the said J. P. and then and there did, &c.* [state the filiation], *whereas in truth and in fact he the said A. B. at the time when he so endeavoured to persuade, solicit, and instigate the said E. F. to make oath and swear as aforesaid, then and there well knew that the said C. D. would be put to great charges and expenses of his monies if she the said E. F. would swear as aforesaid, and whereas in truth and in fact he the said A. B. at the time when he so endeavoured to persuade, solicit, and instigate the said E. F. to make oath and swear as aforesaid, had no reasonable or probable cause whatsoever to suspect or imagine that the said C. D. was the father of such child, but on the contrary thereof the said A. B. was then and there informed by the said E. F. that he the said A. B. was the father of such child of which she the said E. F. was so pregnant as aforesaid; and whereas in truth and in fact she the said E. F. never told or informed him the said A. B. that the said C. D. was the father of such child, and whereas in truth and in fact he the said A. B. so wickedly and unlawfully endeavoured to persuade, solicit, and instigate the said E. F. to swear as aforesaid, in order that the said A.B. might be exonerated, freed, and discharged from divers expenses which might accrue to him as being the father of such child, after the same should be born of the body of her the said E. F., against the peace of our Lady the Queen, her crown and dignity.*

Attorney.

Attorney, who.

AN *Attorney* is one who is appointed to do any thing in the *turn*, stead, or place of another. (1 *Inst.* 51.)

Unqualified persons must not act, except for board of guardians.

By the 6 & 7 Vict. c. 73, s. 2, no person shall act as an attorney in any civil or criminal matter before justices of assize, of oyer and terminer, or gaol delivery, or at any general or quarter sessions of the peace, or before any justices of the peace, or before any commissioners of the revenue, unless admitted and enrolled, and qualified to act according to that act. But by the 7 & 8 Vict. c. 101, s. 68, clerks and officers may conduct proceedings before justices at petty sessions on behalf of a board of guardians, although not attornies or certificated.

Cannot be justices, except in some places.

By the 6 & 7 Vict. c. 73, s. 33, "No attorney or solicitor shall be capable to continue or be a justice of the peace for any county within that part of Great Britain called England, or the principality of Wales, during such time as he shall continue in the business and practice of an attorney or solicitor."

But by sect. 34 it is provided, "That the prohibition last hereinbefore contained shall not extend, or be construed to extend, to any city or town being a county of itself, or to any city, town, cinque port, or liberty having justices of the peace within their respective limits and precincts by charter, commission, or otherwise, but that in every such city, town, liberty, and place, attornies or solicitors may be capable of being justices of the peace, and in such manner only as they might have been if this act had never been made, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding."

Cannot be a commissioner of land-tax, &c.

An attorney cannot be a master, or (in general) clerk, or messenger to a master, of the superior courts (7 Will. IV. & 1 Vict. c. 30, s. 15); nor can he be a commissioner of the land-tax, unless he possesses 100*l.* per annum. (30 Geo. II. c. 3, s. 87, &c.)

May be under-sheriff, &c.

It may be as well to add, that the statutes of 1 Hen. V. c. 4, and 22 Geo. II. c. 46, are repealed, which provided that no attorney whilst under-sheriff, or holding various minor offices, should practise in the Queen's courts or at quarter sessions.

Exempt from serving certain offices.

Attornies are exempted from serving all offices where personal service is required, even although imposed by act of parliament, and in the most comprehensive terms (*Gerard's case*, 2 *W. Bl.* 1126); such as the offices of constable (*R.* v. *Routledge*, 2 *Doug.* 538; *Gerard's case*, 2 *W. Bl.* 1126; 5 & 6 Vict. c. 109, s. 6); overseers of the poor (*Gerard's case*, 2 *W. Bl.* 1126; *Ex parte Jefferies*, 6 *Bing.* 195); or tythingman, offices under the commissioners of sewers, collectors of subsidies, watch and ward, &c. (*Gerard's case*, 2 *W. Bl.* 1126); and corporation offices, such as sheriffs, &c., even although

Attorney.

Right to attend at sessions and before justices, &c.

Privileged communications.

the attorney be resident in the corporation town. (*Mayor of Norwich* v. *Berry*, 1 *W. Bl.* 636; 4 *Burr.* 2109, S. C.) But they are not privileged from being balloted for the militia, for they can pay for substitutes. (*Gerard's case*, 2 *W. Bl.* 1126; *see Evindon's case*, 2 *Str.* 1143, *contra.*)

As to his right to attend at sessions or before magistrates, see *post*, "*Conviction*," "*Sessions*," Vol. V. p. 951, 952." As to his privilege in not answering questions, see *post*, "*Evidence*," Vol. II. p. 454. As to embezzlement by, see "*Larceny*," Vol. III.

Auction, see *post*, "*Excise*," Vol. II.

Autrefois acquit.

What.

THIS is a plea by a person indicted of a treason or felony, that he was heretofore acquitted of the same treason or felony; for one shall not be brought into danger of his life for the same offence more than once. (3 *Inst.* 213.)

When pleadable.

When pleadable.]—If the prisoner *could* have been legally convicted on the first indictment, upon any evidence that *might* have been adduced, his acquittal on that indictment may be successfully pleaded to a second indictment; and it is immaterial whether the proper evidence was adduced at the trial of the first indictment or not. (*R.* v. *Sheen*, 2 *C. & P.* 634: *R.* v. *Clarke*, 1 *Brod. & B.* 473; *R.* v. *Embden*, 9 *East*, 437.)

Thus an acquittal upon an indictment for burglary and larceny may be pleaded to an indictment for larceny of the same goods; because, upon the former indictment, the defendant might have been convicted of the larceny. But if the first indictment were for a burglary, with intent to commit a larceny, and did not charge an actual larceny, an acquittal on it would not be a bar to a subsequent indictment for the larceny; (see 2 *Hale*, 245;) because the defendant could not have been convicted of the larceny on the first indictment.

So an acquittal upon an indictment for murder may be pleaded in bar of another indictment for manslaughter; (*Fost.* 329; 2 *Hale*, 246;) because the defendant might be convicted of the manslaughter on the first indictment.

And if a party charged with the crime of murder committed in the perpetration of a burglary, be generally acquitted on that indictment, he cannot afterwards be convicted of the burglary with violence, under the 7 Will. IV. & 1 Vict. c. 86, s. 2, as the general acquittal on the charge of murder would be an answer to that part of the indictment containing the allegation of violence. (*Reg.* v. *Gould*, 9 *Car. & P.* 364.)

So an acquittal upon an indictment for manslaughter is, it seems, a bar to an indictment for murder. (*Fost.* 329.)

If the charge be in truth the same, though the indictments differ in immaterial circumstances, the defendant may plead his previous acquittal with proper averments; for it would be absurd to suppose that by varying the day, parish, or any other allegation, the precise accuracy of which is not material, the prosecutor could change the right of the defendant, and subject him to a second trial. (*Keilw.* 58; 1 *Leach*, 448; *R.* v. *Embden*, 9 *East*, 437.) Thus, as to the point of time, if he be indicted for a murder as committed on a certain day and acquitted, and afterwards be charged with killing the same person on a different day, he may plead the former acquittal in bar notwithstanding this difference, for the day is not material; and this is a fact which could not be twice committed. (2 *Hale*, 179, 244; 2 *Hawk.* c. 35.) And the same rule applies to accusations of other felonies, for though it is possible for several acts of the same kind to be committed at different times by the same person, it lies in *averment*, and the party indicted may show that the same charge is intended. (2 *Hale*, 179, 244; 2 *Hawk.* c. 35.)

Four persons were tried for a rape, upon an indictment containing counts charging each as principal and the others as aiders and abettors. They were acquitted; and it being proposed on the following day to try three of them for another rape upon the same person (the second indictment being exactly

When pleadable.

the same as the first, with the omission only of the fourth prisoner), they pleaded *autrefois acquit* to the second indictment, averring the identity of the offences, and to this plea there was a replication that the offences were different. The prisoners' counsel put in the commitment and the former indictment, and also the minutes of the former acquittal written on the indictment. On this evidence the jury found that the offences were the same; and it being referred for the opinion of the judges, whether there was any evidence to justify and support the verdict, and if not, whether such verdict was final, and operated as a bar to any further proceedings by the Crown—upon the second indictment their lordships held that the verdict of the jury was final, and the prisoners were discharged. (*R.* v. *Parry*, 7 *Car. & P.* 836.)

All variations not inconsistent with the validity of both proceedings, such as differences in the day, the vill, or the quantity, may be shown to be merely technical. But if the variances are in those things which are material, *autrefois acquit* must not be pleaded; for either the first indictment was ineffectual, and, therefore, the acquital is of no avail, or the second will prove not applicable to the evidence, and therefore the objection is needless. (2 *Hale*, 245.)

An acquittal upon an indictment for a felony is no bar to an indictment for a misdemeanor, and *e converso*. (2 *Hawk.* c. 35, s. 5.) And an acquittal of an offence charged as a larceny cannot be pleaded in bar to an indictment for the same offence charged as a false pretence. (*Reg.* v. *Henderson*, 1 *Car. & M.* 328.) Nor is an acquittal as accessary a bar to an indictment as principal, and *e converso*. (2 *Hale*, 244; *Fost.* 361; 2 *Hawk.* c. 35, s. 11; *Rex* v. *Plant*, 7 *C. & P.* 575.)

So an acquittal upon an insufficient indictment is no bar to another indictment for the same offence. (4 *Co.* 45 a.) Where the defendant was formerly indicted for forging a will, which was set out in the indictment thus: "*I John Styles*," &c. and was acquitted for variance, the will given in evidence commencing "*John Styles*," without the "*I*:" it was holden that he could not plead this acquittal in bar of another indictment, reciting the will correctly, "*John Styles*," &c. (*R.* v. *Cogan*, 2 *Leach*, 503.) Where the first count of an indictment charged the prisoners with having in their possession a mould intended to impress the stamp of the reverse side of a shilling; the second stated, that the mould was intended to impress the obverse side; the third stated, that it was intended to impress *part or parts* of the reverse side; and the fourth stated the same as to the obverse side. A general verdict of guilty having been recorded, a motion was made in arrest of judgment, on the ground that the two last counts were bad for uncertainty, whereupon the judge directed another indictment to be preferred. The second indictment contained the two first counts of the previous one, a third and fourth stated, that the mould was intended to impress parts of the obverse and parts of the reverse sides; a fifth and sixth used the word "part" instead of parts. The prisoner pleaded *autrefois convict*. The twelve judges decided that the plea was bad, and confirmed the second conviction. (*R.* v. *Phillips*, 1 *Jurist*, 427.) And see a case where there was a misstatement of the king's reign. (*R.* v. *Taylor*, *post*.)

An insolvent debtor, acquitted on a former indictment for omitting goods from his schedule, may be again indicted for omitting other goods not specified in the former indictment, but such a course ought not to be taken except under very peculiar circumstances. (*R.* v. *Champneys*, 2 *M. & Rob.* 26.)

As to the sufficiency of the discharge, which may be thus pleaded, it must be a legal acquittal by judgment upon trial, by verdict of a petty jury. (2 *Hale*, 243, 6; 2 *Hawk.* c. 35, s. 6.)

And therefore, if a man be committed for a crime, and no bill be preferred against him, or if it be thrown out by the grand jury, so that he is discharged by proclamation, he is still liable to be indicted. (*Id.*)

So if the facts be found specially by the coroner's inquest or grand jury, and he be thereupon discharged, he cannot plead it in bar to any subsequent prosecution; but if the special verdict be found by the petit jury, and judgment be given by the Court "that he go thereof without day," this will amount to a sufficient acquittal. (*Id.*)

Form, &c. of Plea.

Although it was formerly thought that no acquittal in any other Court could be effectually pleaded in bar to a prosecution in the Court of Queen's Bench, it is now settled that a legal acquittal in any Court whatsoever, having competent jurisdiction to try the charge, will be sufficient to preclude any subsequent proceedings before every other tribunal. (1 *Leach*, 135, n. a.)

Even an erroneous acquittal is conclusive until the judgment be reversed, so that if a judge direct a jury to acquit the prisoner on any ground, however fallacious, he is entitled to the benefit of the verdict. (2 *Inst.* 318; 2 *Hale*, 247.)

If a judgment in favour of a prisoner be reversed, he may be arraigned and tried *de novo*. (2 *Hale*, 247.)

A mere error in the former process, however, will not render that prosecution nugatory, because the reason which relates to errors in the indictment will not apply, and the defendant might legally have been convicted. (*Id.* 248.)

And it may be here observed, that a party found guilty by a jury at a sessions irregularly holden, is entitled to have the record of the proceedings regularly made up according to the fact, and the Court of Queen's Bench will grant a mandamus to the justices to make up such record; (*R.* v. *The Justices of Middlesex, in re Bowman*, 3 *Nev. & M.* 110; S. C. 5 *B. & Adolph.* 1113;) and the Court will postpone the trial of the prisoner to enable him to apply for such mandamus. (*R.* v. *Bowman*, 6 *C. & P.* 101.) The prisoner would, it is conceived, have the same right on a plea of *autrefois acquit*.

Form and requisites of plea.

Form of Plea.]—This plea is of a mixed nature, and consists partly of matter of record, and partly of matter of fact. (2 *Hale*, 241, 255; 2 *Hawk.* c. 35.)

It is requisite to set forth in the plea the record of the former acquittal, or it would be bad on demurrer; (*R.* v. *Wildey*, 1 *M. & Sel.* 188; 2 *Hale*, 241.) But it is not necessary to produce the record immediately, because it is pleaded in bar, and he who pleads it hath neither the custody nor property in the record. (2 *Hawk.* c. 37, s. 65.)

If, in a plea of *autrefois acquit*, the prisoner were to insist on two distinct records of acquittal, his plea would be bad for duplicity; but *semble*, that if he insisted on the wrong, the Court would, in a capital case, take care that he did not suffer by it. (*R.* v. *Sheen*, 2 *C. & P.* 634; and see *R.* v. *Chamberlain*, 6 *C. & P.* 98, *post*, 317.) The two records in that case were the record of acquittal of murder upon the former indictment and the record of acquittal on the coroner's inquisition.

After the statement of the record of acquittal, the matter of fact of the plea must be stated, viz. that the charges and persons are the same which were included in the former prosecution. (1 *Hale*, 255, 392.) Where the variance between the indictments is not material, the identity may be maintained by averments; and the same observation applies to an immaterial difference in the addition of the party indicted. (*Keilw.* 58; *ante*, 312.)

An indictment charged that the defendant on such a day in the second year of the reign of the *present King* kept a gaming house. Plea, that on such a day in the fourth year of the reign of the present King, the defendant was arraigned upon an indictment, which charged that the defendant, on the 18th January, in the fifty-seventh year of the reign of the *late King*, and on divers other days and times between that day and the day of taking that inquisition, kept a gaming-house, &c. The plea then averred the identity of the offence stated in the two indictments, and the acquittal of the defendant. Upon demurrer to this plea, concluding with a prayer of judgment of *respondeas ouster*, it was held that the plea was bad, because the indictment upon which the acquittal was alleged to have taken place, on the face of it, charged an offence committed in the reign of the *late King*; and it was not competent to the defendant to show, by averment, that it was for the same offence as that charged in the indictment before the Court, for that would, in effect, be to contradict the record. It was also held, that the crown was entitled to final judgment, notwithstanding the form in which the demurrer concluded. (*R.* v. *Taylor*, 3 *B. & C.* 502; 5 *D. & R.* 422, S. C.)

The plea concludes with a verification and prayer that the defendant may be dismissed the Court without further day. (2 *Hale*, 392; 2 *Leach*, 715.)

Replication. Evidence.

The plea ought properly to be on parchment, signed by counsel: the Court, however, will not reject the plea because it is informal, but will assign counsel to prepare it in a proper form for the defendant. (*R.* v. *Chamberlain*, 6 *C. & P.* 93.)

Should be on parchment, &c.

In *Vandercomb and Abbott's case*, 2 *Leach*, 712, the Court considered that it was absolutely necessary for the prisoner to plead over to the felony at the same time that he pleads his plea of *autrefois acquit*. But in *R.* v. *Sheen*, 2 *C. & P.* 634, the prisoner merely pleaded his plea of *autrefois acquit*, without pleading over to the felony: and it is laid down in 2 *Curw. Hawk.* c. 23, s. 128, that a prisoner may still plead "not guilty" *after* his special plea is found against him: and in the case of *R.* v. *Welch*, *Car. C. L.* 56, O. B. 1828, the prisoner pleaded *autrefois acquit* to a charge of felony, without also pleading over to the felony: judgment was given against him on this plea; and he after that pleaded "not guilty," and was tried and convicted.

Pleading over to the felony.

Replication.]—The replication may, if the fact of acquittal be disputed, either take issue upon the averments of identity, or aver *nul tiel record*. (2 *Hale*, 255.)

Replication.

In *Vandercomb and Abbott*, 2 *Leach*, 715, (n.), the counsel for the crown wished to reply *ore tenus* to the plea of *autrefois acquit*; "but the prisoner's counsel insisted that the replication must be on parchment, for that only the attorney-general could make such a replication *ore tenus*; and the Court said that it must be on parchment, for otherwise the parties would not have equal justice, as, by its being pleaded *ore tenus*, the prisoners would be deprived of the opportunity of taking advantage of any defect there might happen to be in the form of the replication. However, in the case of *R.* v. *Sheen*, 2 *C. & P.* 635, the counsel for the prosecution replied *ore tenus*, although the plea was on parchment; but he repeated the words of the replication (from notes) so slowly, that they were written down by the learned judge. (*Car. C. L.* 56.)

The replication concludes to the country, and no day is given to bring in the record, as in civil actions: because in criminal cases there can be no trial by the record, it must be by jury only. (*Jervis's Arch. C. L.* 9 ed. 91.)

Evidence.]—To prove the issue of *nul tiel record*, the prisoner must produce the record properly drawn up. (See *R.* v. *Bowman*, 6 *C. & P.* 101; *post*, 317; and *post*, "*Evidence*," Vol. II.) But it seems that during the sitting under the same commission, the original indictment and minutes of the verdict upon it are receivable in evidence in support of a plea of *autrefois acquit*, without a record being drawn up. (*R.* v. *Parry*, 7 *C. & P.* 836.) In order to his pleading *autrefois acquit* in a case of felony, the prisoner has not a right to a copy of the second indictment, but he has a right to have the indictment read slowly. (*Id.*)

Evidence.

In order to enable the defendant to produce the record, if the indictment be before justices or at the assizes, he may remove the tenor of the record into Chancery, and have it sent to the Court where it is to be tried by *mittimus sub pede sigilli*. (2 *Hale*, 242, 255.) Or if he be arraigned in the Queen's Bench, and the former trial were before justices of the peace or of oyer and terminer, the Court will give him a writ of *certiorari* to remove the proceedings, and respite the plea until he has, by the return, been enabled to frame it. (*Id.*)

Production of record how effected.

Addressing Jury.]—If in the replication, the prosecutor take issue on a fact averred in a plea of *autrefois acquit*, the counsel on both sides address the jury. (*R.* v. *Sheen*, 2 *C. & P.* 635.) And the counsel for the accused has the right to begin. (*R.* v. *Parry*, 7 *C. & P.* 836.)

Addressing jury.

Judgment.]—In case of *felony*, if the plea be held bad, the judgment is

Judgment.

Judgment, &c.

respondeat ouster; or rather, as the defendant generally pleads over to the felony, the jury are charged again, and that at the same time with the issue on the plea of *autrefois acquit*, to inquire of the second issue, and the trial proceeds as if no plea in bar had been pleaded. (1 *Leach*, 134.)

In case of *misdemeanors*, as the defendant cannot also plead over, the judgment upon a plea of *autrefois acquit*, which is in bar, whether it be on demurrer to the same, or on issue joined, is final, and sentence will be pronounced against the defendant. (2 *Ld Raym.* 922; *R.* v. *Taylor*, 3 *B. & Cres.* 502; 5 *D. & R.* 422, S. C.; *ante*, 314.)

When, on the other hand, the plea is allowed, the judgment is, that "he shall go without day," and he is altogether discharged from the prosecution. (2 *Hale*, 391.)

A verdict for the prisoner cannot be set aside and a new trial had, although without evidence and against the opinion of the judge. (*R.* v. *Lea*, 2 *Mood. C. C.* 9.)

(1.) Plea of autrefois acquit.

And the said C. D., in his own proper person, cometh into Court here, and having heard the said indictment read, saith, that our said Lady the Queen ought not further to prosecute the said indictment against the said C. D.; because he saith that heretofore, to wit, [*at the general quarter sessions of the peace, holden at* so continuing the caption of the former indictment,] *it was presented that the said C. D.* (*then and there, and thereby described as C. D, late of , in the county aforesaid, labourer,*) *on the day of*, &c., [continuing the indictment to the end; reciting it however in the past, and not in the present tense. Recite also the remainder of the record to the end of the judgment, in the past tense, in like manner. Then proceed thus]: *as by the record thereof more fully and at large appears; which said judgment still remains in full force and effect, and not in the least reversed or made void. And the said C. D. in fact saith, that he the said C. D., and the said C. D. so indicted and acquitted as last aforesaid, are one and the same person, and not other and different persons; and that the* [*felony and larceny*] *of which the said C. D. was so indicted and acquitted as aforesaid, and the* [*felony and larceny*] *of which he is now indicted, are one and the same* [*felony and larceny*], *and not other and different felonies and larcenies.*] *And this he the said C. D. is ready to verify: wherefore he prays judgment, and that by the Court he may be dismissed and discharged from the said premises in the present indictment specified.*

(2.) Plea over to the felony.

[Continue the preceding *autrefois acquit* plea thus]: *And as to the felony and larceny of which the said C. D. now stands indicted, he the said C. D. saith that he is not guilty thereof; and of this the said C. D. puts himself upon the country, &c.*

(3.) Replication of nul tiel record.

AND hereupon A. B. [the clerk of the peace or clerk of arraigns], *who prosecutes for our said Lady the Queen in this behalf, says, that by reason of any thing in the said plea of the said C. D. above pleaded in bar alleged, our said Lady the Queen ought not to be precluded from prosecuting the said indictment against the said C. D.; because he says that there is not any record of the said supposed acquittal; in manner and form as the said C. D. hath above in his said plea alleged, and this he the said A. B. prays may be inquired of by the country, &c. And the said C. D. doth the like. Therefore let a jury come, &c.*

Autrefois attaint.

Plea of abatement.

THE 7 & 8 Geo. IV. c. 28, s. 4, enacts—"That no plea setting forth any attainder shall be pleaded in bar of any indictment, unless the attainder be for the same offence as that charged in the indictment." By this enactment the plea of *autrefois attaint* appears unavailable. (See 4 *Bla. Com.* 337, n.)

As to attainder, see *ante*, "*Attainder*."

Autrefois convict.

A MAN *convicted* of a felony may plead such conviction in bar of any subsequent indictment for the felony of which he was convicted. (2 *Hale, P. C.* 251; *Vaux's case*, 4 *Co.* 45; 2 *Hawk.* c. 36, s. 10, 14.) Autrefois convict.

This plea, like that of *autrefois acquit*, must set out the record of conviction to the allowance of judgment, inclusive, and must contain an averment either that the offences charged in the former indictment and in the present one are one and the same offence, and not other and different, or that the felony charged in the present indictment was (if at all) committed previously to the former conviction. (See *ante*, 314; and further, 1 *Chit. C. L.* 461, 462.)

The Court will not reject a plea of *autrefois convict* on account of the informal manner in which it is handed in by the prisoner, but will assign counsel to put it into a formal shape and postpone the trial to give time for its preparation. (*R.* v. *Chamberlain*, 6 *Car. & P.* 93.)

A plea of *autrefois convict* can only be proved by the record, and the indictment with the finding of the jury, &c. indorsed by the proper officer, is not sufficient, although it appear that no record has been made up: but the Court before whom the prisoner is brought to be tried the second time, will postpone the trial, at the request of the prisoner, on affidavit of the fact, to give time for an application for a mandamus to compel the making up of the record. (*R* v. *Bowman*, 6 *Car. & P.* 101.)

A party found guilty by a jury at a session irregularly holden, is entitled to have the record of the proceedings correctly made up according to the fact, and the Court of Queen's Bench will grant a mandamus to the justices to make up such record. (*R.* v. *The Justices of Middlesex, in re Bowman*, 5 *B. & Adol.* 1113; 3 *Nev. & M.* 110, S. C.)

Abowry, *what is*, see *post*, "*Distress for Rent*," Vol. II.

Award.

AS to arbitration of disputes between masters, labourers and workmen, see the 5 Geo. IV. c. 96, *post*, "*Servants*," Vol. V.

Mr. Watson. in his Treatise on Awards, p. 35, observes, that "matters of a criminal nature, for obvious reasons, are not capable of being submitted to the decision of an arbitrator. But there are many cases which may be made the subject of an indictment, as assaults, nuisances, and the like, and for which the prosecutor may proceed by action, where those reasons do not apply. It is perfectly clear that these matters may be referred before indictment, but whether an indictment found for any of these minor offences can be referred or not without express leave of the Court, does not appear to be quite so clearly settled. Perhaps the clearest rule to be drawn from the cases on the subject is, that indictments for assaults, nuisances, &c. may be referred to arbitration by leave or by authority of the Court where they are depending, but without such permission or authority indictments cannot be referred; and this rule will reconcile all the reported cases on the subject." What criminal matters may be referred.

Thus in the case of *R.* v. *Rant*, reported in *Kyd on Awards*, p. 64; (and see *Elworthy* v. *Bird*, 2 *Bing.* 258; 9 *Moore*, 480, S. C.; and *Elworthy and another* v. *Bird*, *M'Cleland's Exch. Rep.* 69;) and *Rex* v. *Coombs*, which was a reference to arbitration of two cross indictments for riot, which indictments had been found at the Middlesex sessions; the reference by bond and the submission having been made a rule of court, a motion to set aside the award having been made, Mr. *Kyd* showed cause, on the ground that the award

Award.

was a nullity, as a criminal prosecution could not be made the subject of reference. He had hardly stated the fact that the submission was by bond, when the Court expressed considerable surprise that a criminal prosecution should be so submitted; they observed that it was usual indeed in prosecutions of this kind, before a verdict was given, or after verdict of conviction, and before sentence, for the parties to talk together by the recommendation of the Court, and, if they agreed, the Court set a nominal fine; but the whole was done under the inspection of the Court, and their sentence formally allowed.

Several instances will be found of references of indictments by the authothority of the Courts where the indictments were pending, both before and after conviction. (See *R.* v. *Moate*, 3 *B. & Adol.* 237; *Blanchard* v. *Lilly*, 9 *East*, 497; *Kyd*, 66, 67; *R.* v. *Cotesbatch*, 2 *D. & R.* 265.)

In a modern case it was decided on demurrer that an indictment for an assault might, by leave of the Court of Quarter Sessions, be referred to arbitration; and the Court of Common Pleas decided, principally on the authority of *Beeley* v. *Wingfield*, 11 *East*, 46, that an action might be maintained to enforce such a reference. Lord C. J. *Gibbs* is reported to have laid down the law generally, that the parties might refer, without noticing the necessity for the concurrence of the Court; however, his observations must be taken with reference to the precise point then under consideration. (*Baker* v. *Townsend*, 1 *Moore*, 120; 7 *Taunt.* 422, S. C.)

And where a defendant, prosecuted by parish officers for disobeying an order of maintenance, was convicted, and sentence deferred by the Court with a view to an arrangement; in the meantime he was committed to prison, and the officers demanded of him a sum considerably exceeding the amount of maintenance due, but part of which was to cover costs; A. paid part and gave a note for the remainder; he was then brought before the Court, fined 1s. and discharged. It did not appear whether or not the particulars of the arrangement were communicated to the Court, but A. made no complaint when brought up. In an action afterwards brought upon the note, held, that no irregularity appeared in the compromise, and that the note was legal. (*Kirk* v. *Strickwood*, 1 *Nev. & M.* 275; 4 *B. & Adol.* 421, S. C.)

It has been decided that the justices at sessions, by the consent of the parties, have power to refer the merits of an appeal against a poor rate to arbitration, and to adopt the award of the arbitrators as their judgment; but without the leave of the parties they cannot order such a reference, for they have no power to delegate their authority. (*R.* v. *Justices of Northampton*, *Cald.* 9, 2; *Bott*, 716.)

Making submission a rule of court.

The statute 9 & 10 Will. III. c. 15, allowing parties to make a submission a rule of court, in order to proceed for non-performance of an award, &c. does not extend to matters criminal, and therefore a submission for an indictment at the quarter sessions for an assault could not be made a rule of court under the statute. (*Watson* v. *M'Cullum*, 8 *T. R.* 520; *R.* v. *Cotesbatch*, 2 *D. & R.* 265.)

Revoking authority.

Nor does the 3 & 4 Will. IV. c. 42, s. 39, which takes away the power of revoking of a submission to arbitration, extend to a reference agreed to on the trial of an indictment, and either party has power to revoke the reference. (*Reg.* v. *Bardell*, 1 *Nev. & P.* 74; 5 *Ad. & Ell.* 619, S. C.)

Form of an award. *To all to whom these presents shall come, we A. B. of and C. D. of send greeting.*

WHEREAS there are several accounts depending, and divers controversies have arisen, between of [yeoman] of the one part, and of [yeoman] of the other part: and whereas, for putting an end to the said differences, they the said and by their several bonds or obligations bearing date last past, are reciprocally become bound each to the other in the penal sum of to stand to, abide, perform, and keep the award, order, and final determination of us the said so as the said award be made in writing, and ready to be

Form.

delivered to the parties in difference on or before next ensuing, as by the said obligations and conditions thereof may appear; Now know ye, that we the said arbitrators, whose names are hereunto annexed, [and seals affixed,] taking upon us the burden of the said award, and having fully examined and duly considered the proofs and allegations of both the said parties, do make and publish this our award between the said parties, in the manner following, that is to say, first, we do award and order that [all actions, suits, quarrels and controversies whatsoever, had, moved, arisen, and depending between the said parties in law or equity, for any manner of cause whatsoever, touching the said premises, to the day of the date of the submission, shall cease and be no further prosecuted; and that each of the said parties shall pay and bear his own costs and charges in anywise relating to or concerning the premises.] And we do also award and order that [the said shall deliver or cause to be delivered to the said at within the space of &c.] And further, we do hereby award and order, that [the said shall on or before pay or cause to be paid unto the said the sum of .] We do also award and order, &c. And lastly, we do award and order, that the said and on payment of the said sum of shall, in due form of law, execute each to the other of them, or to the other's use, general releases, sufficient in the law for releasing by each to the other of them, his heirs, executors and administrators, of all actions, suits, arrests, quarrels, controversies and demands whatsoever, touching or concerning the premises aforesaid, or any matter or thing thereunto relating, from the beginning of the world, until the day of last past, [viz. the day of the date of the arbitration bonds.] *In witness whereof we have hereunto set our hands the day of .*

A. B.
C. D.

Witness hereof, *E. F.*
G. H.

Backing a Warrant, see *post*, "*Warrant*," Vol. VI.

Badger Baiting *prohibited*, see "*Cattle and Animals*," *post*, "*Police*," Vol. V.

Bail. (a)

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(a) As to bail in general in criminal cases, see 1 *Chit. C. L.* 92 to 104; *Deacon's C. D.* title *Bail*; 4 *Bla. Com.* c. 22; 2 *Hauk.* c. 15; 2 *Hale*, c. 15; *Bac. Abr. Bail in Criminal Cases*; *Petersdorff on Bail*, 475 to 536.

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As to Bail on a Habeas Corpus, or Certiorari, see "*Certiorari*," *post*; "*Habeas Corpus*," Vol. III.

I. What it is, &c.

Discharge without bail.

IF a person be brought before a justice, and after examination, (as to which see "*Examination*," Vol. II.) it appear that no felony is committed, he may discharge him; but if a felony be committed, though it appear not that the party accused is guilty, yet he cannot discharge him, but must bail or commit him. (*Hale's Sum.* 98.)

What.

Bail, (from the French *bailler*, to deliver,) signifies the delivery of a man out of custody, upon the undertaking of one or more persons for him that he shall appear at a day limited, to answer and be justified by the law. (1 *Hale's Sum.* 96.) It is a delivery or bailment of a person to his sureties, upon their giving, together with himself, sufficient security for his appearance, he being supposed to continue in their friendly custody instead of going to prison.

Difference between bail and mainprize.

The difference between bail and mainprize is, that mainpernors are only surety, but bail is a custody; and therefore the bail may retake the prisoner if they doubt he will fly, and detain him and bring him before a justice, and the justice ought to commit the prisoner in discharge of the bail, or put him to find new sureties. (1 *Hale's Sum.* 96.)

II. In what Cases, and Power and Duty of Justices out of Sessions as to.

At common law.

With respect to the cases in which bail is allowable, it is observable that at common law no justice, or indeed any Court, could bail a person in execution on a judgment or conviction for any offence, for then such imprisonment, without bail, is part of the sentence and punishment, and this is the existing law. (8 *T. R.* 325; 4 *Bla. Com.* 298; 1 *Wils.* 299.) Nor will a Court, between conviction and judgment, bail the offender without the consent of the prosecutor. (4 *Burr.* 2545, 2539.) But when a party was arrested before conviction, by the ancient common law all *felonies* were bailable, till murder was excepted by statute; (6 Edw. I. c. 9; *Com. Dig. Bail, F.* 1; *Hale's Sum.* 97;) so that persons might be admitted to bail before conviction is almost every case. (4 *Bla. Com.* 298.)

By statute.

But the statute of Westminster, 3 Edw. I. c. 15, took away the power of justices of the peace to bail in treason, and in several instances of aggravated felony. The statutes 23 Hen. VI. c. 9, 3 Hen. VII. c. 3, and the 1 & 2 Ph. & Mary, c. 13, contained further regulations upon this subject; and the latter statute extended the power of bailing to justices of the peace (*a*).

In felonies.

In Felonies.]—These statutes, however, as to the bailing of prisoners were repealed by 7 Geo. IV. c. 64, s. 1, and now by that act, "Where any person

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(*a*) A justice could not (before the passing of the 7 Geo. IV. c. 64,) receive bail for a prisoner in the following cases: — 1. Upon an accusation of treason. 2. Of murder. 3. Of manslaughter, where the prisoner was clearly

shall be taken on a charge of *felony* or *suspicion of felony*, before one or more justice or justices of the peace, and the charge shall be supported by *positive and credible evidence* of the fact, or by such evidence as, if not explained or contradicted, shall in the opinion of the justice or justices raise *a strong presumption of the guilt* of the person charged, such person shall be committed to prison by such justice or justices in the manner hereinafter mentioned. But if there shall be only *one justice present*, and the whole evidence given before him shall be such as neither to raise a strong presumption of guilt, nor to warrant the dismissal of the charge, such justice shall order the person charged to be *detained in custody* until he or she shall be taken before two justices at the least. [And where any person *so taken*, or any person in the *first instance taken before two justices* of the peace, shall be charged with felony, or on suspicion of felony, and the evidence given in support of the charge shall in their opinion not be such as to raise a strong presumption of the guilt of the person charged, and to require his or her committal; or such evidence shall be adduced on behalf of the person charged as shall in their opinion weaken the presumption of his or her guilt; but there shall, notwithstanding, appear to them in either of such cases to be sufficient ground for judicial inquiry into his or her guilt, the person charged shall be admitted to bail by such two justices in the manner hereinafter mentioned.] Provided always, that nothing herein contained shall be construed to require any such justice or justices to hear evidence on behalf of any person so charged as aforesaid, unless it shall appear to him or them to be meet and conducive to the ends of justice to hear the same."

2. *In what Cases, and Power of Justices as to.*

When one justice may commit.

Justices not bound to hear evidence on behalf of prisoner.

But this enactment as to the cases in which justices should bail, has undergone an important amendment, by the statute 5 & 6 Will. IV. c. 33, s. 3, which, after reciting, "Whereas in many cases the taking bail for the appearance of persons charged with felony *may be safely admitted without endangering the appearance* of such persons to take their trial in due course of law, and it is therefore expedient in such cases to amend and extend the provisions in that respect of the 7 Geo. IV. c. 64," enacts "that it shall be lawful for any two justices of the peace, if they shall think fit, (of whom one or other shall have signed the warrant of commitment,) to admit any person or persons charged with felony, or against whom a warrant of commitment for felony is signed, to bail, in the manner and according to the provisions directed by the said recited act, in such sum or sums of money and with such surety or sureties as they shall think fit, and *notwithstanding such person or persons shall have confessed the matter laid to his or their charge, or notwithstanding such justices shall not think that such charge is groundless, or shall think that the circumstances are such as to raise a presumption of guilt*."

Where two justices may bail.

Since these enactments *one* justice cannot take bail on a charge of *felony*, or *suspicion of felony*. He must either dismiss the charge or commit the accused, or he must order the party to be detained until he be taken before two justices. If the prisoner be brought before *two* or *more* justices either in the first instance or on being ordered to be detained by a single justice, or after a warrant of commitment made, they may, if they shall think fit, admit him to bail.

One justice cannot bail in felony.

Before the justices admit to bail under these enactments, they must take the examinations of the parties as directed by sects. 2 and 3 of 7 Geo. IV. c. 64, and as to which see title "*Examinations by Justices before Trial*," Vol. II. p. 467.

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the slayer, and not barely suspected to be so—or if any indictment was found against him. 4. Such as being committed for felony broke prison—because this not only carries a presumption of guilt, but is also superadding one felony to another. 5. Persons outlawed, and such as have abjured the realm. 6. Approvers, and persons by them accused. 7. Persons taken with the mainour, that is, with the thing stolen in their hands, or in the fact of felony. 8. Persons charged with arson. 9. Excommunicated persons, taken by writ excommunicato capiendo. (See 2 *Inst.* 186; 2 *Hale*, 132, *et seq.*; 2 *Hawk.* c. 15, s. 33, *et seq.*; 4 *Bla. Com.* 298.)

2. *In what Cases, and Power of Justices as to.*

Principle on which parties should be admitted to bail.

The principle which should guide justices in admitting an accused party to bail or committing him for trial, should always be the *probability of his appearing to take his trial*, and not his supposed guilt or innocence. (*Reg.* v. *Scarfe*, 9 *Dowl.* 553.) The enormity of the offence—the rank and station of the accused—the presumption of his guilt or innocence—the severity of the punishment for the crime charged to have been committed, may all be taken into consideration in estimating this probability, but do not individually or collectively constitute the legal grounds on which justices should take or refuse bail.

As regards the consequence of a justice's refusing bail when besought to grant it, see *post*, 328.

In misdemeanors.

In Misdemeanors.]—In all cases of *misdemeanors*, except for breach of prison, justices *must* take bail, see 3 Edw. I. c. 15; unless the party be excluded from it by any special act, see 2 *Hale*, 127.

Persons guilty of affrays may be bailed or not, at the discretion of the magistrate; but he ought to be more cautious how he take bail if a wound has been given, from which death may probably ensue. (1 *Hawk.* c. 23, s. 19; *Bac. Ab. Bail, B.*)

In misdemeanors *one* justice may bail. (See *Dalton*, c. 12; 2 *Hawk.* c. 15, s. 54.)

Where warrant backed.

Where Warrant backed.]—By 24 Geo. II. c. 55, where a warrant has been backed and the party accused has been taken out of the county where the supposed offence has been committed, any justice of the county where he was taken, may, if the offence be bailable, take bail; and the same provision is extended to Ireland, by 44 Geo. III. c. 92, s. 1; and the 45 Geo. III. c. 92, and the 48 Geo. III. c. 58, s. 2, enact, that where the offender escapes from one part of the United Kingdom to the other, he may be bailed by any judge or justice of that part of the United Kingdom where he was apprehended, unless the judge who granted the warrant has written the words "*not bailable*" on the back of the process. See the enactments of the 24 Geo. II. and 45 Geo. III. in full, *post*, "*Warrant*," Vol. VI.

Within the metropolitan police district.

Within the Metropolitan Police District.]—By the 2 & 3 Vict. c. 71, s. 36, (the Metropolitan Police Act,) it is enacted, "That *any one* of the said metropolitan police magistrates, if he shall think fit, may remand any person for further examination, or may suffer to go at large any person who shall be charged before him with *any felony or misdemeanor*, upon his personal recognizance, (with or without sureties,) and every such recognizance shall be conditioned for the appearance of such person before the same or some other of the said magistrates for further examination, or to surrender himself to take his trial at the Central Criminal Court, or at a Court of general or quarter sessions, at a day and place to be therein mentioned, and the magistrate shall be at liberty, from time to time, to enlarge every such recognizance to such further time as he shall appoint, and every such recognizance which shall not be enlarged, shall be discharged without fee or reward, when the party shall have appeared according to the condition thereof: Provided always, that whenever any magistrate shall take the recognizance of any person to appear at the Central Criminal Court, or at a Court of general or quarter sessions, the magistrate shall be bound to return the depositions taken in the case, and to bind over the witnesses to appear and give evidence in like manner as if he had committed the party to take his trial at such Court."

One magistrate may act except in in anything directed to be done at petty, special, or quarter sessions.

Sect. 14. "Any one of the said magistrates may do alone any act at his Court which by any law now in force or by any law not containing an express enactment to the contrary shall be directed to be done by more than one justice, but none of the said magistrates shall be competent to act as a justice either alone or with any other justice in any thing which is to be done at a special or petty sessions of all the justices acting in the division, or by the justices in quarter sessions assembled."

In other cases, actions, &c.

In other Cases.]—No power at all is given to justices of the peace to bail

any persons on process in civil actions, or for contempts to superior courts. (2 *Hawk.* c. 15, s. 64.)

2. *In what Cases, and Power of Justices as to.*

There are furthermore many statutes which prohibit bail and mainprize in very many cases, and allow the same in many others, which are interspersed among the several titles which treat of these matters.

And where a statute ordaineth that an offender shall be imprisoned at the queen's will or pleasure, there the prisoner cannot be bailed till he hath redeemed his liberty by such fine or ransom as shall be assessed by the queen's justices in her Courts. (*Dalt.* c. 167, pp. 294, 295.)

III. Power of Justices in Sessions and others to take Bail.

Justices in sessions.

Justices in Sessions.]—It seems to be a good general rule that so far as any persons are judges of any crime, so far they have power of bailing a person indicted before them of such crime; and upon this ground it seems clear that any two justices, one being of the *quorum*, may of *common right* bail persons indicted at the sessions, for that any two such justices may hear and determine the indictment. Also it hath been holden that any one justice hath the like power. (2 *Hawk.* c. 15, s. 54, 62.

Justices of gaol delivery.

Justices of Gaol Delivery.]—The justices of gaol delivery may bail any person convicted before them of homicide, by misadventure or in self-defence, or even of manslaughter, the better to enable him to obtain his pardon; and this even after their sessions is determined. (2 *Hawk.* c. 15, s. 65.) But if the judge be of opinion that the prisoner in either of the cases is improperly convicted, or that the offence is of a very venial nature, the practice is now not to bail him, but merely to impose a light or a nominal fine on the prisoner, and to order him to be discharged. The justices of gaol delivery, it seems, have the same power of bailing persons indicted before them for any crime, as that possessed by the Court of Queen's Bench. (2 *Hawk.* c. 15, s. 65.)

But a judge will not admit a party to bail after the grand jury have returned a true bill against him for murder. (*Reg.* v. *Chapman*, 8 C. & P. 556.) Nor can a person arrested during the assizes under an indictment for a misdemeanor, be discharged on bail without pleading and traversing. (*Reg.* v. *Wettenhall*, 2 *M.* & *Rob.* 291.)

And where even a true bill was found against several prisoners for a rape, the prisoners had been on bail, and the prosecutrix did not appear either before the grand jury or to give evidence on the trial: on application being made to the judge to postpone the trial, founded on affidavit, stating that, in the belief of the deponent, the prosecutrix was kept out of the way in consequence of money having been given to her by some of the prisoners, the judge postponed the trial, and would not admit the prisoners to bail. (*Reg.* v. *Guttridge*, 9 *Car* & *P.* 228.)

By the Habeas Corpus Act, (31 Car. II. c. 2, s. 7,) "If any person committed for treason or felony, shall on the first day of the sessions of gaol delivery, after such commitment, petition the Court, and upon the last day move in open Court to be set at liberty upon bail, the justices are required to bail such persons, unless it appear upon oath that the witnesses for the King could not be produced the same sessions. And if the prisoner shall not upon his application be indicted and tried the second sessions, he shall be discharged from his imprisonment." See "*Habeas Corpus*," Vol. III.

Sheriffs.

Sheriffs.]—By the common law the *sheriff* had power only to bail those persons who were indicted before him at his torn. By 1 Edw. IV. c. 2, he is required to return all indictments taken before him at his torn to the justices of the next sessions. At this day, therefore, he has no power of this kind, or at least it is never exercised in practice upon criminal charges. (2 *Hen. Bla.* 418, 4 *T. R.* 505; 2 *Saund.* 59 b; *Hawk.* b. 2, c. 15, s. 26, 27; *Bac. Ab. Bail, A.*; *Lamb.* 15.) It has indeed been supposed (2 *Saund.* 59 b) that he

3. *Power of Sessions and others to take Bail.*

may take a recognizance, though not a bond; but it appears from the authorities that he cannot in any way take on himself to set a prisoner at liberty on bail whom he once obtains in his custody. (4 *Term Rep.* 505; 2 *Hen. Blu.* 418; *Lamb.* 15; *Dick. J., Bail, I.*)

Constables.

Constables.]—By the common law every constable, being a conservator of the peace, might have bailed one suspected of felony; but this authority is transferred from him to the justices of the peace by several statutes. (*Lamb.* 15.)

By the Metropolis Police Act, 10 Geo. IV. c. 44, s. 9, *post*, Vol. V. night constable may in certain cases take bail.

The Corporation Act, 5 & 6 Will. IV. c. 76, s. 79, also empowers night constables to take bail in cases of petty misdemeanor.

Court of Queen's Bench, or a Judge thereof.

Court of Queen's Bench.]—The Court of Queen's Bench, or any judge thereof, in vacation, (not being restrained or affected by the statute 3 Edw. I. c. 15, or 7 Geo. IV. c. 64, s. 1,) in the plenitude of that power which they enjoy at common law, may, in their discretion, admit persons to bail in *all* cases whatsoever, though committed by justices of the peace or others, for crimes in which inferior jurisdictions would not venture to interfere, and the only exception in their discretionary authority is, where the commitment is for a contempt, or in execution. (*R.* v. *Marks*, 3 *East*, 163; 2 *Hale*, 129; 2 *Hawk.* c. 15, s. 47; *Leach*, 168; *Rudd's case*, 1 *Cowp.* 333.) Thus they may bail for high treason; (*Leach*, 168; *Comb.* 111;) murder; (3 *East*, 163;) manslaughter; (2 *Stra.* 1242; *Comb.* 111;) forgery; (*Cowp.* 333;) rapes; (4 *Burr.* 2179;) horse stealing; (2 *Chit. Rep.* 110;) libels; (1 *Wils.* 29;) and for all felonies and offences whatever. (3 *East*, 163; 5 *T. R.* 169.)

This power, however, is to be exercised in the discretion of the Court, and none can claim its benefits *de jure*. (2 *Hale*, 129.) The judges seldom admit a person to bail where magistrates have properly refused it, without some particular circumstances are shown to exist in his favour. (*Bac. Ab. Bail, D.*)

And it is not usual for this Court to bail in cases of felony, unless when in consequence of the defect of the commitment, and of the examination and depositions, it appears doubtful whether any offence has been committed. (1 *Leach*, 481; *R.* v. *Judd*, 2 *T. R* 257; *R.* v. *Remnant*, 5 *T. R.* 169.) And however defectively the mittimus may have been framed, yet, if from the depositions the Court can collect that a felony has been committed, they will not bail the prisoner, but remand him upon a special rule. (3 *East*, 163.)

The ill health of the party in custody is not of itself sufficient ground to induce this Court to bail him. (*R.* v. *Shuckburgh*, 1 *Wils.* 29; 1 *Ch. C. L.* 99.) But where he has been for some time in prison, so that his life is actually in danger thereby, the Court might perhaps bail him. (*Ld. Aylesbury's case*, 1 *Salk.* 103.) They will not admit him to bail where the complaint is constitutional. (*R.* v. *Wyndham*, 1 *Stra.* 4.) Nor where the illness arises from the act of the prisoner. (*Id.*)

In all cases where it appears that a prisoner ought to be bailed, if he be unable to defray the expenses of being brought up to Westminster for that purpose, a rule to show cause will be granted why he should not be bailed by a magistrate in the county, with a *certiorari* to return the depositions before them; (*R.* v. *Jones*, 1 *B. & Ald.* 209; see *R.* v. *Booker*, 2 *Dowl. P. C.* 446; *R.* v. *Massey*, 6 *M. & Selw.* 108;) and this without an affidavit of his poverty. (*R.* v. *Gregory*, 9 *Dowl. P. C.* 129.)

In the case of an assault the application to have the defendant bailed should be made to a judge at chambers, and not by motion to the Court. (2 *Chit. Rep.* 110.)

As to the mode of taking the bail in these cases, see the form of the rule in *R.* v. *Massey*, 6 *M. & Selw.* 108.

We shall hereafter consider the necessity for bailing under the act of Habeas Corpus. (See "*Habeas Corpus*," Vol. III.)

Marshal of Queen's Bench.

By 5 Edw. III. c. 8, the Marshal of the Queen's Bench is prohibited from

bailing persons indicted of felony, on pain of half-a-year's imprisonment and ransom. (*F. N. B.* 215.)

3. *Power of Sessions and others to take Bail.*

Courts of Common Pleas, Exchequer, and Judges.

Courts and Judges of C. P. and Exch.] It seems the Courts of Common Pleas and Exchequer at any time during term might, by the common law, award a *habeas corpus* for any person committed for a crime under the degree of treason or felony, and thereupon discharge him, if it shall plainly appear by the return that the commitment was illegal, (as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be committed,) or bail him if it was doubtful. (2 *Inst.* 53, 615; 4 *Inst.* 290; 2 *Hawk.* c. 15, s. 81; *Deac. C. D.* 111.) And now by the 1 & 2 Vict. c. 45, each judge of these Courts has the same power of granting writs of *habeas corpus* and bailing prisoners as if he had been a judge of the Queen's Bench. See the powers given them by the Habeas Corpus Act, *post*, "*Habeas Corpus*," Vol. III.

Court of Chancery.

Court of Chancery.] This Court possesses the same power at common law, as to granting a *habeas corpus* and discharging or bailing a prisoner, as the Courts of Common Pleas and Exchequer, with this addition, that it may award the *habeas* in term or vacation. In some cases the Lord Chancellor may bail for felony. (*Id.; sed vide* 4 *Bla. Com.* 299.)

Houses of Parliament.

Houses of Parliament.] The House of Lords or House of Commons, during their sessions, may bail a person committed for a contempt. (*Skin.* 683.) When the Serjeant of the House of Commons has taken into his custody persons committed by order of the House, he cannot, upon their tendering bail, release them from confinement. (1 *Lev.* 109; *Hard.* 464.)

IV. Number and Sufficiency, &c. of Bail.

Number and sufficiency.

The sureties ought to be at least two men of ability, but whose sufficiency as well as the sum to be expressed in their recognizance, are, it is said, left in a great degree to the discretion of the magistrate or magistrates, and therefore they may examine them upon oath as to the value of their property. (2 *Hale*, 125; *Hawk.* b. 2, c. 15, s. 4; *Bac. Ab. Bail, F.; Com. Dig. Bail, K.* 1; *Dalt. J. C.* 114; *Dick. J. Bail, II.* and *id. V.; Bennett* v. *Watson*, 3 *M. & Selw.* 1.) Every one of the bail ought to be of ability to answer the sum in which he is bound, which, in times when money was more valuable than at present, was said ought *never to be less than* £40 for a capital crime, but might be as much higher as the justices in their discretion thought fit to require upon consideration of the ability and quality of the prisoner, and the nature of the offence. (*Id. ibid.;* and see language of the 31 Car. II. c. 2, s. 3, and 2 *Wils.* 159, as to the description of the bail.)

It is said not to be usual for the Queen's Bench to bail on a *habeas corpus* on a commitment for treason or felony without *four* sureties, but for every inferior offence *two* are sufficient in both cases in that Court. The number of the bail must be mentioned in the *notice*, otherwise the Court will reject the application. (*Hawk.* b. 2, c. 15, s. 4, n. 1; *Bac. Ab. Bail, F.;* 2 *T. R.* 255; 1 *Leach*, 486; 1 *Stra.* 5; 2 *Stra.* 855; *Com. Dig. Bail, K.;* 1 *Gilb. L. & E.* 4; *Dick. J. Bail, V.;* R. v. *Shaw*, 6 *D. & R.* 154.) And if a rule of Court require two bail, and one of the bail appear and be insufficient, the defendant will be remanded. (*Dougl.* 466, in notes.)

And though the commitment of the magistrate be informal, the Court of Queen's Bench will not discharge the defendant, in case it appears that a great offence is charged upon him, without ample security for his appearance. And in a late case of this nature the prisoner was compelled to enter into a recognizance himself in £1000, and four sureties in £500 each. (2 *T. R.* 257; 1 *Leach*, 486.) And after conviction for a libel, the defendant, who was bailed on the ground of illness, was obliged to find bail himself in £2000, and two sureties in £1000 each. (1 *Stra.* 9; 9 *Id.* 5.)

By the Declaration of Rights, 1 Will. sess. 2, c. 2, excessive bail ought not to be required. (See *post*, 327.)

Who may be bail.

Every housekeeper possessed of sufficient property to answer the required responsibility may be bail. The defendant's attorney may be bail for him.

4. *Number, &c. of Bail.*

(*R.* v. *Bowes*, *Dougl.* 466, n.) A person convicted of an infamous crime, as perjury, &c. cannot be admitted as adequate bail. (*R.* v. *Edwards*, 4 *T. R.* 440.) Nor can a married woman, for her recognizance cannot be estreated. (*Styles*, 369; 2 *Hawk.* c. 15.)

Depositing money, &c.

It is said that justices, as a substitute for bail, may take money *in deposito*. (*Moyser* v. *Gray*, *Cro. Car.* 446.)

The bail should not be rejected on account of their political opinions. (*Reg.* v. *Badger*, *post*, 328.)

Increasing number of.

After the defendant has been admitted to bail, the Court will not, on affidavit of aggravating facts, require the bail to be increased. (*R.* v. *Salter*, 2 *Chit. Rep.* 109.) As to requiring fresh bail, see *infra*.

V. Time of taking, Notice and Justification of Bail.

Time of taking bail.

It appears that if a party is not ready with bail at the time he is apprehended, and the offence is bailable, he may at any time before conviction be released from imprisonment on finding sureties. (*R.* v. *Shebbeare*, 1 *Burr.* 460; *Hawk.* b. 2, c. 16, s. 1, n. 1.) This is analogous to proceedings in a civil suit. (*Imp. K. B.* 200, 684, 7th edit.; *Imp. C. P.* 179, 5th edit.) And after the recognizances have been entered into, the justice, before whom the transaction takes place, will issue his warrant called a *liberate* to the gaoler to discharge him. (*Dick. J. Bail*, 6.)

And it is said that justices of the peace will sometimes send the prisoner to some private prison for a short time, to afford him an opportunity of procuring bail before he is committed for trial, but that this practice has been disapproved of as inconvenient, and not agreeable to law. (1 *Hale*, 123, *sed quære.*) It is, however, the present practice, especially in cases where notice of bail is requisite, in order to prevent the necessity of committing defendant in the mean time.

Notice of.

In general no notice of bail is requisite, but justices may, if they think fit, (and in strong cases it is usually done,) order that a reasonable notice of bail, usually twenty-four or forty-eight hours, according to circumstances, shall be given to the prosecutor.

The 30 Geo. II. c. 24, s. 17, which required twenty-four hours' notice of bail in offences, as to false pretences, &c. appears repealed by 7 & 8 Geo. IV. c. 27.

Where bills for misdemeanors are found under the commission of oyer and terminer at the Central Criminal Court, the defendant must give forty-eight hours' notice of bail, unless the application for process is made on a Friday, in any case in which there is reason to think that there is a desire to keep the party in custody over Sunday. (*R.* v. *Carlile*, 6 *C. & P.* 628.)

Where an indictment is found at the sessions, and the prosecutor moves for a warrant, the Court, when they grant it, will make a note, by way of order, at the foot of the warrant, that the defendant shall give twenty-four hours' notice of bail to the prosecutor; which time the Court will, in some cases, order to be extended to forty-eight hours, according to the circumstances stated, and a judge or justice of the peace after sessions will, upon producing a certificate of a bill having been found, grant a warrant on a similar order, the intent of which notice is, that the prosecutor may have an opportunity of inquiring into the sufficiency of the bail, that if they are not satisfactory, he may have an opportunity of opposing them. (*Cro. C. C.* 15.)

Where the defendant, in order to avoid being apprehended under a warrant upon indictment found or preferred, voluntarily goes before a magistrate and offers bail to answer the supposed offence, it is said that no notice of bail is requisite. (*Cro. C. C.* 16.)

Where neither the husband of a feme covert, nor her next of kin, can be discovered, service of a rule nisi for bailing a defendant on a charge of manslaughter may be made on the coroner. (*R.* v. *Williams*, 8 *Dowl. P. C.* 301.)

Justification of.

Justification being requisite, bail is absolute in the first instance. (*R.* v. *Hall*, 2 *Bla. Rep.* 1110.) The bail may, however, be examined on oath by the magistrates, or by the prosecutor, or any professional gentleman by the magistrates' leave, as to the sufficiency of their property.

Fresh bail.

It is said that if the magistrates be deceived, they may require fresh sureties. (2 *Hawk.* c. 15; 2 *Hale*, 125; *Dick. J. Bail.*)

VI. Taking down Examination; Recognizance and subsequent Proceedings.

The justices, or one of them, before admitting the party to bail, must take his examination and the information on oath of those who know the facts and circumstances of the case and must put the same into writing, or so much of the same as shall be material; and must certify such bailment in writing, and must also subscribe such examination, and the information, bailment and recognizance, and transmit them to the proper officer of the Court in which the trial is to be, so as to be delivered to him before or at the opening of the Court on the first day of the assizes or sessions. (See 7 Geo. IV. c. 64, s. 2, 3; *post*, "*Examination*," Vol. II.; and the 24 Geo. II. c. 55, s. 1.)

Putting examination into writing.

Certifying the recognizance.

By the 4 & 5 Will. IV. c. 86, s. 11, justices acting within the limits of the Central Criminal Court are to certify examinations, &c., to the justices of oyer and terminer and gaol delivery, as they are required by the 7 Geo. IV.

Formerly the justices used personally to attend with the recognizance in order to certify it, but it is now handed over to the clerk of the peace or clerk of the assizes.

With respect to the form of the recognizance, it is left to the discretion of justices to take it either in a certain sum, or else body for body; but where the charge is for an offence not amounting to a felony, the recognizance ought only to be expressed for the payment of a certain sum; and the taking a recognizance in any case body for body is now obsolete. (*R.* v. *Dalton*, 2 *Stra.* 911; 2 *Hale*, 125.)

Form and effect of recognizance.

The principal and the bail usually acknowledge themselves respectively to owe to the Queen a named sum, which it is said should not be less than £40, to be levied of their lands and tenements, goods and chattels, if the former shall make default in the performance of the condition which is subscribed, and which requires him to appear at the place of trial to answer the charge against him. (1 *Chit. C. L.* 104.)

But if the party accused be an infant (2 *Hale*, 126), or in gaol (*id.*), or a married woman, then the recognizance is taken only from the sureties. (*Id.*)

The recognizance need not be signed by any of the parties bound in the condition. (*Dick. Sess.* 87; 2 *Hawk.* c. 15, s. 83.)

If the recognizance be to answer generally, it includes every species of crime of which the culprit may be accused, and therefore, where it is intended that the recognizance should only have relation to a particular crime, that crime should be distinctly specified. (*Reg.* v. *Ridpath*, 10 *Mod.* 152.)

Although the jurisdiction of the justices is in general confined to the limits of their own county, yet it is said that recognizances *voluntarily* taken before them in any other place are valid. (3 *Burr.* 14.)

Before whom taken.

Upon the recognizance being taken, if the defendant have appeared voluntarily, or if he be in custody of the constable, the justices discharge him as of course: but if he be in prison, the justices, upon application, issue their warrant, called a *liberate* (form of, *post*, 333, No. 8), to the gaoler to discharge the prisoner.

Deliverance on.

VII. Requiring excessive Bail.

Justices must take care that in cases where they are bound by law to bail the prisoner, they do not, under the pretence of demanding sufficient surety, make so excessive a requisition as in effect to amount to a *denial of bail*, which is a grievance expressly prohibited by the 1 Will. & M. sess. 2, c. 2, (the Declaration of Rights), by which it is declared that excessive bail ought not to be required, and if it be, this is a misdemeanor, punishable not only by the statute, but also by the common law, as an offence against the liberty of the subject, and an action lies at the suit of the party wrongfully imprisoned, and an indictment may be supported. (6 *Mod.* 179; *Hawk.* b. 2, c. 15, s. 13 to 24; *Bac. Ab. Bail, F.*; *Com. Dig. Bail, F.* 5, K. 6; 3 *Bos. & Pul.* 551.)

Excessive bail.

VIII. Denying Bail where it ought to be granted.

Refusing bail.

To refuse bail where the party ought to be bailed (the party offering the same) is a misdemeanor punishable not only by the suit of the party, but also by indictment or criminal information. (2 *Hawk.* c. 15, s. 13; *Hale's Sum.* 97; *Osborn* v. *Gough*, 3 *B. & P.* 551. See 3 Edw. I. c. 15; 31 Car. II. c 2.)

If several persons conspire to persuade the justice to refuse the bail when sufficient, they may be indicted. (6 *Mod.* 179.)

The prisoner must tender the bail, or the justice is not required to grant it. (2 *Hale*, 123; 2 *Hawk.* c. 15, s. 14.)

A very important case has recently been decided with reference to the refusal of bail by justices, which, on account of its practical bearing, it will be prudent to state at some length. The case was *Regina* v. *Badger and another*, decided in the Queen's Bench, Hil. Vac. 1843, and arose out of the following circumstances. It appeared, that during the disturbances in Staffordshire, in 1842, a person named O'Neil was apprehended for using seditious language at a meeting of Chartists held near Dudley. He was committed for trial on that charge; he subsequently tendered as bail two persons perfectly solvent, and who were town-councillors of Birminghams, but the defendants, two justices before whom they attended, refused to accept the bail, on the ground that these persons had attended, and taken a prominent part at Chartist meetings. O'Neil subsequently applied to the Court of Queen's Bench for a rule calling upon the defendants to show cause why a criminal information should not be filed against them for having refused to accept the bail. A rule *nisi* was granted, and in delivering the judgment of the Court on a motion to make that rule absolute, Lord Denman, C. J., after going through the facts, and alluding to the state of the disturbed districts about the period of the transaction, made the following, among other, observations: "Standing charged with a misdemeanor," said his lordship, "O'Neil claims the right of every man so charged, to be released from prison and admitted to bail on producing sufficient sureties. He says he tendered such to the magistrates, who refused to receive them, not from an objection to their sufficiency, but from corrupt, partial, and arbitrary motives, with the determination to keep him in prison, when their duty required them, under the circumstances, to bail him and release him out of custody. We have, first, to consider whether this refusal was a lawful act, a point on which no serious doubt was entertained. Neither of the learned counsel who opposed the rule contended that a magistrate can lawfully reject bail at his own discretion, or is at liberty, when bail is offered, to enter into an investigation as to the character or opinions of such bail, provided he is satisfied of their sufficiency to answer for the appearance of the party in the amount reasonably required for that purpose. The law is clear, and is as old as the Statute of Westminster, 13 Edward I. c. 15. Lord Coke, in his commentary upon that statute (2nd *Institute*, 191), says, that 'to deny a man plevin who is plevisable, and thereby to detain him in prison, is a great offence, and grievously to be punished;' and Lord Hale (c. 17) adopts the same remark, and Hawkins (2, c. 15) speaks of refusal of bail as an indictable offence. Blackstone, referring to the ancient statute (4th book, c. 22), the *Habeas Corpus* and the Bill of Rights, calls it an offence against the liberty of the subject. If, then, such refusal took place from improper motives, it might be treated as a criminal offence and made subject to an indictment or information. The affidavits on which the rule was granted accused the magistrates of motives corrupt, partial, personal, and arbitrary; but even the deponents themselves do not mean to charge pecuniary corruption or personal malice, or any feeling of revenge, in the sense of giving an unfair advantage to one litigant party over another. The only censurable feelings that can with any show of reason be suspected, are a premeditated refusal and disregard of the just claim made by O'Neil for his liberation, and a determination to keep him in prison without legal authority, and in contempt of their duty. The affidavits on both sides are much the same in substance in respect of all that occurred before the magistrates. The facts being clear, the question is, whether a criminal information ought to be filed; and this depends on our

view of the motives which influenced the magistrates. And we must advert to the very questionable character of one line of defence which they appear to insinuate rather than avow They depose that some time previous to the apprehension of O'Neil these deponents consulted with their brother magistrates as to the nature of the bail to be taken by them in the case of persons committed for attending illegal meetings, for using seditious language, and particularly for inciting to outrages, inasmuch as the disturbances were then going on in certain districts in Staffordshire and in the neighbourhood of Dudley, and resistance to the laws was fomented and kept up by the inflammatory and exciting speeches and conduct of persons who were Chartists. They debated whether, if they were called upon to accept as bail for the appearance or good behaviour of individuals charged with any of these acts of sedition persons who had taken a prominent part in the proceedings of the Chartist body, it was advisable to receive them; and that these deponents and the other magistrates, wholly uninfluenced by any corrupt, perverse, vindictive, personal, or partial motive, but, as they believed, in a fair and legitimate exercise of their office, in the performance of their duty as magistrates, and with a view only to the preservation of the peace, decided that such persons ought not, in the then state of the country, to be admitted as bail, and ought not so to be accepted by them. They further say that after the commitment of O'Neil the same decision was again considered by the magistrates, and was agreed to by the lord-lieutenant of Worcestershire, who thought it was a proper decision. Another magistrate states also this resolution, and informs the Court that, if he had been called upon to accept such persons as bail for any one charged with the same offence, he would also have rejected them. Now, the assumption of powers unknown to the law appears to us peculiarly ill-judged at a period of disturbance, and not to be palliated, but rather rendered so much the more culpable, if deliberately followed by high functionaries having a judicial duty to perform; and if we had found the magistrates wilfully adopting such a measure in defiance of the law, the encouragement so given would have compelled us the more strongly to mark our disapprobation of their conduct. These proceedings, however, give the parties challenged an opportunity of explaining the state of mind in which they acted, and we find the magistrates expressly swearing that they thought they were acting in the fair, legitimate exercise of their office, and in the performance of their duty as magistrates. We may regret that the question of law was not more carefully examined; almost the first page of their most ordinary text-books would have convinced these gentlemen that their refusal on such a ground to receive the bail offered was not a legitimate exercise of their office, or a proper performance of their duty as magistrates, but the contrary. Their opinion that it was right was hastily adopted in a crisis of real danger, and most probably, from a deference to the general resolution, and this induces us, in conformity to the rule by which this Court has regulated its practice, to decline interfering by criminal information. We shall therefore discharge the rule, but as the conduct of the magistrates was such as to justify the application, they must pay all the costs attending it."

8. *Denying Bail.*

IX. Granting Bail where it ought to be denied.

Taking bail improperly.

Admitting bail where it ought not is punishable by the judges of assize by fine; or punishable as a negligent escape at common law. (*Hale's Sum.* 97.)

If the keeper of a prison bail any not liable, he shall lose his fee and office; if another officer, he shall have three years' imprisonment, and make fine at the king's pleasure. (3 Edw. I. c. 15.)

A justice of Surrey committed a man on suspicion of stealing a mare, and bound over the owner to prosecute. Afterwards, upon examining two other persons he admitted the party to bail. The prosecutor appeared at the assizes, and found a bill; but the party accused did not appear. And the Court granted an information against the justice, declaring they should not have bailed the man themselves. (*R.* v. *Clarke*, 2 *Stra.* 1216.) However since the 5 & 6 Will. IV. c. 33, s. 3, *ante*, 321, justices may bail though the

9. *Taking Bail improperly.*

party has been committed, one of the bailing justices having signed the commitment.

"If any justice of the peace shall take bail where he ought not, or wittingly or willingly take insufficient bail, and the party appear not, the said justice not only to be proceeded against according to law, but likewise to be complained of to the lord chancellor, that he may be turned out of his commission." (*6th Order of the Judges to be observed by Justices of the Peace, O. B.* 16 *Car.* 2. *From Kelyng's Reports*, p. 3.)

X. Personating Bail.

Personating bail.

By the 11 Geo. IV. & 1 Will. IV. c. 66, s. 11, "If any person shall, before any court, judge, or other person lawfully authorised to take any recognizance or bail, acknowledge any recognizance or bail in the name of any other person not privy or consenting to the same, whether such recognizance or bail in either case be or be not filed; or if any person shall, in the name of any other person not privy or consenting to the same, acknowledge any fine, recovery, cognovit actionem, or judgment, or any deed to be inrolled; every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, nor less than two years."

In addition to the punishment of imprisonment, hard labour, and solitary confinement, may be imposed, (11 Geo. IV. & 1 Will. IV. c. 66, s. 26,) such confinement not to exceed one month at any one time nor three months in any one year. (7 Will. IV. & 1 Vict. c. 90, s. 5.)

If the convict be already under sentence of transportation or imprisonment, this sentence may commence after the expiration of the former sentence. (7 & 8 Geo. IV. c. 28, s. 10.)

This offence is not triable at quarter sessions. (5 & 6 Vict. c. 38, s. 1.)

XI. Power of Bail.

Power of bail.

The party bailed is considered, in law, as in custody of his sureties, who are considered as his keepers, and they may therefore reseize to bring him in, if they fear his escape, and take him before the justice or Court, and by whom he may be committed, and thus the bail may be discharged from their recognizance; but he is at liberty to find new sureties. (2 *Hale*, 124, 7; 2 *Hawk.* c. 15, s. 3; *Com. Dig. Bail, Q.* 2.)

The bail may thus seize the person of the principal at any time, (as on a Sunday,) or at any place, and in surrendering the principal they may command the co-operation of the sheriff and any of his officers. (*Anon.* 6 *Mod.* 231; *Rol. Rep.* 99. And see *Exparte Lyne*, 3 *Stark.* 132; *Horn* v. *Swinford*, 1 *Dowl. N. P. C.* 20.)

XII. Liability of Bail, and what a Forfeiture of Recognizance.

What a forfeiture of recognizance, and its consequences.

By appearance the terms of the recognizance are fulfilled. (2 *Hawk.* c. 15, s. 84.) If, however, the sureties are bound by recognizance, that a defendant shall appear in the Queen's Bench the first day of such term, to answer to a particular information against him and not to depart till he shall be discharged by the Court; and afterwards the Attorney-General enters a *nolle prosequi* as to that information, and exhibits another, on which the defendant is convicted, and refuses to appear in court after personal notice; the recognizance is forfeited by the default, for being express that the party shall not depart till he be discharged by the Court, it cannot be satisfied unless he be forthcoming, and ready to answer to any other information exhibited against him before he receives his discharge, as much as to that which he was particularly bound to answer. (*Reg.* v. *Ridpath*, 10 *Mod.* 152; *ante*, 327.)

Liability of.

But in such case it seems that the recognizance will not be forfeited by the

party's not appearing in court on the first day of every term after he has pleaded to the information as it may be before he has pleaded. (2 *Hawk.* c. 15, s. 84.) 12. *Liability of.*

The 38 Geo. III. c. 52, s. 5, enacts, "That every recognizance for the appearance to answer an indictment for any offence charged to have been committed within the county of any city or town corporate, shall be forfeited, if the prosecutor shall, ten days previous to the holding of the next Court of oyer and terminer and gaol delivery in the next adjoining or other county, give notice to the person bound in such recognizance of the intention to prefer such indictment in the next adjoining or other county, if the party bound in such recognizance shall not appear; but if he shall appear, then the recognizance shall be discharged, the same as if the party bound thereby had complied with the terms thereof; and the 6th section of the same act provides, "That leaving such notice at the last place of abode of the party bound by the recognizance ten days before the holding of the sessions shall suffice, and that the recognizance shall not be estreated or returned into the exchequer until the next following session, in order that such recognizance may be discharged, in case the party bound shall show sufficient cause for discharging the same."

It seems that the defendant and his bail cannot be called upon their recognizance, except on the day on which he is bound to appear; if he is called on any other day, notice must be given of the intention. (*R.* v. *Adams, Rep. temp. Hardw.* 237.)

The bail of a person acquitted of perjury may move to be discharged from their recognizance before the acquittal is entered on the record, because it appears on the *postea.* (*R.* v. *Spencer*, 1 *Wils.* 315.)

The bail are not entitled to have their recognizance discharged without submitting to the terms of paying the costs incurred. (*R.* v. *Lyon*, 3 *Burr.* 1461; *R.* v. *Finmore*, 8 *T. R.* 409; *R.* v. *Turner*, 15 *East*, 570.)

If the principal do not appear, and the recognizance be forfeited and the penalty paid by the bail, yet the principal continues amenable to the law whenever he can be taken.

It should seem, that if the bail have been compelled to pay the penalty in consequence of the recognizance becoming forfeited, they may sustain an action against him for money paid. (See *Fisher* v. *Fallows*, 5 *Esp.* 171.)

The persons of the bail are not liable under the recognizance. (*R.* v. *Dalton*, 2 *Stra.* 911; 2 *Hale*, 125.)

See further as to the forfeiture and estreating of recognizances, *post*, "*Fines and Recognizances*," Vol. III.

XIII. Forms.

Surrey. *The Queen against J. N. indicted for assaulting J. B.*

Take notice, that the above-named J. N. will personally be and appear before the Right Honorable Thomas Lord Denman, or such other judge as shall be sitting at chambers in Roll's Garden, Chancery Lane, on, &c. at the hour of eleven o'clock in the forenoon, and will then and there enter into a recognizance, with sufficient sureties, for his personal appearance at the next session of the peace to be holden for the county of Surrey, to answer an indictment preferred against him for assaulting the above-named J. B.; and the names of such sureties are T. N., No. 190, High Holborn, in the county of Middlesex, plumber, and J. N., of No. 189, High Holborn, in the said county, oilman. Dated, &c. (1.) Notice of bail to an indictment for an assault in Surrey, where indictment was found and certified, and defendant taken under a judge's warrant.

Yours, &c. W. P. attorney for the said J. N.

To J. B. the prosecutor above-named.

Middlesex, (to wit.) *The Queen against F. P.* } *for a nuisance.*

Take notice, that W. B. of No. 9, Booth's Court, Well Street, St Mary-le-bone, in the county of Middlesex, shoemaker, and R. W., of No. 12, Ogle Street, St. Mary-le-bone, in the said county, shoemaker, will, on next, the day of (2.) The like where indictment was for keeping a disorderly house.

14. *Forms.*

instant, at seven o'clock in the evening, before such of her majesty's justices of the peace as shall be sitting at the public office, in Marlborough Street, become bail for the personal appearance of the above-named defendant at the next session of the peace to be holden in and for the said county, to answer and plead to the indictment preferred and found the last session, for unlawfully keeping a common bawdy house. Dated this day of one thousand eight hundred and .

Yours, &c. J. N. solicitor for defendant.

To G. and L. N. solicitors for the prosecution.

The Queen against J. M. } on the prosecution of W. P.

(3.) Notice of putting in bail at judge's chambers, on indictment for assault.

Mr. W. P. Take notice, that I shall put in bail before Mr. Justice B., at his chambers in Roll's Garden, Chancery Lane, to-morrow, at six o'clock in the evening, for my appearance at the next general session of the peace, to be holden at the new sessions-house on Clerkenwell Green, in and for the county of Middlesex, then and there to answer and plead to the indictment you have preferred against me for assaulting you. The names of the bail are M. S. of Tavistock Street, near Covent Garden, mercer, and P. G. of the same place, victualler. Dated this day of , A. D. one thousand eight hundred and .

Yours, &c. J. M.

The Queen against C. D. } on the prosecution of A. B.

(4.) Notice of putting in bail on a bench warrant, before a justice.

Mr. A. B. Take notice, that on , the of , one thousand eight hundred and , at eleven o'clock in the forenoon, I shall put in bail before S. P., esquire, one of her Majesty's justices of the peace in and for the county of Middlesex, at his house, situate in New Brentford in the said county, for my appearance at the next general quarter sessions of the peace, to be held at the sessions-house, Clerkenwell Green, in and for the said county, then and there to answer and plead to the indictment preferred against me for assaulting you, and the names of my bail are, G. H., of, &c. smith, and J. K., of, &c. tailor. Dated this day of, A. D. one thousand eight hundred and .

Yours, &c. C. D.

In the Queen's Bench. *Middlesex.*

The Queen against C. D., indicted by the name of O. P.

(5.) Notice of putting in bail before a judge of Q. B. to an indictment in Q. B.

Take notice, that the defendant will put in bail on Saturday next, at eleven o'clock in the forenoon of the same day, before the Right Honourable Thomas Lord Denman, lord chief justice of her Majesty's Court of Queen's Bench, at Westminster, or such other judge of the said Court as may be then at his chambers in Roll's Gardens, Chancery Lane, London, for the appearance of the said defendant in the said Court to an indictment for certain misdemeanors, and to answer to the same, according to the course of the said Court; and the names and additions of the bail are J. H., of No. 10, Henrietta Street, Covent Garden, in the county of Middlesex, esquire, and J. O. of No. 10, Gray's Inn, in the said county of Middlesex, gentleman. Dated the day of , one thousand eight hundred and .

Your's, &c. O. P. solicitor for the defendant.

To Messrs G. and R. solicitors for the prosecution.

(6.) Recognizance of bail.

[Westmoreland.] BE it remembered, that on the day of in the year of the reign of O. A. of [yeoman,] A. B. of [yeoman,] and B. B. of [yeoman,] came before us [John Moore, Esquire,] and [Richard Burn, Doctor of Laws,] two of her Majesty's justices of the peace in and for the said county, one whereof is of the quorum, and severally acknowledged themselves to owe to our said lady the Queen, that is to say, the said A. O. [20l.] and the said A. B. and B. B. [10l.] each, to be respectively levied of their lands and tenements, goods and chattels, if the said A. O. shall make default in the performance of the condition endorsed [or underwritten].

[John Moore,
Richard Burn.]

The condition of this recognizance is such, that if the within [above] bound A. O. shall personally appear before the justices of our sovereign lady the Queen assigned to

keep the peace within the said county, and likewise to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, at the next general quarter sessions of the peace [or *before her Majesty's justices of gaol delivery, at the next general gaol delivery*] *to be holden in and for the said county, then and there to answer to our said sovereign lady the Queen for and concerning the* [*felonious taking and stealing of the property of A. M. of yeoman,*] *with the suspicion whereof the said A. O. stands charged before us the said justices, and to do and receive what shall by the Court be then and there enjoined to him, and shall not depart the Court without license, then the above* [*within*] *written recognizance shall be void.*

Taken and acknowledged the day and year above written, before us the undersigned
[*J. M.*
R. B.]

(7.) The like where the party is in prison.

[*Westmoreland.*] *BE it remembered, that on the day of in the year of the reign of before us* [*John Moore, Esquire,*] *and* [*Richard Burn, Doctor of Laws,*] *two of the justices of our said lady the Queen assigned to keep the peace within the said county, and one of us of the quorum, at* [*Grimeshill,*] *in the said county, did come A. B. and B. B. of in the said county,* [*yeomen,*] *and took in bail until the next gaol delivery to be holden in the said county, one A. O. of* [*labourer,*] *taken and detained in prison for suspicion of a certain felony* [*in stealing the property of*] *and took upon themselves such of the said A. B. and B. B. under the penalty of* [*20l.*] *of good and lawful money of Great Britain, of the goods and chattels, lands and tenements, of them and each of them, to the use of our said lady the Queen, her heirs and successors, to be levied if the said A. O. shall not personally appear at the said next gaol delivery before the justices of our said lady the Queen assigned to deliver the said gaol, to stand to right concerning the felony aforesaid, according to the law and custom of England. Given under our hands and seals, &c.*

[But the seal need not be, for they are judges of record; only it may be barely subscribed by them: or thus,]

Taken and acknowledged the day and year above written, before us the above said
[*John Moore,*
Richard Burn.]

(8.) Warrant of deliverance.

[*Westmoreland.*] [*John Moore, Esquire,*] *and* [*Richard Burn, Doctor of Laws,*] *two of the justices of and one of us of the quorum, to the keeper of her Majesty's gaol at in the said county, greeting. Forasmuch as A. O. of* [*labourer,*] *hath before us found sufficient sureties to appear before the justices of gaol delivery at the next gaol delivery to be holden in the said county, to answer to such things as shall be then on the behalf of our said sovereign lady objected against him, and namely, to the felonious taking of (for the suspicion whereof he was taken and committed to your said gaol); We command you on the behalf of our said sovereign lady that if the said A. O. do remain in your said gaol for the said cause, and for none other, then you forbear to detain him any longer, but that you deliver him thence, and suffer him to go at large, and that upon the pain that will thereon ensue. Given under our hands and seals at* [*Orton,*] *in the said county, the day of in the year .*

Lord *Hale* says, the advantage of this latter kind of bail is this, that it is not only a recognizance in a sum certain, but also a real bail, and they are his keepers, and may be punished by fine beyond the sum mentioned in the recognizance, if there be cause; and may seize him if they doubt his escape, and have him committed, and so be discharged of the recognizance. (2 *Hale*, 127.)

See forms of proceedings on *habeas corpus, post*, "*Habeas Corpus*," Vol. III.

Bailiff, see "*Constable*," *post*.

Bakers, see "*Bread*," *post*.

Ballast, see "*Rivers*;" "*Ships*," Vol. V.

Banishment, see "*Transportation*, Vol. VI.; "*Judgment*," Vol. III.

Bank Books, *Evidence by*, see "*Evidence*," Vol. II.

Bank Notes, *as to Forgery of*, see "*Forgery*," Vol. III.; *Larceny of*, see "*Larceny*," Vol. III.

Bank of England, *Embezzlement by Clerks of*, see "*Larceny*," Vol. II.

Bank Stock, see "*Forgery*," Vol. III.

Banks, &c. of Rivers, &c. *Injuries to*, see *post*, "*Malicious Injuries to Property*," Vol. V.

Banks for Savings.

9 Geo 4, c. 92, consolidating laws as to saving banks.

BY the 9 Geo. IV. c. 92, intituled "*An Act to Consolidate and Amend the Laws relating to Savings Banks*," passed the 28th July, 1828, after reciting "that it is expedient to amend the laws relative to savings banks in England and Ireland, and to consolidate the same in one act, and to make other provisions respecting savings banks;" it is enacted, "that 57 Geo. III. c. 105, 57 Geo III. c. 130, 58 Geo. III. c. 48, 1 Geo. IV. c. 83, 5 Geo. IV. c. 62, shall be and the same are hereby, from and after the twentieth day of November, one thousand eight hundred and twenty-eight, repealed provided nevertheless, that nothing herein contained shall invalidate or annul any payments, receipts, or appointments made, or proceedings had, or bonds or securities taken or entered into, or drafts, powers of attorney, certificates, orders, or other instruments whatsoever, executed under the authority of any of the hereby repealed acts."

Repeal of acts.

Not to invalidate appointments, &c. under preceding acts.

What institutions entitled to privileges and benefits of act.

Sect. 2. "And whereas certain banks for savings have been established in England and Ireland, for the safe custody and increase of small savings belonging to the industrious classes of his Majesty's subjects, and it is expedient to give protection to such institutions and the funds thereby established, and to afford encouragement to others to form the like institutions; be it enacted, that if any number of persons have formed or shall form any society in any part of England or Ireland, for the purpose of establishing and maintaining any institution in the nature of a bank to receive deposits of money for the benefit of the persons depositing the same, to accumulate the produce of so much thereof as shall not be required by the depositors, their executors or administrators, at compound interest, and to return the whole or any part of such deposit and the produce thereof to the depositors, their executors or administrators, (deducting out of such produce so much as shall be required for the necessary expenses attending the management of such institution,) but deriving no benefit whatsoever from any such deposit or the produce thereof, and shall be desirous of having the benefit of the provisions of this act, such persons shall cause the rules and regulations established or to be established for the management of such institution to be entered, deposited, and filed in

manner hereinafter directed, and thereupon shall be deemed to be entitled to and shall have the benefit of the provisions contained in this act: provided always, that the privilege of paying money into the banks of England or Ireland, and of receiving receipts for the same, shall be and the same is hereby declared to be extended to such institutions as may have formed or may hereafter form their rules and regulations according to the provisions of this act; and it shall and may be lawful for the trustees of such institutions respectively to invest any funds already accumulated by such institutions, and which shall not have been invested at the time of the passing of this act, and to receive receipts for the same in manner authorised by this act: provided nevertheless, that no such institution to be hereafter formed shall have or be entitled to the benefits of the provisions in this act contained, unless the formation of the same shall have been sanctioned and approved of by the justices of the county, riding, division, or place where such institution is intended to be held, at the general quarter sessions, and by the commissioners for the reduction of the national debt, or, on their behalf, by the comptroller-general or assistant comptroller acting under the said commissioners."

9 Geo. 4, c. 92.

Banks to be approved of by sessions and commissioners of national debt.

Sect. 3. "No such institution as aforesaid shall have the benefit of this act unless the rules and regulations for the management thereof shall be entered in a book or books to be kept by an officer of such institution to be appointed for that purpose, and which book or books shall be open at all seasonable times for the inspection of the persons making deposits in the funds of such institution, and unless such rules and regulations shall be fairly transcribed on parchment, and such transcript deposited with the clerk of the peace for the county, riding, division, or place wherein such institution shall be established; which transcript shall be filed by such clerk of the peace with the rolls of the sessions of the peace in his custody, and a certificate of the enrolment thereof shall be signed by such clerk of the peace on a duplicate copy, to be provided by and returned to such institution, on payment of a fee of ten shillings in respect thereof, provided the same be returned to such institution as aforesaid within the space of ten days then next following, and not otherwise; but nevertheless, that nothing herein contained shall extend to prevent any alteration in or amendment of any such rules or regulations so entered and deposited and filed as aforesaid, or repealing or annulling the same or any of them, in the whole or in part, or making any new rules or regulations for the management of such institution, in such manner as by the rules and regulations of such institution shall from time to time be provided, but such new rules or regulations, or such alterations in or amendments of former rules or regulations, or any order annulling or repealing any former rule or regulation, in the whole or in part, shall not be in force until the same respectively shall be entered in such book or books as aforesaid, and the transcript or transcripts thereof deposited with such clerk of the peace as aforesaid, who shall file and certify the same as aforesaid, on payment of a fee of five shillings."

Rules to be entered in a book and be open to inspection of depositors; and a copy thereof deposited with clerk of peace. (a)

Not to prevent alterations.

Alterations to be entered and deposited.

Sect. 4. "Before a transcript of the rules and regulations, or alterations in or amendments of former rules or regulations, for the management of any institution requiring the benefit of this act, shall be deposited with the clerk of the peace for the county, riding, division, or place wherein such institution shall be established, pursuant to the directions of this act, such transcript shall be submitted by the trustees or managers for the time being of each respective institution, and at the expense of the said institution, to a barrister at law to be appointed by the commissioners for the reduction of the national debt, for the purpose of ascertaining whether the same are in conformity to law, and with the provisions of this act; and that the said barrister shall give a certificate thereof, or point out in what part or parts they are repugnant thereto; and the fee to be paid to such barrister for perusing the rules, regulations, alterations, or amendments of each respective institution, and giving such certificate as aforesaid, shall not at any one time exceed the sum of one guinea; and such transcript shall be signed by two trustees, and shall,

Rules, &c before deposited with clerk of peace to be submitted to a barrister.

(a) So much of this act as requires the transcript of the rules to be deposited with the clerk of the peace, or filed by him, and a certificate to be returned to the institution, and that such transcript shall be laid before justices at sessions, is repealed by the 7 & 8 Vict. c. 83, s. 18, *post*, 360 *d*

9 Geo. 4, c. 92.

together with the certificate of such barrister as hereinbefore mentioned, be laid before the justices for such county, riding, division, or place, at the general or quarter sessions next after the time when such transcript shall have been so deposited; and it shall be lawful for such justices then and there present, after due examination thereof, to reject and disapprove of any part or parts thereof, or to allow and confirm the said transcript, or such part or parts thereof as shall be conformable to the true intent and meaning of this act, without requiring the certificate or approval of any other barrister; provided always that the said justices shall signify such rejection or disapproval of any one or more of the rules, orders and regulations contained in such transcript, by the words 'rejected' or 'disapproved' written opposite such rule or rules, order or orders, regulation or regulations, and signed by the chairman of such sessions; and such rule or rules, order or orders, regulation or regulations, as shall be so rejected or disapproved, shall not be in force from the time of such rejection or disapproval, any thing in this act, or in any such rules, orders and regulations to the contrary notwithstanding: provided always, that the said clerk of the peace do, within the space of ten days next after such rejection or disapproval, give notice thereof in writing to the two trustees of such institution, by whom the transcript of such rules, orders and regulations shall be signed as aforesaid; and provided always, that nothing herein contained shall be construed to require any rule making any alteration in the hours of attendance at any such institution as aforesaid to be laid before such barrister as aforesaid, previous to the inrolment thereof."

Session may reject rules.

Manner of signifying such rejection.

Clerk of peace to give notice of such rejection.

Rules, when entered and deposited, to be binding on members and depositors.

Sect. 5. "All rules and regulations from time to time made and in force for the management of such institutions as aforesaid, and duly entered in such book or books as aforesaid, and deposited with such clerk of the peace as aforesaid, shall be binding on the several members and officers of such institution, and the several depositors therein and their representatives, all of whom shall be deemed and taken to have full notice thereof by such entry and deposit as aforesaid: and the entry of such rules and regulations in such book or books as aforesaid, or the transcript thereof deposited with such clerk of the peace as aforesaid, or a true copy of such transcript examined with the original, and proved to be a true copy, shall be received as evidence of such rules and regulations respectively in all cases; and no certiorari shall be brought or allowed to remove any such rules or regulations into any of his majesty's courts of record; and every copy of any such transcript deposited with any clerk of the peace as aforesaid shall be made without fee or reward, except the actual expense of making such copy; and such copy shall not be subject to any stamp duty."

Copy of transcript to be received as evidence.

No certiorari.

Treasurer or manager, &c. not to derive benefit from institution.

Sect. 6. "No such institution as aforesaid shall have the benefit of this act, unless it shall be expressly provided by the rules and regulations for the management thereof, that no person or persons, being treasurer, trustee, or manager of such institution, or having any control in the management thereof, shall derive any benefit from any deposit made in such institution, save only and except such salaries and allowances or other necessary expenses as shall, according to such rules and regulations, be provided for the charges of managing such institution, and for remuneration to officers employed in the management thereof, exclusive of the treasurer or treasurers, trustee or trustees, manager or managers, or other persons having direction in the management of such institution, who shall not directly or indirectly have any salary, allowance, profit, or benefit whatsoever therefrom, beyond their actual expenses for the purposes of such institution."

Treasurer, &c. to give security. (a)

Sect. 7. "That every treasurer, actuary, or cashier, who shall be intrusted with the receipt or custody of any sum of money subscribed or deposited for the purpose of such institution, or any interest or dividend from time to time accruing therefrom, and every officer or other person receiving any salary or allowance for their services from the funds of any savings banks, unless he shall already have given good and sufficient security, shall give good and sufficient security, to be approved of by not less than two trustees and three managers of such savings banks, for the just and faithful execution of such office or trust, and such security shall be given by bond or bonds to the

(a) See the 7 & 8 Vict. c. 83, s. 17, *post*, 360 c

clerk of the peace for the county, county of a city, or county of a town, riding, division, or place, or to the town clerk of the place where such institution shall be established, for the time being, without fee or reward; and in case of forfeiture it shall be lawful for the trustees or managers for the time being of such institution to sue upon such bond or bonds in the name of such clerk of the peace or town clerk for the time being, and to carry on such suit at the costs and charges and for the use of the said institution, fully indemnifying and saving harmless such clerk of the peace or town clerk from all costs and charges in respect of such suit; and no bond to be so given shall be subject to or charged or chargeable with any stamp duty whatever. (a)

9 Geo. 4. c. 92.

No stamp.

Sect. 8. "All monies, goods, chattels, and effects whatever, and all securities for money or other obligatory instruments, and evidences or muniments, and all other effects whatever, and all rights or claims belonging to or had by such institution, shall be vested in the trustee or trustees of such institution for the time being, for the use and benefit of such institution, and the respective depositors therein, their respective executors or administrators, according to their respective claims and interests, and after the death or removal of any trustee or trustees, shall vest in the succeeding trustee or trustees, for the same estate and interest as the former trustee or trustees had therein, and subject to the same trusts, without any assignment or conveyance whatever; and also shall, for all purposes of action or suit, as well criminal as civil, in law or in equity, in anywise touching or concerning the same, be deemed and taken to be, and shall in every such proceeding (where necessary) be stated to be, the property of the person or persons appointed to the office of trustee or trustees of such institution for the time being, in his, her, or their proper name or names, without further description; and such person or persons shall and they are hereby respectively authorised to bring or defend, or cause to be brought or defended, any action, suit or prosecution, criminal as well as civil, in law or equity, touching or concerning the property, right, or claim aforesaid of or belonging to or had by such institution; and such person or persons so appointed shall and may, in all cases concerning the property, right, or claim aforesaid of such institution, sue and be sued, plead and be impleaded, in his, her, or their proper name or names, as trustee or trustees of such institution, without other description; and no such suit, action or prosecution shall be discontinued or abate by the death of such person or persons, or his or their removal from the office of trustee or trustees as aforesaid, but the same shall and may be proceeded on by the succeeding trustee or trustees in the proper name or names of the person or persons commencing the same, any law, usage, or custom to the contrary notwithstanding; and such succeeding trustee or trustees shall pay or receive like costs, as if the action or suit had been commenced in his or their name or names, for the benefit of, or to be reimbursed from, the funds of such institution."

Effects of institution vested in trustees.

Actions, &c

Reimbursing Justices.

Sect. 9. "No trustee or manager shall be personally liable, except for his own acts and deeds, nor for any thing done by him in virtue of his office in the execution of this act, except in cases where he shall be guilty of wilful neglect or default."

Liability of trustees or manager.

Sect. 10. "All and every person and persons who shall have or receive any part of the monies, effects, or funds of or belonging to such institution, or shall in any manner have been or shall be intrusted with the disposition, management, or custody thereof, or of any securities, books, or papers, or property relating to the same, his, her, or their executors, administrators, and assigns respectively, shall, upon demand made in pursuance of any order of not less than two trustees and three managers of such institution, or at any general meeting of the trustees or managers thereof, give in his, her, or their account or accounts to the said trustees or managers, or to such general

Treasurer and trustees, &c. to account and deliver up effects when required.

(a) It is now by virtue of this clause obligatory on every treasurer, &c. to give security, and not as heretofore, when it was not necessary unless the rules required it.

9 Geo. 4, c. 92.

meeting of such institution, or to such other person or persons who shall be nominated to receive the same, to be examined and allowed or disallowed by the said trustees or managers respectively, and shall, on the like demand, pay over all the monies remaining in his or their hands, and assign and transfer or deliver all securities and effects, books, papers, and property, in his or their hands or custody, to such person or persons as the said trustees or managers shall appoint, and in case of any neglect or refusal to deliver such account, or to pay over such monies, or to assign, transfer, or deliver such securities, effects, funds, books, papers, or property, in manner aforesaid, it shall be lawful to and for the trustee or trustees of such institution for the time being to exhibit a petition to the justices of the peace at their general or quarter sessions of the peace for the county, riding, division, or place wherein such institution shall be established, who shall and may proceed thereupon in a summary way, and make such order therein, upon hearing all parties concerned, as to such Court in their discretion shall seem just, which order shall be final and conclusive; and all assignments, sales, and transfers made in pursuance of such order, shall be good and effectual in law to all intents and purposes whatsoever."

How compelled to do so.

Trustees to invest money in Bank of England or Ireland, and in no other security.

Sect. 11. "The several sums of money belonging to any savings bank, which the trustees of such savings bank respectively are authorised to invest under this act, or under any rules or regulations of any such savings bank, shall be paid into and invested in the Bank of England or the Bank of Ireland, as the case may require, in the names of the commissioners for the reduction of the national debt, according to the provisions of this act enabling such trustees to make investments in the names of the said commissioners, and no such sum or sums shall be paid or laid out by the trustees of such savings bank in any other manner or upon any other security whatever, except such sums of money as from time to time shall necessarily remain in the hands of the treasurer or treasurers to answer the exigencies thereof: provided always, that nothing herein contained shall restrain or prevent any depositor, or any trustee or trustees acting on behalf of any depositor or depositors of any friendly society, or any charitable or provident institution or society, from withdrawing from any such savings bank any sum or sums of money which shall have been deposited by such depositor, friendly society, charitable or provident institution or society, and investing the same in any other securities;(a) provided always, that the trustees of any institution already established, or which shall take the benefit of this act in manner hereinbefore provided, shall be and they are hereby empowered to pay into the Banks of England or Ireland, as the case may be, any sum or sums of money, not being less than fifty pounds, to the account of the commissioners for the reduction of the national debt, upon the declaration of the trustees of such institution, or any two or more of them, that such monies belong exclusively to the institution for which such payment is intended to be made, whether such monies shall have been deposited therein before the passing of this act, or thereafter shall be deposited therein; and the cashier or cashiers of the Banks of England and Ireland respectively are hereby required to receive all such monies, and to place the same into the account raised in the names of the said commissioners in the books of the Banks of England and Ireland respectively, denominated 'The Fund for the Banks for Savings:' provided always, that previous to any payment being made into the Banks of England or Ireland as aforesaid, the person or persons applying for that purpose shall in all cases produce to the officer of the said commissioners, at their office in London or Dublin, as the case may be, an order under the hands of two of the trustees of such institution on the account of which such payment is to be made."

Not to prevent depositors from withdrawing their money.

Trustees may pay into Banks of England or Ireland not less than 50*l.* to account of national debt.

Previous to payments order of two trustees to be produced

Not to prevent

Sect. 12. "Nothing in this act contained shall extend to prevent the trus-

(a) This is the same as the 57 Geo. III. c. 105, s. 9; 57 Geo. III. c. 130, s. 9; and 5 Geo. IV. c. 62, s. 27; with an exception of monies remaining in hands of treasurer to answer exigencies.

tees of any savings bank, already established or to be established, receiving any sum or sums of money from any depositor for any purpose except to be paid into the bank to the account of the commissioners for redemption of the national debt; and that it shall be lawful for such trustees to apply any such sum or sums of money in any other manner for the benefit of the several depositors, according to the rules and regulations of such savings banks respectively; any thing in this act contained to the contrary notwithstanding."

9 Geo. 4, c. 92.

trustees from receiving money to be applied in any other manner.

Sect. 13. "In cases where any banks for savings have been or shall be established in any town or place, and other smaller banks have been or shall be established in the neighbourhood of such town or place as branch banks thereof, and such branch banks, by their treasurers, have paid or shall pay any sums into the bank in any such town or place as a central bank, it shall and may be lawful for the said trustees, or any two of them, of any such central bank, to pay into the bank of England or Ireland, in manner prescribed by this act, along with the monies belonging to such central bank, any sum or sums of money belonging to and on account of any such branch bank: provided always, that the treasurer of such branch banks shall certify to the treasurer of such central bank, that the amount contributed by any one subscriber to any such branch bank in any one year does not exceed the proportions authorised by this act."

Central banks may invest the money of branch banks.

Sect. 14. "If any order or declaration produced to the said officer for the purpose of paying monies into the banks of England or Ireland, to the account of the said commissioners as aforesaid, shall contain any matter or thing which be false or untrue, then and in every such case the sum so paid shall be forfeited to the said commissioners."

Penalties on false declaration to obtain receipts.

Sect. 15. "The said commissioners shall cause all the monies paid into the Banks of England and Ireland respectively, and placed to their account in pursuance of the provisions of this act, to be invested from time to time, under such regulations as the said commissioners shall direct, in the purchase of bank annuities or exchequer bills, or in either of them, in their names, and to be carried to the account hereinbefore provided; and the interest which shall arise from time to time and become due thereon shall in like manner be invested in the purchase of government annuities or of exchequer bills as aforesaid."

Monies paid in to be invested in bank annuities or exchequer bills.

Sect. 16. "On the twentieth day of November one thousand eight hundred and twenty-eight, the interest payable on the receipts issued to the trustees of savings banks by the commissioners for the reduction of the national debt shall cease; and that from and after the said twentieth day of November, all receipts issued prior to that day shall carry interest at the rate of two pence halfpenny *per centum per diem;* and that from and after the twentieth day of November one thousand eight hundred and twenty-eight, upon the payment of any sum or sums of money into the Banks of England or Ireland to the account of the said commissioners by the trustees of any savings bank, it shall be lawful for the officer or officers of the said commissioners in that behalf, and he and they is and are hereby authorised and empowered to issue, upon every such payment being made, a receipt, signed by one of the cashiers of the governor and company of the Bank of England or Ireland respectively, for the amount of such payment, carrying interest at the rate of two pence halfpenny *per centum per diem* from the day of such payment inclusive, payable, with the principal, at the Banks of England and Ireland, whenever the same shall be required or drawn for in manner directed by this act; and such receipt shall be dated on the day on which the payment of any such sum or sums of money shall be made respectively; and every such receipt shall be in such form as shall be from time to time directed by the said commissioners; and the principal and interest of all sums mentioned in any receipt shall be charged and chargeable upon, and the same are hereby charged and made payable out of, all or any monies standing in any account in the names of the said commissioners, or out of any monies produced by the sale of any stock or annuities, funds or exchequer bills, standing in their names in the books of the Bank of England and Ireland respectively, as the said commissioners shall from time to time direct."

National debt commissioners, their officer shall give a receipt for the same, carrying interest at 2½d. per cent. per diem.

9 Geo. 4, c. 92.

Such interest to be calculated half-yearly, and carried to account of savings banks as additional principal.

Sect. 17. "All interest which shall become due and payable upon any sum of money mentioned in any such receipt, upon the twentieth day of November and the twentieth day of May in every year next after the date of any such receipt, shall be from time to time calculated and computed by the officer of the said commissioners, and shall in each and every year be placed to the credit of the savings bank on whose account any such sum of money was paid, within six weeks from such twentieth day of November and twentieth day of May respectively, and shall be carried to and written on the account of such savings bank, and shall become principal, and shall from thenceforth carry interest as principal money paid into the said Banks of England or Ireland respectively on the account of such savings bank; and a receipt, according to such form as the said commissioners shall approve, shall be signed by the officer of the said commissioners, and shall be issuable by the said officer half-yearly within six weeks after such twentieth day of November and twentieth day of May respectively (and such receipts shall bear date the twenty-first day of November and twenty-first day of May respectively), for the amount of such interest so credited and made principal as aforesaid, as if the amount thereof had been a payment made by the trustees of such savings bank to the account of the said commissioners: provided always, that no interest shall be computed or calculated on the fractional part of a pound, or any sum less than a pound, of the half-yearly balance standing in the books of the said commissioners on account of any savings bank on any twentieth day of November or twentieth day of May respectively; provided also, that it shall be lawful for the managers and trustees of any such savings bank, if they shall so think fit, to direct that all interest which shall become due and payable to each depositor on any sum of money deposited in such savings bank shall yearly, or twice in each and every year, be calculated and computed by the trustees of such savings bank, or such person or persons as they shall appoint, and shall be carried to the credit of the person or persons depositing the said sum or sums of money, and shall become principal, and shall from thenceforth carry interest in all respects as other principal money deposited in the said banks, or as if the said sum of interest so calculated had actually been paid to the said depositors, and by them repaid to the said trustee or trustees; any law, statute, or usage to the contrary notwithstanding."

No interest on fractional parts of a pound.

Interest arising to depositors may be calculated yearly or twice a year, and carried to their credit as principal.

Before drawing for money, trustees shall sign appointment of agent to receive same, and appointment to be deposited with commissioners.

Sect. 18. "Before any trustees of any savings bank shall make any order or draft for payment, by the said commissioners, of any sum or sums of money under this act, the trustees of such savings bank shall make, give, sign, and execute an appointment under the hands and seals of not less than two of such trustees, and the execution of which shall be attested by two managers of the same savings bank, empowering and authorising some person or persons named in such appointment to be agent or agents for receiving all and every such sum and sums of money as such trustees shall from time to time require to be paid by such commissioners; and every such appointment shall be produced by or on behalf of the person or persons named therein to the officer of the said commissioners, fourteen days at least before the payment of any sum or sums of money on account of such savings bank, and such appointment shall remain deposited in the office of such officer; and every such appointment shall be made in such form, and under such regulations, as shall from time to time be directed or required or approved of by the said commissioners or their officer: (a) provided always, that it shall and may be lawful for the trustees of any savings bank by whom any such appointment shall be made, given, signed, and executed, or for the survivors or survivor of such trustees, to revoke such appointment by any certificate or other instrument under the hands and seals or hand and seal of such trustees or trustee, attested by two managers of such savings bank, and in such form and under such regulations as shall be directed or required or approved of by the said commissioners or their officer; and in case of the decease of every such trustee

Appointments may be revoked, and others granted from time to time

(a) The same as the 1 Geo. IV. c. 83, s. 4, and 5 Geo. IV. c. 62, s. 4, the power to make appointment being given to not less than *two* trustees, instead of not more than *four*.

except one, it shall and may be lawful for the surviving trustee, together with any other trustee or trustees, being not less than two, of the said savings bank, and in case of the decease of all such trustees, or in case all such trustees shall decline or refuse to act, it shall and may be lawful for not less than two other trustees of the said savings bank, from time to time to make, give, and execute an appointment in manner aforesaid, re-appointing the person or persons named in such appointment, or any other person or persons in his or their room or stead, to be the agent or agents of such trustees; and every such certificate or instrument of revocation, and every such new appointment, shall be produced to the officer of the said commissioners by the person or persons named in such new appointment, fourteen days at least before the payment of any sum or sums of money to the person or persons named in such new appointment, and shall remain deposited in the office of such officer." 9 Geo. 4, c. 92.

Sect. 19. "It shall and may be lawful for the trustees of any savings bank from time to time (by any draft or order in writing under the hands of any two trustees of such savings bank, attested by two other trustees or managers, or by any two credible witnesses, according to such form as the said commissioners for the reduction of the national debt shall from time to time direct), to require that the whole or any part of the principal sum or sums of money standing in the books of the said commissioners to the credit of the trustees of such savings bank respectively shall be paid to such person or persons as such trustees shall from time to time require, being the agent or agents named in some appointment executed under this act or the said recited acts, and lodged with the officers of the said commissioners, as hereinbefore mentioned, and then remaining in force; and every such draft or order shall be addressed to the said commissioners, and upon the same being produced to the officer of the said commissioners, the said officer shall, within five days after the production thereof, upon the back of such draft or order, indorse and sign an order, in such form as shall or may from time to time be directed and required by the said commissioners, for the payment of the sum mentioned in the draft or order of such trustees, together with the amount of all interest due on such sum up to the day immediately preceding the day of the date of the order of such officer, and which order of such officer, previous to the issuing thereof, shall be entered and countersigned by the clerk or other proper officer making such entry, and shall be addressed to the cashiers of the governor and company of the bank of England or Ireland, as the case may be; and such cashiers, or one of them, shall, upon the production of such order, pay the sum mentioned therein to the person or persons mentioned in the draft or order of the said trustees; and the signature of such person or persons, jointly or severally, shall be a sufficient discharge to the said commissioners, and to the said governors and company respectively; and all payments made in pursuance of such drafts or orders respectively shall be deemed and taken to be payments made by the said commissioners to the trustees of such savings bank respectively, according to the numerical order and priority of date in which the original receipts of money deposited on account of such savings bank respectively shall have been issued to the trustees thereof respectively in manner hereinbefore mentioned." Trustees may draw for sum placed to their account, by drafts on commissioners, to be indorsed by their officer, with the interest added thereto, and paid by the bank.

Sect. 20. "That whenever the sum to be drawn for by the trustees of any savings bank shall exceed 5,000*l.* the draft or order for that purpose shall be signed by not less than four such trustees, and that the signature of each and every of the said four trustees shall be separately attested by at least one manager of such savings bank, or by some one other credible person, and that any manager or other person attesting the signature of any one of the said four trustees shall not be an attesting witness to the signature of any other of such four trustees: provided also, that whenever the sum or sums drawn for by one or more drafts by the trustees of any savings bank in England and Ireland respectively, or by the trustees of any friendly society in England, shall exceed the sum of 10,000*l.* the amount of such draft or drafts (if more than one) shall not be payable or be paid by the officer of the said commissioners until the expiration of fourteen days next after the day when the draft or drafts for such sum or sums shall be produced to the said officer." Drafts above 5,000*l.* to be signed by four trustees, and attested. Drafts for 10,000*l.* not to be paid until after fourteen days.

9 Geo. 4, c. 92.

Officer not to issue in one day orders for more than 10,000*l.* for same bank.

Trustees appearing in person may receive payments of drafts instead of agents.

Sect. 21. "Such officer shall be and he is hereby restrained from issuing any order or orders for payment as aforesaid, bearing the same date, upon any one day, on account of the same savings bank or friendly society, exceeding in amount the principal sum of 10,000*l*; any thing hereinbefore contained to the contrary thereof in anywise notwithstanding: provided also, that in case any one or more trustee or trustees of any savings bank who shall have made, given, signed, and executed any such appointment, shall at any time appear in person at the office of the said commissioners in England or Ireland respectively, and require payment of any sum or sums of money which might be required by the person or persons authorised to receive the same by such appointment, or if any trustee or trustees of any savings bank shall appear in person, where no such appointment shall have been made, and if such trustee or trustees so appearing shall produce a draft or order, signed by any two or more trustees of such savings bank, for any sum under 5,000*l.* or by any four or more trustees for sums exceeding 5,000*l.*, no such trustee or trustees being himself or themselves a party or parties who signed such draft or order, and if the identity of the person of the trustee or trustees so appearing shall be ascertained to the satisfaction of the said commissioners or their officer, it shall be lawful for the said officer to direct payment to be made to such trustee or trustees so appearing of any sum or sums required to be paid by such order or draft, in like manner as if the person or persons authorised by such appointment to receive the same had required such payment; anything hereinbefore contained to the contrary in anywise notwithstanding; provided nevertheless, that notwithstanding the payment made to such trustees or trustee appearing in person, on the appointment of such person or persons as aforesaid, the appointment shall remain in full force and virtue until revoked by the trustees as hereinbefore mentioned."

Trustees, &c. to ascertain amount of surplus fund, and distribute or appropriate same.

Sect. 22. "Within six weeks after the twentieth day of November, in the year of our Lord one thousand eight hundred and twenty-eight, the trustees and managers of the different savings banks already established in England and Ireland shall ascertain the amount of the increased stocks or funds of their respective banks up to the said twentieth day of November one thousand eight hundred and twenty-eight, and shall, as soon afterwards as conveniently can be, after retaining so much thereof as may be necessary for or towards the future purposes and management of the said savings banks respectively, appropriate the same in the manner provided for by their respective rules and regulations made before the passing of this act; or in the event of no provisions having been made by such rules and regulations, then in such manner as the trustees or managers, or the major part of them, assembled at any general meeting to be convened according to the respective rules and regulations of such savings banks, shall think fit and proper; any thing herein contained to the contrary notwithstanding."

Surplus to be paid over to commissioners for reduction of national debt.

Sect. 23. "In all cases where the joint stock or property of any savings bank, arising from deposits made under this or any former act, shall, from and after the twentieth day of November one thousand eight hundred and twenty-eight, be increased by the interest received beyond the rate of interest payable to the depositors by the rules and regulations of such savings banks, or by any other means, the said trustees or managers, after deducting all such expenses as they may deem proper, shall, within six months after the twentieth day of November in each year, ascertain, certify, and pay over to the said commissioners the amount of such increased stock and property, reserving such portion as may appear necessary to meet current expenses; and the amount of such surplus, which shall be ascertained, certified, and paid over (after such deduction as aforesaid,) shall be discharged from the account of such savings bank standing in the books of the said commissioners, and the said commissioners shall keep a separate and distinct account of such surplus so discharged from the account of the said savings banks respectively as aforesaid, and apply the same in such manner, and under such regulations, from time to time, as any other monies under the provisions of this act: provided always, that it shall and may be lawful for the trustees or managers of the said respective savings banks to claim and receive of and from the

said commissioners, (who are hereby required to pay the same upon such certificate as they may appoint,) for the purposes of the institution, any sum of money equal to the whole or any part of the principal monies which may have been so discharged from the account of such savings banks as aforesaid."

9 Geo. 4, c. 92.

Sect. 24. "From and after the twentieth day of November one thousand eight hundred and twenty-eight, the interest payable to depositors by the trustees or managers of any savings bank shall not exceed the rate of twopence farthing *per centum per diem*."

Interest not to exceed 2¼d. per cent. per diem.

Sect. 25. "In case the trustees or managers of any such institution shall receive or shall have received any deposit of money from or for the benefit of any person under the age of twenty-one years, it shall be lawful for the trustees or managers of such institution to pay such person his or her share and interest in the funds of such institution; and the receipt of such person shall be a sufficient discharge, notwithstanding his or her incapacity or disability in law to act for him or herself."

Savings of minors may be invested.

Sect. 26, reciting, "And whereas deposits in saving banks may have been made and may be made by married women, without notice that they are married women, and deposits may have been made and may be made by women who may have afterwards married;" enacts, "that it shall be lawful for the trustees in any savings bank to pay any sum of money in respect of any such deposit to any such woman, unless the husband of such woman, or his representatives, shall give to such trustees notice of such marriage, and shall require payment to be made to him or them."

Deposits made by married women.

Sect. 27. "From and after the twentieth day of November one thousand eight hundred and twenty-eight, it shall and may be lawful for the trustees or treasurer of any charitable or provident institution or society in England or Ireland, or charitable donation or bequest, for the maintenance, education or benefit of the poor, from time to time to subscribe any part of the funds of such institution or society into the funds of any savings banks, if the trustees or managers thereof shall be willing to receive the same, to the amount of one hundred pounds *per annum*, provided the amount of the sum to be invested by such institution or society shall not at any time exceed the sum of 300*l.* in the whole, exclusive of interest."

Charitable societies may invest sums not exceeding 100*l.* per ann. or 300*l.* in the whole.

Sect. 28. "It shall be lawful, if the trustees or managers of any savings banks shall think proper, for any friendly society established under and by virtue of any act or acts relating to friendly societies from time to time to subscribe the whole or any part of the funds of such friendly society, as they shall from time to time direct, through their treasurer, steward, or other officer or officers, into the funds of any institution which shall take the benefit of this act, and which shall be willing to receive the same, under such terms and conditions as shall be specially provided for that purpose by the rules, orders and regulations of such institutions; provided always, that it shall not be lawful for the said trustees to receive any sum or sums from any friendly society formed and enrolled after the passing of this act which may exceed the sum of 300*l.*, principal and interest included, nor to pay any interest on the same whenever such sum or sums shall amount to or continue at the said sum of 300*l.* or upwards.

Friendly societies may subscribe portion of their funds into savings banks.(*a*)

Proviso not exceeding 300*l.*

Sect. 29. "The receipt or discharge of the treasurer, trustee or other officer of such friendly society, charitable or provident institution or society, for the time being, for any money paid according to the requisition of such treasurer, trustee or other officer apparently authorised to require such payment, shall be a sufficient discharge for the same; and the institution in which such deposit shall be made shall not be responsible for any misapplication of any such money, donation or bequest, by the person or persons to whom the same shall be so paid, or for any want of authority of the person or persons requiring or receiving such payment."

Receipt of treasurer, &c. of friendly society or charity a sufficient discharge.

Sect. 30. "No person who is or shall be a member of any friendly society established or to be established under and by virtue of any act or acts relating

Members of friendly or charitable societies not

(*a*) See *post*, "*Friendly Societies*," Vol. III.

9 Geo. 4, c. 92.

Liable to disability in those societies by subscribing to an institution under this act.

Proviso for depositors belonging to societies.

to friendly societies, or a member of any of the charitable institutions hereinbefore mentioned, shall, by reason of such person being or becoming a depositor in any institution taking the benefit of this act, be considered as subject or liable to any penalty, forfeiture or disability, declared or expressed, or intended so to be, by or in the rules, orders or regulations of such friendly society; any rules, orders or regulations of such friendly society made, or hereafter to be made, to the contrary notwithstanding; provided also, that no depositor shall be subject or liable to any penalty or forfeiture on account of his belonging to or being interested in the funds of any friendly society or charitable society deposited in any other savings bank."

Regulations, &c. of act extended to payments, &c. under 30 Geo. 3, c. 128.

Sect. 31. "All regulations and provisions in this act contained, relative to money paid into the Bank of England, and receipts issued on account thereof, and also to the application of all such money by the said commissioners, shall be applicable to payments made and receipts issued under the authority of an act passed in the fifty-ninth year of the reign of his late Majesty King George the Third, intituled 'An Act for the further Protection and Encouragement of Friendly Societies, and for preventing Frauds and Abuses therein,' except with respect to all such friendly societies as may have been formed and enrolled previous to the passing of this act."

No sum to be subscribed without name and profession, &c. of depositor.

Sect. 32. "No sum shall be paid or subscribed into any savings bank by any person or persons, by ticket or number or otherwise, without disclosing his or her name, together with his or her profession, business, occupation, calling and residence, to the trustees or managers of such savings bank; and the trustees or managers of every savings bank are hereby required to cause the name of such depositor, together with his or her profession, business, occupation, calling and residence, to be entered in the books of the institution."

Persons allowed to subscribe as trustees on behalf of others.

Sect. 33. "It shall and may be lawful for the trustees or managers of any savings bank to receive from any person or persons acting as trustee or trustees on behalf of any depositor or depositors, whether such person or persons is or are himself or themselves a depositor or depositors or not, any sum or sums not exceeding the annual amount hereinafter mentioned, provided that such trustee or trustees shall make such declaration on behalf of such depositor or depositors, and subject to the like conditions, as by this act is required in the case of any person or persons making any deposit on his or her own account; and all deposits made by any such trustee or trustees shall be inserted in the books of such savings bank in the joint names of such trustee or trustees and of the person or persons on whose account such sum shall be so deposited; and the receipt and receipts of such trustee or trustees, or the survivor of them, or the executors or administrators of any sole trustee or surviving trustee, with or without the receipt of the person or persons on whose account such sum may have been deposited, shall be a good and valid discharge to the trustees or managers of the institution."

Subscribers to one savings bank shall not subscribe to any other.

Declaration to be made at time of subscription.

Sect. 34. "It shall not be lawful for any person or persons who shall have made any deposit in, or any subscription to, or who shall be entitled to any benefit from, the funds of any savings bank, to make any deposit in or to subscribe any sum into the funds of any other savings bank, or to open any new account in the said savings bank; and that every person desirous of making any deposit in or any subscription to any savings bank, shall at the time of making the first deposit in any savings bank, and at such other time or times as such depositor shall be required so to do by the trustees or managers of any such savings bank, sign, either by themselves, or in case of infants under the age of seven years, by some person to be approved of by the trustees or managers, or by such other person as they shall appoint, a declaration in such form as shall be directed or approved of by the commissioners or other proper officer, that the person or persons on whose behalf any such first deposit or subscription shall be required to be made is not or are not entitled to any deposit, or any such subsequent deposit or subscription in or any benefit from the funds of any savings bank, other than that into which such deposit or subscription shall be made, or any other funds in the said savings bank; and in case any such declaration shall not be true, or if any person

shall at any time have or hold or be possessed of any deposit or funds in more than one savings bank within the United Kingdom, every such person shall forfeit and lose all right and title to any deposit in or to any funds of any and every such savings bank; and the managers and trustees of such savings bank shall and they are hereby required in such case to close the account of such depositor, and to cause the sum or sums so forfeited to be forthwith paid into the Bank of England or Bank of Ireland, as the case may be, to the account of the commissioners standing in the books of the governor and company of the said banks respectively, under the title of 'The account of the commissioners for applying certain sums of money annually to the reduction of the national debt;' and the cashier or cashiers of the said governor and company is and are hereby required to receive all such sums, and to place the same to the said account, to be applied in like manner as all other money placed to the said account; and every such declaration so made shall be filed and kept and preserved by the trustees of every such savings bank; and a printed notice of such regulation and prohibition shall be affixed in the office or place appointed for the receiving of deposits to any savings bank, in such form as the said commissioners or their proper officer shall from time to time direct, or require or approve."

9 Geo. 4, c. 92.

Penalty on false declaration, forfeiture of deposit to sinking fund.

Declarations to be filed.

Sect. 35. "From and after the twentieth day of November, one thousand eight hundred and twenty-eight, it shall not be lawful for the trustees of any savings bank to receive from any one present or future depositor any sum or sums exceeding 30*l.* in the whole, exclusive of compound interest, in any one year, ending on the twentieth day of November, nor to receive from any depositor any sum or sums of money whatever, which shall make the sum to which such depositor shall be entitled exceed the sum of 150*l.* in the whole: provided always, that whenever the sum or sums standing in the name of any depositor shall amount in the whole to 200*l.* principal and interest included, that thenceforth no interest shall be payable on any such deposits so long as it shall continue to amount to the said sum of 200*l.*"

Trustees not to receive from one depositor more than 30*l.* in any year, nor more than 150*l.* in whole.

When deposits and interest amount to 200*l.* interest to cease.

Sect. 36. "Nothing in this act contained shall prevent or be construed to prevent the trustees of any savings bank from paying interest to any depositor whose deposit shall, on the day of the passing of this act, amount to or exceed the sum of 200*l.*"

Not to affect deposits of 200*l.* at passing of act.

Sect. 37. "The said trustees shall not receive from any such depositor any fresh or additional deposit, so long as the sum or sums to which such depositor shall be entitled shall amount to or exceed the sum of 150*l.*"

Trustees not to receive from persons whose deposit amounts to 150*l.*

Sect. 38. "It shall be lawful for any depositor, after having withdrawn any sum or sums of money from and out of any savings bank, to re-deposit in any such savings bank, at any time or times within any one year, reckoning from the twentieth day of November, any sum or sums of money, provided such sum or sums of money re-deposited, and any previous deposit or deposits which shall have been made by such depositor in the course of the year, taken together, shall not exceed at any time in such year the sum of 30*l.* additional principal money bearing interest; and the trustees and managers of savings banks are hereby prohibited from receiving from any depositor any sum or sums which shall make the said depositor entitled at the end of such year to more than the said additional sum of 30*l.* within twelve calendar months, reckoning from the twentieth day of November as aforesaid."

Depositors may withdraw deposits, and again subscribe, provided same does not in any year exceed 30*l.*

Sect. 39. "At any time after the passing of this act it shall and may be lawful for any depositor in any savings bank to withdraw from such savings bank the whole of his or her deposits and interests thereon at any one time (but not in parts or shares), for the purpose of investing the same in any other savings bank; and in such case it shall be lawful for the trustees or managers of any such savings bank from which such deposit shall be intended to be withdrawn, or any one or more of them, and they are hereby required, to grant to any such depositor a certificate, under the hands of such one or more trustee or trustees, manager or managers respectively, attested by the secretary or actuary of such savings bank, and such certificate shall state the whole amount of the deposit and interest due to such depositor in such savings bank, and shall be in such form as shall be directed or approved of

Deposits may be withdrawn from one savings bank to be placed in another, and how.

9 Geo. 4, c. 92.

by the commissioners for the reduction of the national debt, or their officer; and upon the production of such certificate, signed as herein-before directed, to the trustees or managers of the savings bank into which such deposit and interest is intended to be removed, the person applying shall, and he or she is hereby required to indorse his or her name on the back of such certificate, in the presence of one or more of the trustees or managers of such savings bank, and such indorsement shall be attested by one of such trustees or managers; and if such trustee or trustees, or manager or managers, shall be satisfied that such certificate is authentic, and that no abuse is intended thereby, it shall and may be lawful for the trustees or managers of such savings bank to receive the sum specified in such certificate, and to place the same to the account of the person therein described in the books of such savings bank, any thing in this act to the contrary thereof notwithstanding: provided always, that previous to such investment a like declaration shall be made by the person applying to make such deposit as is required in other cases of making deposits in savings banks according to the provisions contained in this act, and such person shall be considered in all respects as an original subscriber to such savings bank, and shall be liable to all such rules, regulations and restrictions as an original subscriber to such bank." (*a*)

Depositor dying leaving a sum exceeding 50*l.* same not to be paid until after administration.

Sect. 40. "In case any depositor in the funds of any institution taking the benefit of this act shall die, leaving any sum or sums of money in the said funds, or any dividends or interest due thereon belonging to him or her at the time of his or her death, exceeding in the whole the sum of 50*l.* the same shall not be paid to any person or persons as representative or representatives of such depositors, but upon the probate of the will of the deceased depositor, or letters of administration of his or her estate and effects: provided always, that where the whole estate or effects of any such depositor, for or in respect of which any probate or letters of administration respectively shall be granted, shall not exceed the value of 50*l.*, no stamp duty shall be chargeable thereon, nor upon any legacy or residue or part thereof bequeathed, nor upon any share or part of the estate or effects to be paid or distributed by or under such probate or letters of administration: provided also, that in every such case the person or persons claiming such probate or letters of administration free from stamp duty under this act, shall exhibit to the Court or person having authority to grant the probate or letters of administration in such case a certificate of the amount and value of the share and interest which the deceased depositor had in the funds of the said institution, which certificate shall be granted in such form and manner as shall have been settled by the rules or regulations of the institutions respectively, and shall be signed or testified by such person or persons as shall be directed therein: and every such certificate shall be taken and received by the Court or person having authority to grant such probate or letters of administration as evidence of the amount and value of the shares and interest of the deceased depositor in the funds of the said institution."

No duty on probate where estate under 50*l.*

Certificate of amount and value of depositor's interest to be produced on claiming probate, &c.

Administration bonds, &c. for effects under 50*l.* exempt from stamp.

Sect. 41. "In all cases where the whole estate and effects of the deceased depositor, for or in respect of which letters of administration shall be granted, shall not exceed the value of 50*l.* sterling, no stamp shall be chargeable upon the bond required to be given by the administrator for the due administration of the effects of such deceased depositor, nor upon any affidavit or document leading to or connected with such administration, that every such bond and affidavit shall be exempted from stamp duty in like manner and under the like regulations as are provided in and by this act with respect to such letters of administration: provided, that in case any depositor in the funds of any such institution shall die, leaving a sum of money in the funds, which with the interest thereon shall not exceed in the whole 50*l.* it shall be lawful for

Where effects of person dying intestate shall not exceed 50*l.* same may be divided according to rules of institution, &c.

(*a*) This is taken from 5 Geo. IV. c. 62, s. 26, but it authorises *one* trustee or manager to grant the certificate, and does not require the signature of the depositor to be made in the presence of one of the trustees, &c. of the bank from which the deposit is to be drawn.

the trustees or managers of such institution, and they are hereby authorised and permitted in case such trustees or managers shall be satisfied that no will was made and left by such deceased depositor, and that no letters of administration will be taken out of the goods and chattels of such depositor, to pay the same at any time after the decease of such depositor, according to the rules and regulations of the said institutions; and in the event of there being no rules and regulations made in that behalf, then the said trustees or managers are hereby authorised and permitted to pay and divide the same to and amongst the person or persons entitled to the effects of the deceased intestate according to the Statute of Distributions."

Payment to persons appearing to be next of kin declared valid. Remedy for next of kin.

Sect. 42. "That whenever any trustees or managers of any savings bank at any time after the decease of any depositor, have paid and divided any sum of money not exceeding 50*l.* to or amongst any person or persons who shall at the time of such payment appear to such trustees or managers to be entitled to the effects of any deceased intestate depositor according to the Statute of Distributions, or according to the rules and regulations of any such savings banks, the payment of any such sum or sums of money shall be valid and effectual with respect to any demand of any other person or persons as next of kin of such deceased intestate depositor, or as the lawful representative or representatives of such depositor, against the funds of such savings bank, or against the treasurer or trustees or managers thereof; but nevertheless such next of kin or representatives shall have remedy for such money so paid as aforesaid against the person or persons who shall have received the same."

Payments under probates of wills, &c. appearing to be in force shall be valid.

Sect. 43. "Payment of any money by any such institutions as aforesaid to any person or persons having any letters of administration or probate of any such will or testamentary disposition granted by any Ecclesiastical Court, and appearing to be in force, shall be valid and effectual with respect to any demand of any other person or persons as the lawful representative or representatives of such depositor against the funds of such institution, or against the treasurer, trustees, or managers thereof; but nevertheless such lawful representative or representatives shall have remedy for such money or securities for money so paid or transferred as aforesaid against the person or persons who shall have received the same."

Powers of attorney, &c. given by trustees or depositors, not liable to stamp.

Sect. 44. "No power, warrant, or letter of attorney, granted or to be granted by any person or persons, or trustee or trustees of any institution established under this act, nor any power, warrant, or letter of attorney given by any depositor or depositors in the funds of such institution to any other person or persons, authorising him, her, or them to make any deposit or deposits of any sum or sums of money in the said funds on behalf of the said depositor or depositors, or to sign any document or instrument required by the rules or regulations of such institution to be signed on making such deposit, or to receive back any sum or sums of money deposited in the said funds, or the dividends or interests arising therefrom, nor any receipt nor any entry in any book of receipt for money deposited in the funds of any such institution, nor for any money received by any depositor, his or her executors or administrators, assigns or attorneys, from the funds of such institution, nor any draft or order, nor any appointment of any agent or agents, nor any certificate or other instrument for the revocation of any such appointment, nor any other instrument or document whatever required or authorised to be given, issued, signed, made, or produced in pursuance of this act, shall be subject or liable to or charged with any stamp duty or duties whatsoever."

No draft, order, or appointment of agents, &c. liable to stamp.

Disputes to be referred to arbitrators, (*a*)

Sect. 45. "If any dispute shall arise between any such institution, or any person or persons acting under them, and any individual depositor therein,

(*a*) It is compulsory on the parties to refer the matter in dispute to arbitrators, and where an action was brought by the plaintiff against the defendant, as trustee of a saving bank, to recover a sum deposited by the plaintiff with the cashier of that establishment, but which the latter had purloined: it was held it would not lie. (*Crisp* v. *Bunbury*, 8 *Bing.* 394; 1 *M. & Scott*, 646, S. C.)

9 Geo 4, c. 92.

In case of not agreeing, to be settled by a barrister.

or any executor, administrator, next of kin, or creditor of any deceased depositor, or any person claiming to be such executor, administrator, next of kin or creditor, then and in every such case the matter so in dispute shall be referred to the arbitration of two indifferent persons, one to be chosen and appointed by the trustees or managers of such institution, and the other by the party with whom the dispute arose, and in case the arbitrators so appointed shall not agree, then such matter in dispute shall be referred in writing to the barrister at law so to be appointed by the said commissioners as aforesaid, who shall receive a fee of not more than one guinea; and whatever award, order, or determination shall be made by the said arbitrators or by the said barrister, shall be binding and conclusive on all parties, and shall be final to all intents and purposes, without any appeal; and the said award, order, or determination shall declare by whom the said fee payable to the said barrister shall be paid; and no submission to or award, order, or determination of the said arbitrators, or of the said barrister, shall be subject or liable to or charged with any stamp duty or duties whatsoever."

Trustees to make up annually accounts of progress, &c. and transmit same to national debt commissioners.

Sect. 46. "And for the more effectually ascertaining from time to time the actual and progressive state of the several savings banks respectively, be it enacted, that the trustees or managers of any savings bank shall annually cause a general statement of the funds of such savings bank, invested in the Bank of England or the Bank of Ireland in the names of the commissioners for the reduction of the national debt, to be prepared up to the twentieth day of November in each year, showing the balance or principal sum due to all the depositors collectively in such savings bank, and a statement of the expenses incurred, and stating in whose hand such balance shall then be remaining; and every such annual statement shall be attested by two managers or two trustees, or by one manager and one trustee of such savings bank; and every such annual statement shall be countersigned by the secretary or actuary of such savings bank; and all such annual statements shall be transmitted to the office of the said commissioners for the reduction of the national debt in London or Dublin, (as the case may be), within six weeks next after the twentieth day of November in each year; and in case the trustees of any such savings bank shall neglect or refuse to make out and transmit such account as aforesaid, or in case any such trustees shall at any time neglect or refuse to obey any orders or directions given by the said commissioners, or through their officer, pursuant to the directions of this act, it shall and may be lawful for the said commissioners to close the account of the trustees of such savings bank, and to discontinue the keeping any further account with the trustees of such savings bank, and to direct that no further sum shall be received at the Bank of England or at the Bank of Ire-

If trustees neglect, &c. commissioners may close their accounts, &c.

If the savings bank refuse to appoint an arbitrator to decide the claims, a mandamus lies to compel them, unless indeed it is a matter of dispute whether the persons applying for the mandamus are entitled to represent the body of depositors who require the arbitration. (*Rex* v. *The Managers, &c. of Witham Savings Bank*, 1 *Ad. & Ell.* 321.)

In *Rex* v. *Cheadle Savings Bank*, 1 *Ad & Ell.* 323, n., 3 *N. & M.* 418, S. C.; the Court granted a mandamus calling upon a savings bank to appoint an arbitrator to decide between them and applicants, in whose names a deposit had been made, though the deposit had been withdrawn by the person who made it for the applicants, and though the published rules directed that a duplicate book of the deposits shall be delivered by the bank, and be an authority for paying over any sums to the person bringing it to the bank, and though such a duplicate was delivered up to the bank when the deposit was withdrawn. But where, by a rule of a savings bank, no claim for any sum of money could be made more than seven years from the death of a depositor, the Court discharged a rule nisi for a mandamus to the trustees of such a bank to appoint an arbitrator, under s. 45, to decide a dispute as to money, the alleged depositor of which had been dead more than seven years. (*Reg* v. *Northwich Savings Bank, Trustees*, 1 *Per. & D.* 477, 9 *Ad. & Ell.* 729.)

Where money belonging to depositors has been embezzled, the remedy against the trustees is by mandamus to appoint an arbitrator, under s. 45, and not by action. (*Rex* v. *Mildenhall Savings Bank*, 6 *Ad. & E.* 952; 2 *N. & P.* 278, S. C.)

land from the trustees of such savings bank to the account of the said commissioners, until such time as such commissioners shall think fit: provided always, that it may be lawful for the said commissioners to re-open such account, and to allow the growing interest of such account during the time of such discontinuance, and to authorise the receipt of money at the Banks of England or Ireland, whenever such commissioners shall think fit to do so, upon such trustees complying with the directions of such commissioners or their officer."

9 Geo. 4, c. 92.

Sect. 47. "The trustees or managers of every such savings bank shall cause a duplicate of every such annual statement, accompanied by a list of the trustees and managers of such institution for the time being, attested and countersigned as aforesaid, to be publicly affixed and exhibited in some conspicuous part of the office or place where the deposits of such savings bank are usually received, for the information of all persons making deposits therein, and every such duplicate shall from time to time remain so affixed and exhibited until the ensuing annual statement shall in like manner be affixed and exhibited as aforesaid; and every depositor shall be entitled to receive from the said institution a printed copy of such annual statement on payment of one penny."

Duplicate of accounts to be affixed in office of savings bank

Sect. 48. "From and after the passing of this act the following accounts shall be prepared by the said commissioners, and shall be annually laid before both houses of parliament on or before the twenty-fifth day of March in every year, if the parliament shall be sitting, and if the parliament shall not be sitting, then within fourteen days after the commencement of the then next session of parliament; that is to say, accounts, made up to the twentieth day of November then next preceding, of the gross amount of all sums received and credited, including interest, and of all sums paid, including interest, from the sixth day of August, in the year of our Lord one thousand eight hundred and seventeen, up to such twentieth day of November, by the said commissioners, on account of the trustees of the several savings banks in England and Ireland, and also on account of any friendly societies in England respectively, and of the gross amount of all sums, stock, funds, annuities, and exchequer bills standing in the names of such commissioners on the twentieth day of November on account of any such savings banks or friendly societies respectively, and the sums paid for the purchase of such stocks, funds, or exchequer bills, and the gross amount of the interest or dividends received thereon by the said commissioners, and the gross amount of the interest paid by such commissioners up to such twentieth day of November on all receipts issued to the trustees of any such savings bank or friendly societies in England and Ireland respectively; and also on account of all expenses incurred by the said commissioners for salaries of clerks or other incidental charges, during the preceding year."

Accounts to be annually laid before parliament by national debt commissioners.

Sect. 49. "And for the purpose of rendering the accounts of the several savings banks in England and Ireland uniform and correspondent with the accounts of the commissioners for the reduction of the national debt, it is enacted, that from and after the twentieth day of November, one thousand eight hundred and twenty-eight, the interest or dividends due to each depositor in each savings bank in England shall be computed half yearly to the twentieth day of May and the twentieth day of November, or yearly to the twentieth day of November in each year, or up to such period nearest to such twentieth day of May or twentieth day of November as such interest shall be payable, according to the rules or regulations of such savings banks respectively, and to no other periods."

Savings banks to compute interest to 20 h May and 20th November half-yearly or yearly.

Sect. 50. "It shall and may be lawful for the said commissioners, and they are hereby authorised and empowered, to lay out, from time to time, (if they shall deem it expedient, and under such regulations as the said commissioners shall direct,) the whole or any part of the monies which shall be standing in their names in the books of the Banks of England and Ireland respectively, in pursuance of this act, in the purchase of exchequer bills held by the said banks respectively or by the public, as the case may be; and the said commissioners shall be entitled to receive, for the sum or sums laid out by them

Commissioners may purchase exchequer bills, &c.

9 Geo. 4, c. 92.

in exchequer bills, such an amount of 3*l. per centum* consolidated or reduced annuities, transferable at the Bank of England, as the said sum or sums of money would have bought if the same had been applied to the purchase of 3*l. per centum* annuities, estimating the amount of such annuities at the quarterly average price of 3*l. per centum* annuities which shall have been purchased with the monies commonly called the sinking fund in the same quarter of the year in which such exchequer bills shall have been purchased; and the said 3*l. per centum* annuities, and the dividends arising thereon from time to time, shall constitute and form part of the funds belonging to the said commissioners on account of the said savings banks, and shall be subject to the same provisions and to the same and the like purposes as all other capital stocks and dividends standing in their names on the said account shall and may be subject and liable to; and the accountant-general of the said governor and company shall, within five days after such entry shall have been made as aforesaid, certify to the said commissioners the amount of the 3*l. per centum* annuities so placed upon their said account under the provisions of this act."

Comptroller-general to certify to treasury, quarterly, amount of principal and interest paid for exchequer bills.

Sect. 51. "The comptroller-general or assistant comptroller acting under the said commissioners shall, at the end of every quarter of the year in which such exchequer bills shall have been purchased by or on account of the said commissioners as aforesaid, certify to the lords commissioners of his Majesty's treasury the amount of the principal and interest paid for the same (and also the amount and description of 3*l. per centum* annuities which might have been purchased with such principal and interest, estimated at the quarterly average price of 3*l. per centum* annuities as aforesaid); and thereupon it shall and may be lawful for the said lords commissioners of his Majesty's treasury, or any three or more of them, and they are hereby authorised and required, by warrant under their hands, from time to time to order and direct the said governor and company of the Bank of England to direct their accountant-general to enter and place to the credit of the said commissioners, upon the account standing in their names in the books of the said bank, under the title of 'The Fund for the Banks for Savings,' the amount of the 3*l. per centum* consolidated or reduced annuities (as the case may be) contained from time to time in every such certificate; the first half yearly payment of the dividend whereof shall commence from the day on which the last half-yearly dividends were due and payable on the said 3*l. per centum* consolidated or reduced annuities, as the case may be."

3*l. per cent.* annuities created by purchase of exchequer bills to be chargeable upon consolidated fund.

Sect. 52. "That the 3*l. per centum* annuities which shall be created from time to time by the purchase of exchequer bills under and by virtue of this act, shall be deemed and taken to be, and shall from time to time be added to, and shall form part of the capital of the 3*l. per centum* consolidated or reduced annuities (as the case may be) transferable at the Bank of England, and the dividends arising thereon shall, as the same shall become due, be charged upon and be payable out of, and the same are hereby made chargeable upon, the consolidated fund of the United Kingdom of Great Britain and Ireland."

Exchequer bills to be delivered to paymaster of, to be cancelled, &c.

Sect. 53. "It shall be lawful for the said commissioners to cause all or any part of the exchequer bills purchased by them, or on their account, under the provisions of this act, to be delivered to the paymasters of exchequer bills, to be cancelled, within five days after the expiration of the quarter of the year in which such bills shall have been so purchased; and the said paymasters are in such case hereby required, upon the delivery thereof, to cancel the same accordingly; and it shall and may be lawful to the said commissioners to exchange from time to time any part of such exchequer bills, not so delivered to be cancelled, for new bills of the like amount (if they shall deem it expedient to do so), according to the usual course of the exchequer, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding."

Commissioners may sell bank annuities.

Sect. 54. "It shall and may be lawful for the said commissioners, and they are hereby authorised and empowered, to sell from time to time, if they shall deem it expedient, any part of the said bank annuities, which shall be stand-

ing in their names in the books of the Bank of England and Ireland respectively, in pursuance of the said recited acts or this act, and to apply the whole or any part of the monies produced by such sale or sales in the purchase of exchequer bills, in the same manner and under the same regulations and provisions as any other monies are authorised by this act to be so invested by the said commissioners."

9 Geo. 4, c. 92.

Sect. 55. "That it shall and may be lawful for the said commissioners, or for the proper officer or officers of the said commissioners, from time to time, to make application to the lord high treasurer or to the commissioners of his Majesty's treasury of the United Kingdom of Great Britain and Ireland, stating and certifying what sum of money may be required for satisfying any demands which shall from time to time be made upon the said commissioners for the reduction of the national debt by the trustees of any savings bank or friendly society in England or Ireland, and thereupon it shall and may be lawful for the lord high treasurer or commissioners of the said treasury, or any three of them, in case they shall think fit and proper so to do, by warrant under their hands, to cause or direct any number of exchequer bills to be made out at the receipt of his Majesty's exchequer in Great Britain, for such sum or sums of money as shall be from time to time stated and certified in any such application of the said commissioners, or their officer or officers under the direction of the said commissioners, or for any part of any such sum or sums; and such exchequer bills shall be made out in the same or like manner, form, and order, and according to the same or like rules and directions, as are prescribed and directed in and by an act made in the forty-eighth year of the reign of his late Majesty King George the Third, intituled '*An Act for regulating the Issuing and Paying of Exchequer Bills.*'"

Treasury may issue exchequer bills to national debt commissioners for payments to savings banks.

48 Geo. 3, c. 1.

Sect. 56. "It shall and may be lawful for the governor and company of the Bank of England and Bank of Ireland respectively from time to time to advance to the said commissioners for the reduction of the national debt such sum or sums of money, on the credit of such exchequer bill or bills issued to or purchased by the commissioners under the provisions of this act as aforesaid, at such time or times, and under such regulations for the purposes of this act, as shall be agreed upon by the said commissioners and the said governor and company of the Banks of England and Ireland respectively, and at such times as the said commissioners shall from time to time require; any law or statute to the contrary thereof in anywise notwithstanding."

Banks of England or Ireland may make advances to commissioners upon such bills.

Sect. 57. "The principal sum of every such exchequer bill which shall have been issued to the said commissioners upon their application, for the purposes hereinbefore directed, upon which any sum of money shall have been so advanced by the governor and company of the Banks of England or of Ireland respectively, under the provisions of this act, shall, together with all interest due thereon, be discharged from time to time by the said commissioners for the reduction of the national debt, in such portions as the said commissioners shall deem fit and expedient, with and out of any monies invested from time to time by the trustees of any savings banks or friendly societies in England or Ireland respectively, and carried to the credit of the said commissioners on account of any such savings banks or friendly societies, or by the sale of any bank annuities, or with and out of the monies or funds commonly called the sinking fund, standing in the names of the said commissioners in the books of the governor and company of the Banks of England or Ireland respectively, or by all or either of such means of repayment as the said commissioners shall deem most proper and convenient; and that immediately upon any such payment being made by the said commissioners for the reduction of the national debt, exchequer bills to the amount of the principal sum so paid off and discharged shall be delivered up to the said commissioners by the governor and company of the Bank of England or Bank of Ireland respectively; and the said commissioners shall forthwith cause the said exchequer bills to be delivered to the paymasters of exchequer bills, to be cancelled: provided always, that whenever the principal sum of any such exchequer bill or bills shall have been discharged and paid off by any sum or sums of money advanced from the sinking fund, and under the provisions of

How such bills to be paid off by national debt commissioners.

Regulations to be observed when such bills are paid off by advances from sinking fund.

9 Geo. 4, c. 92.

this act, the said commissioners shall cause their agent or proper officer to transfer from any account standing in the names of the said commissioners in the books of the governor and company of the Bank of England, or from any accounts standing in their names in the books of the Bank of Ireland, under or by virtue of this act, or of any act or acts relating to savings banks or friendly societies, as the case may be, into the account standing in the names of the said commissioners in the books of the Bank of England or Bank of Ireland respectively, under the title of 'The Account of the Commissioners appointed by Act of Parliament for applying certain Sums of Money annually to the Reduction of the National Debt,' such an amount of stock as shall produce, by computation, the principal sum and interest of all such exchequer bills so paid off and discharged; and the said computations shall be made by the proper officer or officers of the said commissioners, according to the price at which such stock shall have been purchased by the said commissioners on the day of transferring the said amount of stock as aforesaid; and upon every such transfer of stock being made as hereinbefore directed, the accountant-general of the governor and company of the Bank of England or Bank of Ireland respectively shall thereupon transmit to the office of the said commissioners for the reduction of the national debt a certificate of every such transfer, containing the amount and description of stock so transferred."

Commissioners may keep a balance in Bank of England for drafts which may be drawn.

Sect. 58, reciting that "it is expedient to provide more effectually in certain cases for the payment of any draft or drafts which may be drawn upon the said commissioners by the trustees of any savings bank in Ireland in pursuance of this act," enacts, "That it shall and may be lawful for the said commissioners, if they shall so think fit, and they are hereby authorised and empowered, to pay into the Bank of England, from time to time, any sum or sums of money to be placed to their credit in account with the governor and company of the Bank of Ireland, on account of the fund for the banks for savings, under such regulations as shall or may be agreed upon from time to time between the said commissioners and the said governor and company of the Bank of Ireland; and all sums of money so placed to the said commissioners' credit as aforesaid shall be carried to the account of the said commissioners, by the cashiers of the said governor and company of the Bank of Ireland, standing in the books of the said bank under the title of 'The Fund for the Banks for Savings,' and shall be subject and shall be applied to the several purposes hereinbefore mentioned, as if every such sum and sums of money had been originally paid into the Bank of Ireland to the said account under the provisions of this act."

Receipts, &c. to be in form approved by commissioners.

Sect. 59. "All receipts, orders, certificates, indorsements, accounts, returns, or instruments, or other matters or things whatsoever, which shall be required for carrying into execution this act, shall be made in such form and manner, and containing such particulars, and under such regulations as shall from time to time be directed, or required, or approved of by the said commissioners, or their officer or officers."

Indemnity to commissioners, and Banks of England and Ireland.

Sect. 60. "This act shall be and the same is declared to be a full and sufficient indemnity and discharge to the commissioners for the reduction of the national debt, and to the governor and company of the Bank of England and Bank of Ireland respectively, and their officers, for all things to be done or required, or permitted to be done, pursuant to his act."

Commissioners may employ clerks, &c.

Sect 61. "It shall and may be lawful for the said commissioners for the reduction of the national debt, and they are hereby authorised and empowered to appoint a barrister at law, and employ such and so many of the clerks and other officers as shall be necessary for carrying into execution the purposes of this act; and that it shall and may be lawful for the lord high treasurer or the commissioners of his Majesty's treasury of the United Kingdom of Great Britain and Ireland for the time being, and they are hereby authorised and empowered to settle and appoint such allowances as shall be proper for the services, pains, and labour of such clerks, or other persons to be appointed and employed by the said commissioners, in manner and for the purposes aforesaid; and out of the fund upon which the establishment of the

Treasury may pay them, and discharge incidental expenses.

said commissioners is chargeable by any act now in force, to pay and discharge all such allowances and all other incidental charges which shall necessarily attend the execution of this act, in such manner as to them shall seem just and reasonable."

9 Geo. 4, c. 92.

Sect. 62. "This act shall extend to all savings banks established, or hereafter to be established, in England and Ireland, and not elsewhere; and be deemed a public act, and shall be judicially taken notice of as such by all judges, justices, and other persons whomsoever, without the same being specially shown or pleaded."

Act to extend to all savings banks in England and Ireland.

By the 3 Will. IV. c. 14, intituled "*An Act to enable Depositors in Savings Banks, and others, to purchase Government Annuities through the medium of Savings Banks; and to amend an Act of the Ninth Year of his late Majesty, to consolidate and amend the Laws relating to Savings Banks,*" reciting, "Whereas an act was passed in the ninth year of the reign of his late Majesty King George the Fourth, entitled '*An Act to consolidate and amend the Laws relating to Savings Banks,*' and it is expedient to alter and amend the same, and also to enable depositors in savings banks, and others, to lay out their funds in the purchase of immediate or deferred life annuities, as well as immediate or deferred annuities for a certain number of years, and that provisions should be made for carrying the said measures into effect as hereinafter expressed; be it therefore enacted, &c. That from and after the 20th day of May, in the year of our Lord 1833, or as soon after as the commissioners for the reduction of the national debt shall think fit, of which due notice shall be given in the London Gazette, it shall and may be lawful for any two trustees or managers of a savings bank legally established to receive from any depositor in the said savings bank, or other person whom the said trustees or managers shall think entitled to become a depositor in a savings bank, any sum or sums of money for the purchase of immediate or deferred life annuities, or of immediate or deferred annuities for a certain limited term of years; such annuities to be contracted for by any two of the said trustees or managers on behalf of the commissioners for the reduction of the national debt, and to be charged and chargeable, and the said annuities are hereby made chargeable, upon the consolidated fund of the united kingdom, under the limitations, restrictions, and regulations hereafter expressed; and all sums of money from time to time paid to the said trustees or managers on account of the purchase of every such annuity shall be kept separate, distinct, and apart from the other funds of the institution, and be from time to time, when received, paid into the Bank of England to the account of the commissioners for the reduction of the national debt; and the cashiers of the Bank of England are hereby required to receive all such monies, and to place the same to the account of the said commissioners, to be entitled 'The Fund for purchasing Life Annuities, or Annuities for Terms of Years, (as the case may be,) on the Account of Savings Banks and Parochial Societies;' and the said commissioners shall in like manner keep distinct and separate accounts of all monies so placed to the said accounts, pursuant to the provisions of this act."

3 Will. 4, c. 14.

9 Geo. 4, c. 92.

Trustees of savings banks may receive money from depositors, &c. for purchase of annuities.

Annuities to be contracted for by two trustees on behalf of commissioners for reduction of national debt.

Money paid to trustees on account of purchase of annuity to be kept distinct, and paid to account of commissioners.

Sect. 2. "No such annuity or annuities shall be contracted for by the said trustees or managers on behalf of the said commissioners upon the life of any nominee, under the provisions of this act, who on the day when the contract for such annuity or annuities shall be made shall be under the age of fifteen years; neither shall any such annuity or annuities sold or granted to or possessed by any one individual exceed in the whole the sum of twenty pounds nor less than four pounds per annum: provided also, that it shall be lawful for the said trustees or managers, or commissioners, or the comptroller general, or assistant comptroller acting under the said commissioners, to decline or refuse to contract for, sell, or grant any annuity, under the provisions of this act, in any case where there shall be, in the opinion of the said trustees or managers, or of the said commissioners, or of the said comptroller general or assistant comptroller, sufficient grounds for refusing or declining so to do: provided also, that if any one individual shall have or

Annuities not to be granted on the life of any nominee under fifteen years of age, nor to exceed 20*l.* per annum.

Commissioners, &c. may decline to contract for any annuity.

3 Will. 4, c. 14.

hold or be possessed at any one time of any annuity or annuities granted under the provisions of this act exceeding in the whole the sum of twenty pounds per annum, the said annuity or annuities shall immediately cease and be forfeited."

Fees to be taken;

Sect. 3. "It shall not be lawful for the said trustees or managers to take, demand, or receive from any person applying to enter into any contract for the purchase of such annuity as aforesaid, for admission fee or otherwise, a greater sum of money than two shillings and sixpence, nor from any person who may have entered into any such contract a greater sum annually than the sum of one shilling, which said several sums the said trustees are hereby authorised and empowered to charge and demand of and from such persons as aforesaid; and that the money arising from such fees and payments shall be applied towards defraying the necessary expenses incurred by the said trustees or managers in carrying into execution the provisions of this act with respect to the contracting for, granting, and paying such annuities."

to be applied in defraying the necessary expenses of trustees.

Payments may be made and annuities received at other savings banks, &c. than that at which the contract was originally entered into.

Sect. 4. "It shall and may be lawful for any person, having contracted for the purchase of any such annuity as aforesaid, with the consent of the commissioners for the reduction of the national debt, or the comptroller general or assistant comptroller acting under them, to make the annual or other payments, or to receive the said annuity so contracted for as aforesaid, through he hands of the trustees or managers of any other savings bank or society (hereinafter mentioned) than that at which such person originally entered into such contract as aforesaid."

Treasury shall direct use of tables of the value of annuities as approved by them.

Sect. 5. "For the better carrying this act into execution it shall and may be lawful for the commissioners of his Majesty's treasury, or any three or more of them, from time to time, as they shall think fit, to direct the commissioners for the reduction of the national debt, to use and adopt such tables as shall from time to time be authorised and approved of by the said commissioners of the treasury, or any three or more of them, for ascertaining the values of annuities, whether immediate or deferred, depending on the continuance of single lives, and also such tables of the values of annuities for a certain limited term of years, immediate or deferred, as may be granted according to the provisions of this act; and such respective tables shall be valid and effectual for the purposes of this act; and all annuities for lives or years, of whatsoever kind, to be purchased under the provisions of this act, shall be purchased according to the values stated in such tables respectively so long as the same shall remain in force; and it shall be lawful for the said commissioners of the treasury to alter, revoke, and recall all or any of the said tables from time to time, and to direct the use and adoption of such other tables in lieu thereof as shall be approved of by the said commissioners of the treasury, and also to discontinue, by any warrant under their hands addressed to the said commissioners for the reduction of the national debt (of which the said last-mentioned commissioners shall give notice in the London Gazette), the granting of any annuities for lives or years under the provisions of this act, if they shall think it fit and expedient so to do: provided always, that the said commissioners for the reduction of the national debt shall, previous to the adoption and using of any such tables respectively, give notice from time to time in the London Gazette, in such form and manner as to the said commissioners for the reduction of the national debt shall seem fit and proper, that such tables have been authorised and approved by the said commissioners of the treasury."

Purchasers of annuities for lives or for years shall be entitled to such amount of ananuity as shall be specified in the tables.

Sect. 6. "In every case when any sum of money shall be paid as the consideration for the purchase of any annuity for lives or years, of whatsoever kind, under the provisions of this act, the person or persons purchasing any such annuity for lives or years, upon the payment of such sum of money to the said trustees or managers, and by the said trustees paid into the Bank of England to the account of the said commissioners, entitled 'The Fund for purchasing Life Annuities or Annuities for Terms of Years on account of Saving Banks and Parochial Societies,' shall for every sum of money paid be entitled to receive, during the continuance of the single life of the nominee,

whether such life annuity shall be immediate or deferred, or during the term of years, immediate or deferred, for which any annuity shall be granted under this act, an annuity for life or for terms of years, as the case may be, of such annual amount as shall be specified in any such table or tables respectively as the commissioners of his Majesty's treasury, or any three or more of them, shall from time to time authorise and approve, in manner herein-before directed, to be calculated and ascertained according to the age of the nominee, or the continuance of the term of years respectively, as the case may be."

Preventing fractions.

Sect. 7. "In every case where the calculation of the amount of any annuity according to the provisions of this act shall produce a fraction less than sixpence, the fractional part of the said annuity less than sixpence shall be taken from the amount thereof, and shall not be payable by the officer of the said commissioners for the reduction of the national debt."

Life annuities granted under this act shall be carried to a separate account, as also annuities for years.

Sect. 8. "All life annuities, of whatsoever kind, which shall be purchased and granted under the provisions of this act, (whether such life annuities shall commence immediately or not,) shall, in their due course as the same shall fall due and become payable, be carried to a new and separate account in the books of the said commissioners for the reduction of the national debt; and all annuities for terms of years which shall be purchased and granted under this act shall in like manner be carried to a new and separate account in the books of the said commissioners."

Life annuitants may make further purchases on lives of original nominees, without fresh certificates.

Sect. 9. "Whenever proof of the age of any nominee shall have been produced under the provisions of this act, as herein-after directed, any person or persons who shall be desirous of purchasing any annuity or annuities, whether such annuity shall depend upon the life of such person or not, (the total amount of such annuities not exceeding the sum herein-before mentioned,) on the life of such nominee, (whether such life annuities shall have been originally contracted for to commence immediately or not,) shall be at liberty so to do; and the original proof of the age of such nominee, produced at the time of the purchase of the first annuity upon the life of such nominee, shall be deemed sufficient for that purpose, without the production of any further proof of age."

Amount of annuities from time to time payable shall be certified to the treasury, who shall issue their warrant to the Bank for payment thereof out of the consolidated fund.

Sect. 10. "For the purpose of ascertaining from time to time the amount of annuities for lives or for terms of years payable under the authority of this act, the said comptroller general or assistant comptroller acting under the said commissioners, shall, within fourteen days preceding the fifth day of July, the tenth day of October, the fifth day of January, and the fifth day of April in each and every year, (commencing on the tenth day of October one thousand eight hundred and thirty-three,) certify to the commissioners of his Majesty's treasury the amount of annuities for lives and of annuities for terms of years payable under this act, the half-yearly payments of which shall from time to time be chargeable upon the said consolidated fund on each of such days respectively; and the said commissioners of the treasury, or any three or more of them, shall thereupon order and direct, by warrant under their hands, the sum specified from time to time in every such certificate to be issued and paid out of the said consolidated fund from time to time to the governor and company of the Bank of England, to be by them placed to the account of the said commissioners for the reduction of the national debt, for the purposes of paying all such annuities respectively."

Time of payment of annuities granted under this act.

Sect. 11. "All annuities for lives or years, of whatsoever kind, which shall be purchased under the provisions of this act, shall be payable by two equal half-yearly payments, to be respectively made on the fifth day of January and on the fifth day of July, or on the fifth day of April and the tenth day of October, in each and every year, according to the respective periods, as herein-after mentioned, within which any money shall be paid for the purchase of any such annuities for life or years, of whatsoever kind respectively; and the first half-yearly payment of every such annuity so purchased shall be made at the times following, (that is to say,) on the fifth day of January, in respect of all such purchases completed by the actual payment of money into the Bank of England to the account of the said commissioners herein-

3 Will. 4, c. 14.

after mentioned at any time during the quarter ending on the tenth day of October preceding such fifth day of January; on the fifth day of April, in respect of all such purchases so completed at any time during the quarter ending on the fifth day of January preceding the fifth day of April; on the fifth day of July in respect of all such purchases so completed at any time during the quarter ending the fifth day of April preceding such fifth day of July; and on the tenth day of October, in respect of all such purchases so completed at any time during the quarter ending on the fifth day of July preceding such tenth day of October; and all future half-yearly payments of every such annuity shall be made with reference to the time of such half-yearly payment: provided always, that upon the death of a nominee in respect of any life annuity, a sum equal to one-fourth part of the annuity depending upon the life of such nominee, (over and above all half-yearly arrears thereof respectively,) shall be payable to the person or persons entitled to such annuity, or his, her, or their executors or administrators, (as the case may be,) on the half-yearly days of payment next succeeding the production of proof to the said trustees, and by them to the said commissioners, certifying the death of such nominee; provided that such proof shall be produced to the said commissioners within thirty days next preceding the fifth day of January, fifth day of April, fifth day of July, and tenth day of October respectively in every year, and that such last mentioned payment shall be claimed within two years after the death of such nominee, but not otherwise: provided also, that the fourth part of any expired life annuity payable under the provisions of this act shall not be payable or be paid upon or in respect of any deferred life annuity, unless one half-yearly payment of such deferred life annuity shall have been actually paid or become due at the time of the decease of such nominee."

Quarterly payment on death of nominee of life annuities

Proviso as to deferred annuities.

Bargains for annuities not to be made for fourteen days after the quarterly day of payment.

Sect. 12. "For the space of fourteen days next after any of the said quarterly days for payment of the said annuities respectively, no bargain or contract shall be made by the said trustees or managers on behalf of the said commissioners for the reduction of the national debt, for the grant or purchase of any annuity under this act; any thing herein-before contained to the contrary in anywise notwithstanding."

Contracts for annuities to be sanctioned by commissioners for reduction of national debt before they are entered into.

Sect. 13. "All contracts for life annuities or annuities for a limited term of years, whether immediate or deferred, which shall be entered into by the trustees or managers of any savings bank, or by the trustees or managers of any society in any parish or place authorised by this act to contract for the same, shall in each and every case be deemed and taken to be contracts made by the said trustees or managers on behalf of the commissioners for the reduction of the national debt: provided always, that no life annuity shall be permitted to be contracted for, nor shall any payment of any life annuity be made, under the provisions of this act, until proof of the age of the person proposed to be nominated, and until proof of the existence and identity of the respective nominees upon whose life the payment of any annuity shall be demanded, shall have been previously submitted to and approved of by the said commissioners, or by the comptroller general or assistant comptroller acting under the said commissioners; and the said annuities for lives and for terms of years shall be placed under the same regulations as are contained in the acts now in force for enabling the said commissioners to grant life annuities and annuities for terms of years, so far as the same can be made applicable thereto, save and except that no charge by way of commission shall be made by the said commissioners at any time on any sum of money which shall be paid by any person for the purchase of any annuities under the provisions of this act, and also according to such instructions and regulations as the said commissioners, or the said comptroller general or assistant comptroller, shall from time to time issue and direct for carrying into effect the provisions of this act; and all the provisions, penalties, and forfeitures in the said last-mentioned acts contained shall apply and be in force with regard to any and all annuities granted under this act in the same manner as though the same were expressly enacted herein, except so far as the same shall be altered or varied by this act."

Sect. 14. "Upon the production to the proper officer of the said commissioners for the reduction of the national debt of proof of the existence and identity of the respective nominees, as herein-before enacted, and upon the same being approved by such officer, it shall be lawful for any two trustees of the savings bank wherein such respective nominees shall be registered, and also for any two trustees of any society duly established in any parish under this act, to draw upon the said commissioners for the half-yearly payment of the several annuities then due upon the lives of such nominees respectively; and such officer shall and he is hereby required to pay to the said trustees as aforesaid, or their respective agents, now appointed or hereafter to be appointed, within five days after the production of such draft, the several half-yearly payments then due."

3 Will. 4, c. 14.

On production of proof of existence &c., certificate shall be granted for payment of annuity for life.

Sect. 15. "In all cases of annuities for terms of years it shall be lawful for the said trustees, as herein-before mentioned, to draw upon the said commissioners for the half-yearly payment of the several last-mentioned annuities then due; and the said officer shall and he is hereby required to pay to the said trustees or their respective agents, now appointed or hereafter duly appointed, within five days after the draft is presented, the several half-yearly payments then due."

Annuities for terms of years to be paid without proof.

Sect. 16 "The right, title, interest and benefit in and to any annuity, of whatsoever kind, whether such annuity shall be immediate or deferred, which may be purchased under the provisions of this act, shall not be transferable or assignable by the purchaser thereof so as to enable the assignee to receive the same during the lifetime of the said purchaser, except in case of his or her insolvency or bankruptcy, when the same shall become the property of his or her assignee or assignees for the benefit of his or her creditors, and the same shall, in such case, after due notice of such insolvency or bankruptcy, be paid to such assignee or assignees aforesaid; and in case of any such bankruptcy or insolvency, the said commissioners for the reduction of the national debt shall repurchase the said annuity according to the value thereof, the same being computed upon the same tables upon which the said annuity was originally purchased; and the receipt of the assignee or assignees shall be a sufficient discharge to the said commissioners."

Annuities granted under this act not transferable, except in case of bankruptcy or insolvency.

Sect. 17. "Life annuities and annuities for terms of years, purchased under the provisions of this act, shall not be subject or liable to any taxes, charges or imposition whatever; and all such annuities shall be deemed personal estate, and in all cases where the same shall not depend upon the life of the person entitled thereto shall go to the executors or administrators of such person as personal estate, and shall not be descendible to the heirs."

As to the liability of annuities to taxes.

Annuities shall be personal estate.

Sect. 18. "Whenever it shall happen that any person, having made any one or more annual payment or payments, in cases where the consideration for any deferred life annuity or annuity for terms of years shall be by annual payments for or in the purchase of any deferred annuity under this act, or their respective executors or administrators, shall make default in paying or continuing to make the residue of such annual payments until the whole consideration for any such life annuity or annuity for terms of years shall be fully paid according to the agreement for the same, or in case the person so contracting for such life annuity or annuity for terms of years should die previous to the said annuity becoming payable, then and in every such case the amount of all annual payments which shall have been actually made previous to such default shall be returned, exclusive of interest, to the said person so making default as aforesaid; or in case of the death of the party having entered into such contract as herein-before mentioned, the annual or other payment or payments which shall have been actually made previous to his death shall be paid, exclusive of interest, to his executors or administrators; and that the money so returned shall be charged, paid, and defrayed out of the monies standing in the names of the commissioners for the reduction of the national debt at the bank of England, under the provisions of this act."

If annual payments are not kept up, or if party die before annuity commences, all payments to be returned.

Sect. 19. "No stamp duty whatever shall be paid or payable upon or in respect of any copy of any register of the birth or baptism, or marriage or

Registers, receipts, &c. exempt from stamp duty.

3 Will. 4, c. 14.

burial of any nominee or other person, or upon or in respect of any certificate or declaration to be made or taken in pursuance of this act, or any certificate or other instrument whatsoever respecting the payment of money for the purchase of any annuity under this act, or any power of attorney authorising the receipt, or any receipt for the payment of any such annuity or any part thereof, but that the same shall be respectively free from all stamp duties whatsoever, any thing in any act or acts to the contrary notwithstanding."

Appointment of clerks and officers.

Sect. 20. "It shall be lawful for the commissioners for the reduction of the national debt, and they are hereby authorised and empowered from time to time to appoint such officers, clerks, and other persons as may be necessary for carrying this act into execution, and as may be approved of by the commissioners of his Majesty's treasury.

For defraying expenses attending the execution of this act.

Sect. 21. "It shall be lawful for the lord high treasurer, or the commissioners of his Majesty's treasury, or any three or more of them for the time being, to order and direct to be issued and paid, out of the fund upon which the establishment of the commissioners for the reduction of the national debt is chargeable, any sum or sums of money for the payment of salaries to officers and clerks acting in the execution of this act, in such manner as the said lord high treasurer, or commissioners of the treasury, or any three or more of them, shall from time to time think fit and reasonable: provided always, that any incidental expenses incurred by the said commissioners for the reduction of the national debt in carrying into execution this act, or the said act made and passed in the ninth year of the reign of King George the Fourth, intituled '*An Act to consolidate and amend the Laws relating to Savings Banks*,' or the act made and passed in the tenth year of the reign of King George the Fourth, intituled '*An Act to consolidate and amend the Laws relating to Friendly Societies*,' shall and may be defrayed by the commissioners for the reduction of the national debt out of any monies, stocks, or funds standing in the names of the said commissioners at the Bank of England."

9 G. 4, c. 92

10 G. 4, c. 56.

Quorum of commissioners.

Sect. 22. "It shall be lawful for any three or more of the commissioners for the reduction of the national debt for the time being to execute and do all matters and things which the said commissioners are required or empowered to do for the execution of this act."

Account to be annually laid before parliament of annuities granted, and of money paid for annuities.

Sect. 23. "There shall be prepared and annually laid before both Houses of Parliament, on or before the twenty-fifth day of March in every year, if parliament shall be then sitting, and if parliament shall not be then sitting, then within fourteen days after the commencement of the then next session of parliament, an account made up by the commissioners for the reduction of the national debt to the fifth day of January preceding, of the gross amount of all sums of money paid to the said commissioners, and the gross amount of annuities for lives and for terms of years which shall have been granted for the same, under the provisions of this act, within the year ending on the fifth day of January as aforesaid."

Monies paid to commissioners on account of this act to be invested in bank annuities for term of years, or exchequer bills which shall be cancelled.

Commissioners may reserve a part of such sums to repay money claimed in case of death, &c. of party purchasing annuity.

Sect. 24. "The said commissioners for the reduction of the national debt shall cause all monies placed to their said accounts in pursuance of the provisions of this act to be invested from time to time, under such regulations as the said commissioners shall direct, in the purchase of any bank annuities, or annuities for terms of years, or exchequer bills, or in either of them, and to be carried to the accounts hereinbefore provided; which said bank annuities and exchequer bills (as the case may be) shall be forthwith cancelled, and all interest or dividends on such bank annuities, shall cease to be charged upon or to be issued out of the consolidated fund from and after the day upon which any such bank annuities shall have been purchased by the said commissioners; provided, nevertheless, that it shall and may be lawful for the said commissioners for the reduction of the national debt to retain and reserve from time to time so much of such monies as they shall deem expedient for the purpose of enabling the said commissioners to return and pay back any sum or sums of money, as hereinbefore directed, to such person or persons who shall have contracted for the purchase of any annuity under the provisions of this act, by annual or other payments, but who, from death or

otherwise, may not be enabled to make good and keep up the same, or to his, her, or their executors or administrators, as well as to the executors or administrators of such person or persons who may die before the annuity which he, she, or they may have contracted for becomes payable."

3 Will. 4, c. 14.

Sect. 25. "It shall be lawful for the said commissioners for the reduction of the national debt from time to time, and as they shall think fit, to sell and dispose of the bank annuities and exchequer bills, or any part thereof, which may be now standing or may hereafter stand in their names in the books of the Bank of England, in pursuance of the said act made and passed in the ninth year of the reign of King George the Fourth, intituled '*An Act to consolidate and amend the Laws relating to Savings Banks*,' and of the said act made and passed in the tenth year of the reign of his said late Majesty George the Fourth, intituled '*An Act to consolidate and amend the Laws relating to Friendly Societies*,' and with the proceeds thereof to purchase in lieu thereof any other description of bank annuities, or annuities for terms of years, or exchequer bills."

Commissioners may sell and dispose of bank annuities, &c. now standing in their names, pursuant to 9 G. 4, c. 92, and 10 G. 4, c. 56, and purchase other bank annuities, &c. in lieu thereof.

Sect. 26. "It shall and may be lawful for the trustees and managers of any savings banks, desirous of carrying the provisions of this act into execution, to frame rules and regulations for that purpose; and that all the provisions of the said act, made and passed in the ninth year of the reign of his said late Majesty King George the Fourth, as relate to the framing, enrolling and altering rules of savings banks, as well as to disputes between the said trustees or managers and depositors therein, shall be applicable to the rules and regulations to be made under the provisions of this act, and to the parties purchasing such annuities, as herein mentioned; and that for the purposes of this act every person purchasing an annuity through the medium of a savings bank shall be considered as a depositor in a savings bank."

Trustees may make rules for carrying the provisions of this act into execution.

Sect. 27. "In any parish or place in the United Kingdom where no savings bank is legally established under the provisions of the said act hereinbefore mentioned, it shall and may be lawful to and for any persons in such parish or place to establish a society for carrying the provisions of this act into execution: provided that the rector or vicar or minister of the parish, or elder for the time being, or a resident justice of the peace, shall be one of the trustees of such society; and provided also, that all the provisions of the said last-mentioned act and of this act, in as far as the same can or may be applicable, shall apply to the trustees and managers of any such society to be formed for the purposes of this act, and to the parties purchasing such annuities as herein mentioned, and to the rules and regulations to be made for carrying the same into effect."

Where no savings bank is legally established, other trustees may establish a society for the purpose of granting annuities.

Provisions of 9 G. 4, c. 92, applicable to any society formed under this act.

Sect. 28. "If any person already appointed under the provisions of the said act made and passed in the ninth year of his late Majesty King George the Fourth, or who may hereafter be appointed to any office in a savings bank, or in a society established under this act, and being entrusted with the keeping of the accounts, or having in his hands or possession, by virtue of his said office or employment, any monies or effects belonging to such savings bank or society, or any deeds or securities relating to the same, shall die, or become a bankrupt or insolvent, or have any execution or attachment or other process issued against his lands, goods, chattels, or effects, or make any assignment thereof for the benefit of his creditors, his executors, administrators or assignees, or other persons having legal right, or the sheriff or other officer executing such process, shall, within forty days after demand made by two of the trustees of the said savings bank or society as aforesaid, deliver and pay over all monies and other things belonging to such savings bank or society to such person as the said trustees shall appoint, and shall pay out of the estates, assets, or effects of such person all sums of money remaining due which such person received by virtue of his said office or employment, before any other of his debts are paid or satisfied, or before the money directed to be levied by such process as aforesaid is paid over to the party issuing such process; and all such assets, lands, goods, chattels, estates, and effects shall be bound to the payment and discharge thereof accordingly."

Executors, &c. of officers of savings banks to pay money due to savings banks before any other debts.

3 Will. 4, c. 14.

So much of 9 Geo. 4, c. 29, as relates to withdrawing deposits and re-depositing, repealed.

No money exceeding 30*l.* to be deposited in any one year.

Sect. 29. "From and after the twentieth day of November, in the year of our Lord one thousand eight hundred and thirty-three, so much of the said act made and passed in the ninth year of the reign of King George the Fourth, as relates to depositors withdrawing their deposits and re-depositing the same, provided the sum invested does not in any one year exceed thirty pounds additional principal money, shall be and the same is hereby repealed; and that no money, whether such money shall have been previously withdrawn from such savings banks or not, shall at any time be received by the trustees or managers from any depositor which shall in any one year, ending on the twentieth day of November, exceed the sum of thirty pounds."

If annual returns are not made pursuant to 9 Geo. 4, c. 92, s. 46, name of savings bank to be published in Gazette.

Sect. 30. "If the annual statements directed by the said act passed in the ninth year of his late Majesty King George the Fourth to be prepared and transmitted by the trustees of a savings bank, shall not be prepared and transmitted to the commissioners for the reduction of the national debt within the time limited by the said act, it shall and may be lawful for the said commissioners, or for the comptroller general or assistant comptroller acting under the said commissioners, and they and he is and are hereby severally required, forthwith to publish in the London Gazette, and also in any newspapers published in the county in which the savings bank is established, the name of every such savings bank so neglecting or making default in transmitting such annual statement as aforesaid, in such form and words, for the information of the depositors, and under such regulations, as the said commissioners or the said comptroller general or assistant comptroller shall from time to time think fit."

Statement of expenses may be required from trustees or managers.

Sect. 31. "It shall and may be lawful for the commissioners for the reduction of the national debt, or the comptroller general or assistant comptroller acting under the said commissioners, if they or he shall think fit, to require from time to time of and from the trustees or managers of any savings bank a detailed statement of all the expenses whatever incurred by the said trustees or managers in the management or otherwise of the said savings bank."

When money is in the hands of a treasurer, his certificate to accompany the statement.

Sect. 32. "Whenever it shall appear in any annual statement that any sum of money of or belonging to a savings bank is in the hands of any treasurer or other person, the said annual statement shall be accompanied with a certificate, signed by such treasurer or other person, that the sum of money therein mentioned is in his possession."

Re-enrolment of rules not necessary.

Sect. 33. "Nothing contained in this act respecting savings banks shall render it necessary to have the rules and regulations of savings banks again enrolled, if the same have been before enrolled according to law."

9 Geo. 4, c. 92, as amended by this act, extended to Guernsey, &c.

Sect. 34. "The provisions of the said act made and passed in the ninth year of his late Majesty King George the Fourth, and of this act, shall extend to all savings banks established or hereafter to be established in the islands of Guernsey and Jersey and Isle of Man."

Limits of the act.

Sect. 35. "This act shall extend to Great Britain and Ireland and Berwick-upon-Tweed, and the islands of Guernsey and Jersey and Isle of Man."

7 & 8 Vict. c. 83.

By the 7 & 8 Vict. c. 83, intituled "*An Act to amend the Laws relating to Savings Banks, and to the Purchase of Government Annuities through the Medium of Savings Banks,*" (9th August, 1844,) reciting that it is expedient to amend the laws relating to savings banks, and to make other provisions respecting savings banks and the purchase of government annuities through the medium of savings banks; and reciting the passing of the 9 Geo. IV. c. 92 and 3 & 4 Will. IV. c. 14, it is enacted "that on the twentieth day of November, one thousand eight hundred and forty-four, the interest payable on the receipts issued to the trustees of savings banks by the commissioners for the reduction of the national debt shall cease, and that from and after the said twentieth day of November, all receipts issued prior to that day shall carry interest at the rate of three pounds five shillings per centum per annum; and that from and after the said twentieth day of November, upon the payment of any sum or sums of money into the banks of England or Ireland, to the account of the said commissioners, by the trustees of any

From and after 20th November, 1844, the interest payable to trustees of savings banks shall be at the rate of 3*l.* 5*s.* per cent.

savings banks, it shall be lawful for the officer or officers of the said commissioners in that behalf, and he and they is and are hereby authorised and empowered, to issue, upon every such payment being made, a receipt, signed by one of the cashiers of the governor and company of the banks of England or Ireland respectively, for the amount of such payment, carrying interest at the rate of three pounds five shillings per centum per annum from the day of such payment inclusive, payable, with the principal, at the banks of England or Ireland respectively, whenever the same shall be required or drawn for in manner directed by the said recited act; and such receipt shall be dated on the day on which the payment of any such sum or sums of money shall be made respectively; and every such receipt shall be in such form as shall be from time to time directed by the said commissioners; and the principal and interest of all sums mentioned in any receipt shall be charged and chargeable upon, and the same are hereby charged and made payable out of, all or any monies standing in any account in the names of the said commissioners, or out of any monies produced by the sale of any stock or annuities, funds, or exchequer bills standing in their names in the books of the banks of England or Ireland respectively, as the said commissioners shall from time to time direct: provided always, that no fractional part of one penny shall be allowed or paid as interest upon the principal sum contained in any receipt issued under the provisions of this act." 7 & 8 Vict. c. 83.

Sect. 2. "That from and after the twentieth day of November, one thousand eight hundred and forty-four, the interest payable to the depositors by the trustees or managers of any savings banks shall not exceed the rate of three pounds and ten-pence per centum per annum." After 20th Nov. 1844, interest to depositors not to exceed 3*l.* 0*s.* 10*d* per cent.

Sect. 3. "That from and after the twentieth day of November, one thousand eight hundred and forty-four, it shall not be lawful to receive from any depositor his or her first deposit in any savings bank without requiring him or her to sign the declaration required by the said recited act, and in the manner therein mentioned, a copy of which declaration, with the penalty attached thereto if false, shall also be annexed to or printed at the beginning of the deposit book." Depositors on making first deposit to sign a declaration, and a copy thereof to be annexed to deposit book.

Sect. 4. "That if any actuary, cashier, secretary, officer, or other person holding any situation or appointment in any savings bank, shall receive any sum or sums of money from or on account of any depositor or person desirous of becoming such, or on account of such institution, and shall not, at the next day on which the said institution is opened for the receipt of deposits, or in the case of local receivers acting on behalf of any savings bank shall not within the time specified in the rules of the said institution account for and pay over the same to the trustees or managers thereof, or to such person as may be directed by the rules of the institution, such actuary, cashier, secretary, officer, or local receiver, or other person as aforesaid, on being convicted thereof, shall be guilty of a misdemeanor." Punishment of actuary, &c. receiving deposits and not paying over same to managers, &c.

Sect. 5. "That provision shall be made in the rules of every savings bank that every depositor therein shall, once in every year at least, cause his deposit book to be produced at the office of the said institution for the purpose of being examined." *Depositor to produce his book at institution.*

Sect. 6. "That no trustee or manager of any savings bank shall be liable to make good any deficiency which may hereafter arise in the funds of any savings bank, unless such person shall have respectively declared, by writing under their hands and deposited with the commissioners for the reduction of the national debt, that they are willing so to be answerable; and it shall be lawful for each of such persons, or for such persons collectively, to limit his or their responsibility to such sum as shall be specified in any such instrument: provided always, that the trustee and manager of any such institution shall be and is hereby declared to be personally responsible and liable for all monies actually received by him on account of or to and for the use of such institution, and not paid over or disposed of in the manner directed by the rules of the said institution; and an abstract of the above provisions shall be enrolled as one of the rules of the institution." Limiting responsibility of trustees and managers.

Sect. 7. "That from and after the twentieth day of November, one thou- Trust accounts.

7 & 8 Vict. c. 83.

sand eight hundred and forty-four, when deposits shall be made by a trustee on behalf of another, the sum shall be invested in the name of such trustee and the name of the person on whose account such sum shall be so deposited; and repayment of the same or any part thereof shall not be made by the trustees or managers of any savings bank without the receipt and receipts of the said trustee and the person on whose account such deposit may have been made, or the survivor or survivors, or the executors or administrators of such survivor, whose receipt and receipts, either in person or by agent appointed by power of attorney, which power of attorney shall be valid if executed by an infant of or exceeding the age of fourteen years, shall alone be a good and valid discharge to the said trustees and managers, except in the case of the insanity or imbecility of the party on whose behalf the deposit has been made, upon proof of which to the satisfaction of the said trustees or managers repayment may be made to the said trustee; and an abstract of the above provisions shall be enrolled as one of the rules of the institution: provided always, that nothing herein contained shall extend or be construed to extend to interfere with any trust accounts opened before the passing of this act."

Repayment of trust deposits.

Annuities not to exceed 30*l.*

Sect. 8. "That from and after the twentieth day of November, one thousand eight hundred and forty-four, so much of the 3 & 4 Will. IV. c. 14, *ante*, 353, as provides that no annuity or annuities sold or granted to or possessed by any one individual shall exceed in the whole the sum of twenty pounds nor less than four pounds per annum, shall be and the same is hereby repealed; and from and after the twentieth day of November, one thousand eight hundred and forty-four, no annuity or annuities sold or granted to or possessed by any one individual under the said recited act or this act shall exceed in the whole the sum of thirty pounds nor less than four pounds per annum: provided also, that nothing in this or the said recited act contained shall prevent such annuity being sold or granted to or possessed by any married man or woman, although an annuity to the same amount or a less amount may have been sold or granted to or possessed by the wife or husband of such party."

Annuity may be granted to husband and to wife.

Amount payable on purchase of annuity.

Sect. 9. "That instead of the sums allowed to be charged at the time of purchasing an annuity under this or the said recited act, and the yearly sum payable during the continuance of the said annuity, the said trustees or managers may at the time of purchasing such annuity charge any sum not exceeding the following; (that is to say,) for every annuity under five pounds the sum of five shillings; five pounds and under ten pounds, the sum of ten shillings; ten pounds and under fifteen pounds, the sum of fifteen shillings; fifteen pounds and under twenty pounds, the sum of one pound; twenty pounds and under twenty-five pounds, the sum of one pound five shillings; twenty-five pounds and not exceeding thirty pounds, the sum of one pound ten shillings."

Where deposits and interest do not exceed 50*l.* exclusive of interest, if will, &c. not proved within a month, money may be paid to widow or to party entitled to effects of deceased.

Sect. 10. "That in case any depositor in any savings bank shall die, leaving any sum of money in the said institution belonging to him or her at the time of his or her death, not exceeding in the whole the sum of fifty pounds, exclusive of interest, and probate of the will of the deceased depositor, or letters of administration of his or her estate and effects, is not produced to the trustees or managers of the said institution, or if notice in writing of the existence of a will and intention to prove the same or to take out letters of administration is not given to the said trustees or managers within the period of one month from the death of the said depositor, and in the latter case unless such will is proved or letters of administration taken out within the period of two months from the death of the said depositor, it shall be lawful for the said trustees or managers to pay and divide the same to or amongst any person or persons who shall appear to such trustees or managers to be the widow, or entitled to the effects of such deceased depositor, according to the statute of distribution, or according to the rules of the institution, and the payment of any such sum of money shall be valid and effectual with respect to any demand of any other person or persons as next of kin of such deceased depositor, or as the lawful representative of such depositor, against the funds of such savings bank, or against the trustees and managers thereof;

but nevertheless such next of kin or representative shall have remedy for recovery of such money so paid as aforesaid against the person or persons who shall have received the same." 7 & 8 Vict. c. 83.

Sect. 11. "That if any depositor, being illegitimate, shall die intestate, leaving any person or persons who but for the illegitimacy of such depositor and of such person or persons would be entitled to the money due to such deceased depositor, it shall be lawful for the trustees or managers, with the authority in writing of the barrister appointed to certify the rules of savings banks, to pay the money due to such deceased depositor to any one or more of the persons as in their opinion would have been entitled to the same, according to the statute of distributions, if the said depositor and such person or persons had been legitimate." Payment on death of depositor, being illegitimate, and dying intestate.

Sect. 12. And whereas deposits in savings banks may have been made and may be made by married women, and deposits may have been and may be made by women who may have afterwards married; be it enacted, "That it shall be lawful for the trustees or managers of any savings bank to pay any sum of money in respect of any such deposit to any such woman, unless the husband of such woman shall give to such trustees or managers notice in writing of such marriage, and shall require payment to be made to him." Payment to married women of deposits made by them, when declared to be valid.

Sect. 13. "That the time for making out and issuing the half-yearly receipts for interest to the several savings banks and friendly societies shall be extended to sixty days from and after the twentieth of May and twentieth of November respectively in each year, and the time for transmitting the annual statement mentioned in the said recited act shall be extended to nine weeks next after the twentieth day of November in each year." Time for making out half-yearly receipts and annual statement.

Sect. 14. "That if any dispute shall arise between the trustees and managers of any savings bank and any individual depositor therein, or any executor, administrator, next of kin, or creditor, or assignee of depositor, who may become bankrupt or insolvent, or any person claiming to be such executor, administrator, next of kin, creditor, or assignee, or to be entitled to any money deposited in such savings bank, then and in every such case the matter in dispute shall be referred in writing to the barrister at law appointed under the said recited acts, who shall have power to proceed ex parte on notice in writing to the said trustees or managers left or sent by the said barrister to the office of the said institution; and whatever award, order, or determination shall be made by the said barrister shall be binding and conclusive on all parties, and shall be final to all intents and purposes without any appeal; and no submission to, or award, order, or determination of the said barrister shall be subject or liable to be charged with any stamp duty whatever." Settlement of disputes.

Sect. 15. "That on any such reference it shall be lawful for the said barrister and he is hereby authorised, to inspect any book or books belonging to the said institution relating to the matter in dispute, and to administer an oath to any witness appearing before him, or to take the affirmation in cases where affirmation is allowed by law instead of oath; and if upon such oath or affirmation any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall be prosecuted and punished accordingly." On reference, barrister may inspect books and administer oath to witnesses.

Sect. 16. "That within one month from the passing of this act the clerk of the peace or town clerk with whom any bond given as security, pursuant to the provisions of either of the said recited acts, shall have been deposited shall transmit the same to the commissioners for the reduction of the national debt, to be and remain in their custody; and it shall be lawful for the said commissioners, on any application and receipt signed by not less than two trustees and three managers, in such form as the said commissioners shall direct, to deliver up to the trustees of the institution any bond or bonds which may have been or shall hereafter be given by way of security on behalf of such institution, for the purpose of being cancelled." Bonds given under 9 Geo. 4, c. 92, and 3 & 4 Will. 4, c. 14, to be sent to commissioners for reduction of national debt. When bonds may be delivered up to be cancelled.

Sect. 17. "That every treasurer, actuary, or cashier who shall be entrusted with the receipt or custody of any sum of money subscribed or deposited for the purpose of such institution, or any interest or dividend from time to time Treasurer and other officers entrusted with receipt or custody

7 & 8 Vict. c. 83.

of money, &c. to give security.

accruing therefrom, and every officer or other person receiving any salary or allowance for their services from the funds of any savings bank or government annuity society (unless he shall have already given good and sufficient security), shall give good and sufficient security, to be approved of by not less than two trustees and three managers of such savings bank or government annuity society, for the just and faithful execution of such office or trust; and such security when given by an actuary or cashier, or officer or person receiving any salary or allowance for his services as aforesaid, shall be given by bond or bonds with one or more sureties to the comptroller general of the national debt office for the time being, without fee or reward; and in case of forfeiture it shall be lawful for the trustees or managers for the time being of such institution to sue upon such bond or bonds in the name of such comptroller general for the time being, and to carry on such suit at the costs and charges and for the use of the said institution, fully indemnifying and saving harmless such comptroller general from all costs and charges in respect of such suit; and no bond to be so given shall be subject to or charged or chargeable with any stamp duty whatever; and such bond shall, when executed, be deposited with the commissioners for the reduction of the national debt."

Security to be given by bond to comptroller general.

Trustees may sue upon bond.

Bond not liable to stamp duty.

Repeal of part of 9 Geo. 4, c. 92, as to deposit of rules with clerk of the peace.

Sect. 18. "That so much of the said recited act as requires that the transcript of the rules of a savings bank or government annuity society shall be deposited with or filed by the clerk of the peace, and a certificate thereof returned to the institution, and that such transcript shall be laid before the justices at sessions, shall be and the same is hereby repealed."

Two written or printed copies of rules &c. to be submitted to barrister for his certificate.

Sect. 19. "That two written or printed copies of all rules or alterations of rules made in pursuance of the said recited acts or this act, signed by two trustees, with all convenient speed after the same shall be made, altered, or amended, and so from time to time after every making, altering or amending thereof, shall be submitted to the barrister at law appointed under the provisions of the said recited act, for the purpose of ascertaining whether the said rules or alterations, or amendments thereof, are in conformity to law and with the provisions of the said acts relating to savings banks or government annuity society; and that the said barrister shall give a certificate on each of the said written or printed copies that the same are in conformity to law and the provisions of the said last-mentioned acts, or point out in what part or parts the said rules, alterations, or amendments are repugnant thereto; and that the barrister for perusing the rules, or alterations or amendments of the rules, of such respective savings bank or government annuity society, and giving such certificate as aforesaid, shall demand no further fee than specified in the said recited act; and one of such written or printed copies, when certified by the said barrister, shall be returned to the trustees of the said institution, and the other of such transcripts or printed copies shall be transmitted by such barrister to the commissioners for the reduction of the national debt; and that all rules, alterations and amendments thereof, from the time when the same shall have been certified by the said barrister, shall be binding on the trustees, managers and officers of the said institution and the depositors therein and their representatives; and the copy of such rules deposited with the said commissioners, or a true copy thereof, examined with the original and proved to be a true copy, shall be received as evidence of such rules respectively in all cases, and no certiorari shall be brought or allowed to remove any such rules into any of her majesty's courts of record."

Barrister to return one copy to institution, and transmit the other copy to commissioners.

Scotland.

Sect. 20, adapts the provisions of the act to the law of Scotland.

Provisions of this act to apply to purchasers of annuities.

Sect. 21. "That all the provisions of this act, in as far as the same can or may be applicable, shall apply to the trustees and managers of any government annuity society, and to the parties purchasing annuities, and to the rules and regulations to be made for carrying the same into effect."

Extent of act.

Sect. 22. "That this act shall extend to Great Britain and Ireland, Berwick-upon-Tweed, and the islands of Guernsey, Jersey, and Isle of Man."

Mr. Tidd Pratt, in his work on Savings Banks, gives the following Table as to the funds of Savings Banks.

THE YEAR ENDING 20TH NOVEMBER, 1828.

This Form of the General Statement *of the Funds of the Savings Banks is to be filled up and produced at the National Debt Office, within Six Weeks after the 20th November, 1828, pursuant to 9th Geo. IV. cap. 92, sec. 46.*

Drs. The Trustees of the Savings Banks established at _____ *Crs.*

Charge.

In the year ending 20th November, 1828.

To Balance due on the 20th November, 1827, including Interest . . .

To Sums deposited . . . .

To Interest on Monies invested with the Commissioners for the Reduction of the National Debt . . . . .

Discharge.

In the year ending 20th Nov. 1828.

By Principal paid to Depositors

Interest do. . . . . .

Charges of Management, viz.

Salaries . . . . . _____

Rent and Taxes . . . _____

Printing and Stationery _____

Balance on 20th Nov. 1828.

Invested with the Commissioners for the Reduction of the National Debt, including Interest . . . . . _____

Do. in the Hands of

_____

_____

Treasurer or Banker . _____

The Rate of Annual Interest allowed to the Depositors is _____ per cent.

State the Names of the Treasurer and Officers who have given Security.

Name.	*Amount of Security.*

The foregoing Account is to be accompanied by the following Statement.

The Balance due on the 20th Nov. 1828, brought forward.

State the No. of Depositors.		Total amount of each class.
_____	whose respective Balances on the 20th Nov. 1828, (including interest) did not exceed 20*l.* each	
_____	Do. were above 20 and not exceeding 50 do.	
_____	Do. were above 50 and not exceeding 100 do.	
_____	Do. were above 100 and not exceeding 150 do.	
_____	Do. were above 150 and not exceeding 200 do.	
_____	Do. . (*exceeding* 200*l. if any*)	
_____	Total No. of Depositors	
_____	Charitable Societies	
_____	Friendly Societies	
_____	Total No. of Accounts.	
_____	Surplus	
Deduct from surplus.	To be appropriated according to the Rules and Regulations of the said Bank, per 9 Geo. 4, cap. 92, sec. 22	
	Retained for the future Purposes and Management of the said Bank, per ditto	

Amount of Surplus Fund remaining on 20th November, 1828. .

We do hereby certify to the Commissioners for the Reduction of the National Debt, that the foregoing is a true Account, and that the Surplus Fund or increased Stock of the above Savings Bank, on the 20th of November, 1828, amounted to the Sum of _____

Witness our Hands this _____ day of _____, 182

_____ } Two Trustees (or) Two Managers (or) a Trustee and a Manager, of the said Savings Bank.

Witness _____ } Secretary or Actuary.

Bankers. *Making Frames, &c. for Paper, with Names on, post "Forgery,"* Vol. II.; *Embezzlement by, post, "Larceny,"* Vol. III.

Bankrupt.

WE shall notice only that portion of the bankrupt laws as come within the object of this work.

I. *The Derivation and Description of a Bankrupt*, 362.

II. *Non-Surrender or of Embezzlement by Bankrupts; Destroying or Falsifying Books, or Obtaining Goods on Credit on False Pretences, &c.; Search Warrants*, 363.

III. *Perjury by Bankrupts, &c.* 366.

IV. *Forms*, 367.

I. Derivation and Description of a Bankrupt.

Derivation.

Lord *Coke* says, that *banque*, in French, signifies the same as *mensa* in Latin; and that *route* is a sign or mark, as we say a cart rout is the sign or mark where the cart hath gone; and that metaphorically a *bankrupt*, or *banqueroute*, is taken for him that hath wasted his estate, and removed his *banque*, so as there is left but a mention thereof. (4 *Inst.* 277.)

And it is observable that the title of the first English statute concerning this offence, stat. 34 & 35 Hen. VIII. c. 4, "*An Act against such Persons as do make Bankrupt*," is a literal translation of the French words, *qui font banque route*.

But as the first bankers came to us from Italy, it seemeth more probable that they brought their name along with them; and, consequently, that the word *bankrupt* or *banqueroute* cometh from the Italian *banco rotto*, the *bench* being *broken*. The *banker* himself was so called from the *bench* or table which he used with his name inscribed, and when he failed, his bench was broken. Which word *rotto* is what remaineth in that country of the Latin *ruptus*, all which, both word and metaphor, we preserve in our language, when we say, that a person is *bankrupt*, or that such a one is broken.

But whatever be the derivation of the word, a bankrupt has been defined to be a trader who secretes himself, or does certain other acts, tending to defraud his creditors. Throughout the three first statutes, the bankrupt is uniformly called an offender, and the original policy of the bankrupt laws seems to have been to prevent and defeat the frauds of criminal debtors. The bankrupt being deemed an offender, and being completely divested of the disposition of his property, those statutes at the first would naturally be considered penal statutes. As trade, however, increased, the risks and calamities incident to commercial speculation were found to augment proportionably, and at length a bankrupt ceased to be considered as a criminal. Accordingly the fourth statute on the subject (21 Jac. 1, c. 19) stated at its very commencement, that "all and singular the aforesaid statutes and laws heretofore made against bankrupts, and for relief of creditors, shall be in all things largely and beneficially construed and expounded for the aid, help, and relief of the creditors of such person or persons as already be, or hereafter shall become bankrupt;" and at this day the bankrupt laws are considered to be a system, calculated for the benefit of trade, and founded on the principles of humanity, as well as justice. To that end they confer some privileges, not only on the

creditors, but also on the bankrupt or debtor himself; on the creditors by compelling the bankrupt to give up all his effects to their use, without any fraudulent concealment; on the debtor by exempting him from the rigour of the general law, whereby his person might be confined at the discretion of his creditor, though he in truth should be destitute of any means to discharge the debt; whereas the system of laws in relation to bankrupts, taking into consideration the sudden and unavoidable accidents to which men in trade are liable, has secured to them personal freedom and some pecuniary emoluments, upon condition that they surrender up their whole estate for the benefit of those who, in confidence of the bankrupt's solvency, have become his creditors.

1. *Definition of.*

As to who may be made a bankrupt under the present laws, will be found in the 2d section of the 6 Geo. IV. c. 16, and 5 & 6 Vict. c. 122, s. 10.

II. Non-surrender and Embezzlement by Bankrupts; Destroying or Falsifying Books, &c.; Obtaining, &c., Goods on Credit on False Pretences, &c.; Search Warrants.

By the 5 & 6 Vict. c. 132, s. 32, it is enacted, "That if any person adjudged bankrupt after the commencement of this act shall not, upon the day limited for the surrender of such bankrupt, and before three of the clock of such day, or at the hour and upon the day allowed him for finishing his examination, after notice thereof in writing to be left at the usual or last known place of abode or business of such person, or personal notice in case such person be then in prison, and notice given in the *London Gazette* of the issuing of the fiat, and of the sittings of the Court authorised to act in the prosecution of the fiat against him, surrender himself to such Court, and sign or subscribe such surrender, and submit to be examined before such Court from time to time upon oath; or if any such bankrupt, upon such examination, shall not discover all his real and personal estate, and how, and to whom, upon what consideration, and when he disposed of, assigned, or transferred any of such estate, and all books, papers, and writings relating thereunto (except such part as shall have been really and *bonâ fide* before sold and disposed of in the way of his trade, or laid out in the ordinary expense of his family;) or if any such bankrupt shall not upon such examination deliver up to the said Court all such part of such estate, and all books, papers and writings relating thereunto, as shall be in his possession, custody or power; (except the necessary wearing apparel of himself, his wife and children;) or if any such bankrupt shall remove, conceal or embezzle any part of such estate to the value of ten pounds or upwards, or any books of account, papers or writings relating thereto, with intent to defraud his creditors; every such bankrupt shall be deemed guilty of felony, and be liable to be transported for life, or for such term, not less than seven years, as the Court before which he shall be convicted shall adjudge, or shall be liable to be imprisoned, with or without hard labour, in any common gaol, penitentiary house, or house of correction, for any term not exceeding seven years."

Bankrupt not surrendering, and submitting to be examined;

or making discovery of his estate and effects;

or not delivering up his estate, books, &c.;

or concealing, &c. to the value of 10*l.* guilty of felony, and liable to transportation or imprisonment, with or without hard labour.

Offences under this enactment are not triable at quarter sessions, 5 & 6 Vict. c. 38, s. 1.

Sect. 33. "That the Court authorised to act in the prosecution of any fiat in bankruptcy shall have power, as often as such Court shall think fit, from time to time, to enlarge the time for the bankrupt named in such fiat surrendering himself for such time as such court shall think fit, so as every such order be made six days at least before the day on which such bankrupt was to surrender himself."

Court may enlarge the time for the bankrupt surrendering himself.

Sect. 34. "That if any bankrupt shall, after an act of bankruptcy committed, or in contemplation of bankruptcy, or with intent to defeat the object of this or any other statute relating to bankrupts, and after the commencement of this act, have destroyed, altered, mutilated, or falsified any of his books, papers, writings, or securities, or made or been privy to the making of

Bankrupt destroying or falsifying any of his books, &c. or making false entries, guilty of a misdemeanor, and liable to imprison-

2. *Non-Surrender and Embezzlement by, &c.*

any false or fraudulent entry in any book of account or other document, with intend to defraud his creditors, every such bankrupt shall be deemed to be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned in any common gaol or house of correction for any term not exceeding three years, with or without hard labour."

ment, with or without hard labour.

Bankrupt within three months of his bankruptcy, having obtained goods on credit under false pretence, or removing, concealing, &c. goods so obtained, guilty of a misdemeanor.

Sect. 35. "That if any bankrupt shall within three months next preceding his bankruptcy, and after the commencement of this act, under the false colour and pretence of carrying on business and dealing in the ordinary course of trade, have obtained on credit from any other person any goods or chattels with intent to defraud the owner thereof, or if any bankrupt shall within the time aforesaid, with such intent, have removed, concealed, or disposed of any goods or chattels so obtained, knowing them to have been so obtained, every such person so offending shall be deemed to be guilty of a misdemeanor, and being convicted thereof shall be liable to imprisonment for any term not exceeding two years, with or without hard labour."

Prosecution against bankrupt for any offence under this act may be ordered by the court acting in prosecution of the fiat.

Sect. 36. "That it shall be lawful for the Court authorised to act in the prosecution of any fiat in bankruptcy issued after the commencement of this act, upon the request in writing of at least three creditors (not being partners) who shall have respectively proved debts of the amount of fifty pounds or upwards under such fiat, to direct the assignees of the bankrupt named in such fiat, if he shall be suspected of or charged with the commission of any of the offences specified in this act, to institute and carry on a prosecution of such bankrupt for such offence, and to order that the costs and expenses to be incurred in such prosecution shall be paid out of the estate and effects of the said bankrupt, and such assignees shall thereupon institute and carry on such prosecution; and in case the said assignees shall refuse or neglect to institute and carry on to conviction such prosecution, having no lawful or reasonable impediment made known to and allowed by the said Court, the said Court may order the same to be instituted and carried on either by the official assignee alone, or by the creditors making such request as aforesaid, as the said Court may think fit."

Search warrants may be granted by justices.

By 6 Geo. IV. c. 16, sect. 29, "That in all cases where it shall be made to appear to the satisfaction of any justice of peace in England or Ireland, that there is reason to suspect and believe that property of the bankrupt is concealed in any house, premises, or other place not belonging to such bankrupt, such justice of peace is hereby directed and authorised to grant a search warrant to the person so deputed by the commissioners as aforesaid, and it shall be lawful for such person to execute the same in like manner, and such person shall be entitled to the same protection as is allowed by law in execution of a search warrant for property reputed to be stolen and concealed."

A warrant under this enactment is not valid if presented to any one besides the messenger under the commission. (*Reg.* v. *Stevenson*, 2 *C. & P.* 464.)

May be granted by the court.

By 5 & 6 Vict. c. 122, s. 30, "That in all cases where it shall be made to appear to the satisfaction of the Court authorised to act in the prosecution of any fiat in bankruptcy, that there is reason to suspect and believe that property of any bankrupt is concealed in any house, premises, or other place not belonging to such bankrupt, such Court is hereby directed and authorised to grant a search warrant to any person appointed by the Court in which the adjudication against such bankrupt shall have been made, and it shall be lawful for such person to execute such warrant according to the tenor thereof; and such person shall be entitled to the same protection as is allowed by law in execution of a search warrant for property reputed to be stolen or concealed."

Decisions as to not surrendering.

Decisions, &c.]—The provisions against a bankrupt for not surrendering have been considered so severe, that in cases before the 6 Geo. IV. c. 16, s. 119, where it appeared the absence of the defendant was occasioned rather by ignorance or accident than design, the lord chancellor superseded the commission, in order to prevent the commencement of proceedings under it. (*Exparte Wood*, 1 *Atk.* 222; 18 *Ves.* 18; 3 *Ves.* 238.)

A bankrupt who was in prison for debt did not surrender to his commission, nor did he apply to have the time for his surrender enlarged, nor did he apply to be brought up to surrender under sect. 119 of the act 6 Geo. IV. c. 16, nor did he give notice to commissioners that he was in prison: it was held, that under these circumstances he was not indictable for not surrendering to his commission, even though the imprisonment could be shown to have been conclusive. (*R.* v. *Mitchell*, 4 *C. & P.* 251.)

2. *Non-Surrender and Embezzlement by, &c.*

If a bankrupt surrender to the fiat, and at the time of such surrender refuse to answer particular questions concerning his property, but takes the oath, and assigns as his reason for not answering, that he intends to dispute the commission, the refusal to such answer would not be a capital offence within the act, but subject him only to a committal to prison by the commissioners. (*Page's case*, *R. & R. C. C.* 392; 3 *Moore*, 656; 1 *B. & B.* 308; 7 *Price*, 616, S. C. *infra.*)

The bankrupt will not be guilty of felony if he surrender before the last moment of the time allowed him, though indeed it is both his interest and his duty to do so as soon as possible. (*R.* v. *Perrott*, 2 *Burr.* 1124; *Kenyon* v. *Solomon*, *Cowp.* 156.)

Concealing effects.

Up to and until his last examination, the bankrupt has a *locus pœnitentiæ*, and cannot, therefore, until that be passed, be indicted for concealing property, which he may upon his last examination give up. (*R.* v. *Walters*, 5 *C. & P.* 138.)

Form, &c. of indictment.

The Indictment.]—The indictment must show that the party actually became a bankrupt; and merely stating that the commissioners adjudged him a bankrupt will not suffice. (*R.* v. *Jones*, 4 *B. & Ad.* 345; 1 *Nev. & M.* 78, S. C.)

It must set forth the proceedings accurately. It should state that the fiat was awarded, and issued, and the allegation that it was awarded only will not suffice. (*R.* v. *Frith*, 1 *Leach*, 10.) A statement that it issued out of Chancery would be bad. (1 *Rose*, *B. C.* 222) But an averment, that a commission issued under the great seal *of Great Britain*, was held supported by proof that it issued under the great seal of Great Britain and *Ireland*. (*R.* v. *Bullock*, 2 *Leach*, 996; 1 *Taunt.* 71.)

On an indictment for not surrendering the notices required to be published in the Gazette and given to the bankrupt should be stated according to the words of the statute and the notices as given. (*R.* v. *Frith*, 1 *Leach*, 10.) An averment of a notice, requiring the bankrupt *to surrender to the commissioners at Guildhall*, without naming the commissioners or showing that they were the commissioners appointed by the commission of bankrupt, will be too uncertain (1 *Leach*, 10. See *Gow*, 210.)

In an indictment against a bankrupt, he was charged in feloniously making default in not submitting to be examined: it was made a question, whether this was sufficient without charging him with a refusal to surrender and submit to examination. (*R.* v. *Page*, 3 *Moore*, 656; 1 *B. & B.* 308, S. C.)

The indictment for embezzling the effects must particularly specify the property embezzled, and a distinct value must be put on the articles enumerated, for it is the essence of the offence, that the goods embezzled be of the value fixed by the act, viz. 10*l.* (*Forsyth's case*, *R. & R. C. C.* 277.)

Evidence.

Evidence on]—It is necessary to prove a valid fiat against the bankrupt. (See *Ex parte Bullock*, 14 *Vesey*, 452.) All the proceedings by which the prisoner was made a bankrupt, as well as the notices requiring him to surrender if the indictment be against him for not surrendering, must be proved. (1 *Atk.* 211.) Therefore, the trading, the petitioning creditor's debt, the act of bankruptcy, the fiat and adjudication, must be strictly shown in evidence. (*R.* v. *Punshon*, 3 *Campb.* 96; *R.* v. *Barnes*, 1 *Stark. Rep.* 243.)

But this strictness of proof has been held in one case not to be necessary on an indictment for perjury against a *third* person, in which the adjudication of the commissioners was held to be sufficient evidence of the bankruptcy. (*R.* v. *Raphael*, *Manning's Index*, 232, 2*d ed.*)

2. *Non-Surrender and Embezzlement by, &c.*

Gazette to be conclusive evidence of bankruptcy, &c in certain cases.

And by the 5 & 6 Vict. c. 122, s. 24, "That if the bankrupt shall not (if he were within the United Kingdom at the date of the adjudication), within twenty-one days after the advertisement of the bankruptcy in the *London Gazette*, or (if he were in any other part of *Europe* at the date of the adjudication) within three months after such advertisement, or (if he were elsewhere at the date of the adjudication) within twelve months after such advertisement, have commenced an action, suit, or other proceeding to dispute or annul the fiat, and shall not have prosecuted the same with due diligence and with effect, *the Gazette containing such advertisement shall be conclusive evidence in all cases as against such bankrupt*, and in all actions at law or suits in equity brought by the assignees for any debt or demand for which such bankrupt might have sustained any action or suit had he not been adjudged bankrupt, that such person so adjudged bankrupt became a bankrupt before the date and suing forth of such fiat, and that such fiat was sued forth on the day on which the same is stated in the Gazette to bear date, saving all rights which shall have accrued to any such person as aforesaid previous to the commencement of this act, and in respect of which any proceedings shall be pending at the time of the commencement of this act, which shall be adjudged and determined as if this act had not been passed."

It would seem that this enactment applies to criminal prosecutions against the bankrupt. But this seems not free from doubt. (See *Thorold* v. *Thorold*, 7 *Jurist*.)

Proceedings on fiats in bankruptcy were formerly proved either by producing the proceedings themselves duly enrolled, (6 Geo. IV. c. 16, s. 96,) or, (if the original instrument in writing were filed in the office, or were officially in the possession of the Lord Chancellor's secretary), by copies duly signed and attested. (6 Geo. IV. c. 16, s. 97.) But now the records of all fiats in bankruptcy, and of all proceedings under the same, heretofore entered of record under the stat. 6 Geo. IV. c. 16, are removed into the Court of Bankruptcy, established by 1 & 2 Will. IV. c. 56, and are kept as records of that Court; and all proceedings in bankruptcy and copies thereof purporting to be sealed with the seal of that Court, are to be received as evidence. (2 & 3 Will. IV. c. 114, s. 9.)

Deposition of deceased witness of petitioning creditor's debt, made evidence.

And by the 5 & 6 Vict. c 122, s. 25, "In the event of the death of any witness deposing to the petitioning creditor's debt, trading, or act of bankruptcy, under any fiat in bankruptcy already issued or hereafter to be issued, the deposition of any such deceased witness purporting to be sealed with the seal of the Court of Bankruptcy, or a copy thereof purporting to be so sealed, shall in all cases be receivable in evidence of the matters therein respectively contained."

In order to prove the notice in the Gazette, the production of the Gazette itself will be sufficient, without proving its being bought of the Gazette printer, or where it came from. (*Forsyth's case*, *R & R. C. C.* 277.) See "*Evidence*," Vol. II.

On an indictment for concealing effects, if the evidence be that the bankrupt on his last examination stated that a book given in by him contained an account of all his effects, it is incumbent on the prosecutor to produce the book, or account for it, that it may be seen whether that book mentions the property or not. (*Evans's case*, *R. & R. C. C.* 70.)

The defendant may procure an acquittal by proving that he was an infant at the time of contracting the debts mentioned in the indictment, for though such obligations are only voidable by him at his election, no man can be made a bankrupt for debts which he was not compellable to discharge. (*R.* v. *Cole*, 1 *Ld. Raym.* 443; 12 *Mod.* 243, S. C.)

III. Perjury by Bankrupts.

Punishment of persons giving false evidence, or swearing or

By the 5 & 6 Vict. c. 122, s. 81, "Any bankrupt or other person who shall, upon any examination upon oath or affirmation before the Court authorised to act in the prosecution of any fiat in bankruptcy, or in any affidavit, or

deposition, or solemn affirmation, authorised or directed by this or any other act relating to bankrupts, wilfully and corruptly give false evidence, or wilfully and corruptly swear or affirm any thing which shall be false, being convicted thereof, shall be liable to the penalties of wilful and corrupt perjury."

3. *Perjury by Bankrupts.*

affirming any thing which shall be false.

As to perjury in general, see "*Perjury*," Vol. V.

IV. Forms.

[Commencement as *ante*, p. 9, (No. 1)]: *for that the said C. D. being a person against whom a fiat in bankruptcy had duly issued, and who had thereupon been duly declared bankrupt, whereof notice in writing was on , at , left at the usual place of abode of the said C. D. there, feloniously did not before three of the clock upon the forty-second day after such notice given as aforesaid, and notice given in the Gazette of the issuing of the said fiat and of the meeting of the commissioners in that behalf, surrender himself to the said commissioners* [state the offence]; *against the form of the statute in such case made and provided. And you the said keeper, &c.* [conclude, as *ante*, p. 9, (No. 1.)]

(1.) Commitment against a bankrupt for not surrendering.

[Commencement as *ante*, p. 9, (No 1.)]: *for that the said C. D. being a person against whom a fiat in bankruptcy had duly issued, and who had thereupon been duly declared a bankrupt, upon being examined before the commissioners in that behalf, on at , feloniously did not deliver up to the said commissioners or to any of them, or to any person in their behalf, certain personal property, to wit of the value of , which was then and there in the possession, custody, and power of the said C. D., and not being any part of the necessary wearing apparel of the said C. D., or of his wife or children; against the form of the statute in such case made and provided. And you the said keeper, &c.* [as *ante*, p. 9, (No. 1,)]

(2.) The like, for not delivering up his books.

[Commencement as *ante*, p. 9, (No. 1,)]: *for that he the said C. D. on, &c. at, &c. after he had been found a bankrupt, upon a fiat of bankrupt duly issued against him, did feloniously remove, conceal, and embezzle part of his personal estate, to wit to the value of 10l. and upwards, with intent to defraud his creditors, against the statute in such case made and provided, and you the said keeper, &c.* [as *ante*, p. 9, to the end.]

(3.) The like, for concealing his effects.

To

WHEREAS it appears to me J. J. Esquire, one of the justices of our Lady the Queen assigned to keep the peace in the said county, by the information on oath of C. D. of, &c., that there is reason to suspect and believe that property of , a bankrupt, is concealed in the dwelling-house of , at W. in the county aforesaid: these are therefore, by virtue of the act of parliament passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled "An Act to amend the Laws relating to Bankrupts," *to authorise and require you, with necessary and proper assistants, to enter in the day time into the said dwelling-house of the said at W. aforesaid in the county aforesaid, and there diligently to search for the said property; and if any of the property of the said bankrupt shall be found upon such search, that you seize the same to be disposed of and dealt with according to the provisions in the said act contained. Given under my hand and seal at W. aforesaid in the said county, the day of , in the year of the reign, &c.*

(4.) Search warrant under 6 Geo. 4, c. 16, s. 29, *ante*.

—— *to wit. THE jurors for our Lady the Queen upon their oath present, that heretofore and before the committing of the offence by C. D. as hereinafter next mentioned, to wit, on the day of in the year of the reign of our Sovereign Lady the now Queen Victoria, at the parish of in the county of , the said C. D. was a and a trader within the true intent and meaning of the laws and statutes then and now in force relating to bankrupts and subject and liable as such trader to the said laws and statutes, and exercising and carrying on the trade and business of a and was then and there indebted to in a certain sum of money exceeding 50l., to wit, in the sum of ; and that the said C. D. so being such trader and indebted as aforesaid, afterwards, to wit, on the day and year aforesaid at the parish aforesaid in the county aforesaid, did commit an act of bankruptcy and became and was a bankrupt within the true intent and meaning of the said laws and statutes: and*

(5.) Indictment against a bankrupt on the 35th sect. of 5 & 6 Vict. c. 122, for obtaining goods on credit under false pretences.

4. *Forms.*

the jurors aforesaid, upon their oath aforesaid, do further present that afterwards and whilst the said C. D. was such trader and so indebted as aforesaid, to wit, on the day of in the year of the reign aforesaid, to wit, at London aforesaid, a fiat in bankruptcy was duly and according to law issued by the Right Honourable then and there being Lord High Chancellor of Great Britain, on the petition of the said against the said C. D., and which said fiat was then and there directed to her Majesty's Court of Bankruptcy for the district of Exeter, under and by virtue of which said fiat Esquire, being a commissioner of the said Court, did afterwards, to wit, on the day of in the year of the reign aforesaid, at the parish aforesaid in the county aforesaid, in due form of law find that the said C. D. had become and was a bankrupt before the issuing of the said fiat within the true intent and meaning of the said laws and statutes, and did then and there adjudge and declare the said C. D. to be a bankrupt accordingly; and the jurors aforesaid, on their oath aforesaid, do further present that the said C. D., late of the parish aforesaid in the county aforesaid, before the said bankruptcy and within three months next preceding his said bankruptcy, and after the commencement of a certain act of parliament made and passed in a session of parliament held in the fifth and sixth years of the reign of our Lady the now Queen Victoria, intituled* "An Act for the Amendment of the Law of Bankruptcy," *and whilst he was such trader as aforesaid, to wit, on the day of in the year of the reign aforesaid, to wit, at the parish aforesaid in the county aforesaid, wilfully, wickedly, and unlawfully, under the false colour and pretence of carrying on business and dealing in the ordinary course of trade, did obtain from A. B. on credit, to wit, a credit of months from the day and year last aforesaid, divers goods and chattels, to wit of great value, to wit, of the value of , the said A. B. being then and there the owner of the said goods and chattels, with intent then and there to defraud the said A. B. thereof; to the great damage of the said A. B., against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.*

(6.) The like, on s. 32, for not surrendering.

[Commencement as in preceding form to the* and then thus]: *of all which notice in writing was then and there left at the usual place of abode of the said C. D., and notice was also then and there given in the London Gazette of the issuing of the said fiat, and of the sittings of the Court authorised to act in the prosecution of the said fiat against him the said C. D.; and the said C. D. so being declared bankrupt, and the said notice being so given as aforesaid, he the said C. D. feloniously did not, before of the clock upon the day limited for the surrender of him the said C. D., to wit, the day of , in the year aforesaid, surrender himself to the said Court, but wholly neglected and omitted so to do, nor hath he as yet surrendered himself to the said Court; against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.*

(7.) The like, for concealing his property.

[Commencement as *supra* (No. 5,) to the * and then thus]: *and the said C. D., so being declared bankrupt as aforesaid, afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did remove, conceal, and embezzle a certain part of his personal estate, to the value of ten pounds and upwards, that is to say, of the value of ten pounds, of the value of , and of the value of , with intent then and there to defraud his the said C. D.'s creditors, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.* [Add one or more other counts as the case may suggest. There would be no occasion in such counts to repeat any of the proceedings previous to the finding of defendant a bankrupt. It would be best to refer to them as being stated in the first count.]

Baptism, Proof of, see "*Evidence,*" Vol. II.; "*Registers,*" Vol. V.

Barking of Trees, see "*Malicious Injuries to Property;* "*Larceny,*" Vol. V.

Barns, see "*Burning*," *post*; "*Malicious Injuries to Property*," Vol. V.

Baron and Feme, see "*Husband and Wife*," Vol. III. As to Evidence by, see "*Evidence*," Vol. II. 426. As to Offences by, see "*Wife*," Vol. VI.

Baron Court.

What.

Its jurisdiction.

THE *Court Baron* is a Court which every lord of the manor (anciently called a *baron*) hath within the precinct of that manor. The business thereof is to inquire of matters concerning the lord and tenant in their *civil* capacity only, as of the death of tenants since the last Court, of alienations, surrenders, encroachments, trespasses, escheats, forfeitures, and such like. But with this Court is frequently held, by grant or prescription, a *Court Leet*; the jurisdiction whereof extendeth to all *criminal* matters within the precinct, for the preservation of the Queen's peace; for which see "*Leet*," Vol. III.

Liability of steward of.

The steward of a court baron is a *judicial* officer; and trespass will not lie against him, where the regular bailiff of the court, by mistake, took the goods of B. under a precept, commanding him to take in execution the goods of A. (*Holroyd* v. *Breare*, 2 *B. & Ald.* 473; and see *Tinsley* v. *Nassau*, *M. & M.* 52; 2 *C. & P.* 582, S. C.; *Pitcher* v. *King*, 9 *Ad. & Ell.* 288.) But he would be responsible where he directs the process to bailiffs specially nominated by the party who sues it out, taking an indemnity. (*Bradley* v. *Carr*, 3 *Scott*, *N. R.* 523.)

Barratry.

What it is.

WHAT it is.]—This word *Barratry* we have received either from the *Danes* or *Normans*, or both; for *barrata* in the *Danish*, and *baret* in the *Norman*, do equally signify a quarrel or contention.

And a *barrator*, in legal acceptation, doth signify a *common mover, exciter, or maintainer of suits or quarrels, either in courts or in the country.* (1 *Inst.* 368; 1 *Hawk.* c. 81, s. 1.)

Barratry in another sense is used to denote a *fraudulent* act of the master or mariners, committed to the prejudice of the owners of the ship; (see *Abbott on Ship.* 161;) offences of which description are provided against by legislative enactments, which will be found more aptly considered under title "*Ships*," Vol. V.

A common mover.]—It seems clear that no one can be a barrator in the first sense in respect of one act only; but every indictment for such crime must charge the defendant with being a *common barrator*. (1 *Hawk.* c. 85, s. 5; 8 *Rep.* 36.)

Mover, exciter, or maintainer.]—Yet it seemeth that an attorney is in no danger of being judged guilty of an act of barratry, in respect of his maintaining another in a groundless action, to the commencing whereof he was no way privy. (1 *Hawk.* c. 81, s. 1.)

Also it hath been holden that a man shall not be judged a barrator in respect of any number of false actions brought by him in his own right; for in such cases he is liable to costs. (1 *Hawk.* c. 81, s. 4.)

In Courts.]—Either courts of record, or not of record, as in the county, hundred, or other inferior courts. (1 *Inst.* 368.)

Barratry.

Or in the Country.]—In three manners: 1. In disturbance of the peace. 2. In taking or keeping possession of lands in controversy, not only by force, but also by subtlety and deceit, and most commonly in suppression of truth and right. 3. By false inventions, and sowing calumniations, rumours, and reports, whereby discord and disquiet may grow between neighbours. (1 *Inst.* 368.)

How punished, &c.

How punished, &c.]—By stat. 34 Edw. III. c. 1, the justices of the peace shall have power to restrain all barrators, and to pursue, arrest, take, and chastise them, according to their trespass or offence.

And although this statute does not create the offence, but supposes it at common law, and only appoints the punishment, yet an indictment of barratry, concluding *against the form of the statute,* is holden to be good, and agreeable to many precedents. (*Burton's case, Cro. Eliz.* 148; 1 *Hawk.* c. 81, s. 10.)

But it hath been resolved that such indictment is not good, without also concluding *against the peace;* for this is an essential part of it, as being an offence by the common law; (*Id.* s. 12;) the omission, however, would not be cured after judgment by the 7 Geo. IV. c. 64, s. 20, *post,* "*Indictment,*" Vol. III.

And it hath been holden that an indictment of this kind may be good, without alleging the offence at any certain *place;* because from the nature of the thing, consisting of the repetition of several acts, it must be intended to have happened in several places; for which cause it is said that a trial ought to be by a jury from the body of the county. (*Id.* s. 11.)

This case, and that of a common scold, seem to be the only offences for which a general indictment will lie, without showing any of the particular facts in the indictment; for barratry is an offence of a complicated nature, consisting in the repetition of divers acts in disturbance of the peace, and it would be too prolix to enumerate them in the indictment; and therefore experience hath settled it to be sufficient to charge a man generally as a common barrator, and before the time to give the defendant a note of the particular matters which are intended to be proved against him; for otherwise it will be impossible to prepare a defence against so general and uncertain a charge, which may be proved by such a multiplicity of different instances; and therefore the court generally will not suffer the prosecution to go on in the trial of the indictment, without such note being given to the defendant. (1 *Hawk.* c. 81, s. 13; 2 *Hawk.* c. 25, s. 59; *J'Anson* v. *Stuart,* 1 *T. R.* 754.)

As to the kind and manner of punishment, it is said that if the offender be a common person, he shall be fined and imprisoned, and bound to his good behaviour, and if he be of any profession relating to the law, he ought also to be further punished, by being disabled to practise for the future. (1 *Hawk.* c. 81, s. 14.)

And by stat. 12 Geo. I. c. 29, s. 4, made perpetual by 21 Geo. II. c. 3, if any person who hath been convicted of common barratry shall practise as an attorney or solicitor, he shall be transported for fourteen years.

Barrister. See *post,* "*Champerty;*" "*Maintenance,*" Vol. V. What communications with, are privileged, see "*Evidence,*" Vol. II. p. 454. Are exempt from serving as Parish Constables, 5 & 6 Vict. c. 109, s. 6, *post,* title "*Constable.*" Are not privileged from Arrest while attending as an Advocate at a Petty Sessions, *Newton* v. *Constable,* 2 *Q. B.* 157. See "*Sessions,*" Vol. V.

Bastards.

CONCERNING the *Settlement* of Bastard Children, and the *Removal* of unmarried Women with child, see title "*Poor*," Vol. IV.

Concerning the offence of concealing the birth of, see *post*, "*Children*."

Herein of—

I. *Who is a Bastard*, 371.

II. *Proof of Illegitimacy*, 371.

III. *Maintenance of Bastards at Common Law*, 375.

IV. *Maintenance of, by Statute Law*, 376.

V. *Right of Parents to Custody of*, 388.

VI. *Capacity of, to inherit*, 390.

VII. *Forms*, 391.

I. Who a Bastard.

Who a bastard. Where no marriage.

A bastard by our *English* laws is one that is not only begotten, but born out of lawful matrimony. The civil and canon laws do not allow a child to remain a bastard if the parents afterwards intermarry; and herein they differ most materially from our law; which, though not so strict as to require that the child should be *begotten*; yet makes it an indispensable condition to make it legitimate, that it shall be *born* after lawful wedlock. (1 *Bla. Com.* 454; 2 *Inst.* 96.)

Birth after marriage.

If a woman grossly *enceinte* marry, it is the child of the husband; for when they testify their consent by a public marriage before the birth of the child, it is a public acknowledgment that the child is his, for at that time the child is one with the mother, and therefore in taking the mother, he takes the child with her. (1 *Roll. Abr.* 358; 1 *Inst.* 244; and see *per Lord Ellenborough*, C. J., *R.* v. *Luffe*, 8 *East*, 207, 208, S. C.; *post*, 374.)

Birth after death of husband.

As all children born before matrimony are bastard, so are all children born so long after the death of the husband, that by the usual course of gestation they could not be begotten by him. But this being a matter of some uncertainty, the law is not exact as to a few days. (*Alsop* v. *Bowtrell*, *Cro. Jac.* 541.)

II. Proof of Illegitimacy.

Proof of void marriage.

Although there be an actual marriage, the marriage may be shown to be *void*, and the illegitimacy established, by a prior marriage, want of age, want of reason, want of consent of parent or guardian, where such consent is necessary, or the non-observance of the solemnities required by the Marriage Act, or by a divorce *a vinculo matrimonii*. (See "*Marriage*," Vol. V.)

Presumption of legitimacy.

Children born during lawful marriage are *presumed* to be legitimate, but this presumption may be removed by proof of their illegitimacy.

Disproof of it.

We will consider how the presumption of legitimacy may be removed;—*first*, in cases where the husband *is alive* when the child is born;—*secondly*, when he is *dead* before it is born;—and *lastly*, by what *witnesses* it may be rebutted.

1st. When husband alive at birth.

1st. *Proof in Cases where Husband alive at Birth.*]—If the husband has had actual access to the wife, the issue will be legitimate, although the woman be proved to have been ever so unfaithful to the nuptial bed. (*R.* v. *Brown*, 2 *Stra.* 811; *Cope* v. *Cope*, 5 *C. & P.* 608; 1 *M. & Rob.* 269, S. C.)

By want of access.

Access will in general be *presumed* where there has been an opportunity for it, even though there has been a voluntary separation between husband

2. *Proof of Illegitimacy.*

and wife, and it generally requires strong and difficult evidence to show it has not taken place. (*R.* v *Luffe*, 8 *East*, 207; *per Sir J. Leach*, in *Head* v. *Head*, 1 *Sim. & St.* 154; 1 *Turner*, 139; S. C. *St. George and St. Margaret*, 1 *Salk.* 123.)

Formerly, indeed, if the husband were within the four seas, no proof of *non-access* to his wife was admitted, but the child was deemed to be his: but as this notion was built on no rational foundation, it is now departed from; and though the husband and wife are both in England, if there be sufficient proof that he had no access to her, the child will be a bastard. This was determined in the case of *Pendrell* v. *Pendrell*, 2 *Stra.* 925; *Andr.* 9; which was an issue out of Chancery to try whether the plaintiff were the heir at law of one *Thomas Pendrell.* It was agreed by court and counsel, on the trial at Guildhall, before Lord Chief Justice *Raymond*, that the old doctrine of *being within the four seas* was not to take place, but the jury were at liberty to consider of the point of access, which they did, and found against the plaintiff. And the Court of Chancery acquiesced in the determination.

Wife living in adultery.

The mere circumstance of the wife living notoriously in adultery is not sufficient proof of the illegitimacy of a child born during that period. And therefore, where, during the life of the husband, the wife married and lived with another person, and had children, who were christened and always called by his name, but there was no legal evidence as to access or non-access by the husband before the birth of such children: it was considered that the sessions were not warranted in finding that the children were illegitimate. (*Reg.* v. *Inhabitants of Mansfield*, 1 *Gale & D.* 7; 1 *Ad. & Ell.* (N. S.) 44, S. C.; and see *Bury* v. *Phillpot*, 2 *Mylne & K.* 349.)

Access may be rebutted:

But access is not to be *conclusively* presumed merely because the parties are within such a distance as to render it possible. (*Id.*; and see *Clark* v. *Maynard*, 6 *Maddox*, 364.)

by circumstantial evidence.

In a recent case, where a husband and wife, after living together for ten years, and having one child, agreed to separate; they accordingly afterwards lived apart, but within such distance as afforded them opportunities of sexual intercourse, the husband not being impotent: it was held, that the presumption of law in favour of the legitimacy of a child begotten and born of the wife during the separation, may be rebutted not only by evidence to show that the husband had not sexual intercourse with her, but also by evidence of their conduct: such as that the wife was living in adultery; that she concealed the birth of the child from the husband, and declared to him that she never had such child; that the husband disclaimed all knowledge of the child, and acted up to his death as if no such child was in existence: and also that the wife's paramour aided in concealing the child, reared and educated it as his own, and left it all his property by his will. (*Morris* v. *Davis*, 5 *Clark & F.* 163; 1 *Mood. & Rob.* 275; and see *Goodright* v. *Saul*, 4 *T. R.* 356; *Pendrell* v. *Pendrell*, 2 *Stra.* 925; *B. N. P.* 113.)

So proof that the husband left Norwich and went to reside in London, that his wife remained behind and lived with another man as his wife for years, during which time the child in question was born; that this child always went by the adulterer's name, and was reputed illegitimate in the family; has been held sufficient evidence of illegitimacy, though it did not clearly appear where the real husband had been from the time of conception to that of delivery. (*Thompson* v. *Saul*, 4 *T. R.* 356.)

Husband beyond seas.

But now non-access may be established by showing that the child was conceived and born when the husband continued *beyond* the four *seas*; (*R.* v. *Alberton*, 1 *Ld. Raym.* 395; 2 *Salk.* 483, S. C.; *Co. Lit.* 244;) but he need not be proved to have been so absent during the active period of gestation. (*R.* v. *Luffe*, 8 *East*, 207.) So also proof of the husband's being beyond seas until within a fortnight of his wife's delivery, the child will be considered a bastard. (*R.* v. *Luffe*, 8 *East*, 193; *R.* v. *Maidstone*, 12 *East*, 550.) And this point has been since established by the opinion of the judges in the case of a claim to the *Earldom of Banbury*, which involved a question of legitimacy in the person from whom the claimant derived his title. (*Case of the Banbury Claim of Peerage*, 2 *Selw. N. P.* 731; S. P. reported in 1 *Sim. & Stuart's Rep.* 153.) The case of the *Banbury*

Peerage was much cited in the case of *Head* v. *Head*, 1 *Turner's Ch. Rep.* 141; 1 *Sim. & Stuart's Rep.* 159.)

2. *Proof of Illegitimacy.*

Divorce.

Proof of a *divorce à mensa et thoro* will be *primâ facie* evidence of non-access, for obedience to the ecclesiastical sentence will be presumed; (*St. George* v. *St. Margaret*, 1 *Salk.* 128; 1 *Bla. Com.* 457; *B. N. P.* 112;) but such *primâ facie* evidence may be rebutted by proof of access. (*Id.*)

Physical impossibility.

Proof of *physical impossibility* on the part of the husband to procreate the child will be sufficient proof of its illegitimacy; as if the husband be only eight years of age; (1 *Roll. Abr.* 359;) or if he is diseased, infirm, or bed-ridden. (*Foscraft's case*, 1 *Roll. Abr.* 359; 1 *Bott*, 445; *R.* v. *Cuff*, 8 *East*, 200.) In *Lomas* v. *Holmden*, 2 *Stra.* 940, the defendants to prove illegitimacy were admitted to give evidence of inability from a bad habit of body. But their evidence not going to an *impossibility*, but an *improbability* only, that was not thought sufficient. (And see *per Lord Ellenborough*, *R.* v. *Luffe*, 8 *East*, 207.)

Direct proof of non-access.

Direct Proof of non-access will of course be sufficient to establish the illegitimacy. (*R.* v. *St. Bride*, 1 *Stra.* 51; *Pendrell* v. *Pendrell*, 2 *Stra.* 925, 1073; *R.* v. *Maidstone*, 12 *East*, 550; *Morris* v. *Davies*, *supra.*)

2d. Where husband dead at birth.

2dly. *Proof in Cases where Husband Dead at Birth.*]—It is a general rule, that if the child comes into the world within the usual period of gestation, it is to be considered legitimate; if beyond that period, illegitimate. (*Radwell's case*, *Co. Litt.* 124 b.)

"The usual period of gestation is nine calendar months, but there is very commonly a difference of one, two, or three weeks. A child may be born alive at any time from three months, but we have seen none born with powers of coming to manhood or of being reared before seven months or near that time; at six months it cannot be. I have known a woman bear a living child in a perfectly natural way, fourteen days later than nine calendar months; and I believe two women to have been delivered of a child alive in a natural way, above ten calendar months from the hour of conception." (*Harg. & But. Co. Lit.* 123 b. *Information from Dr. Hunter.* And see title "*Abortion*," *ante*, 10.)

In a case where the wife was a lewd woman, and she was delivered of a child forty weeks and ten days after the death of the husband, it was held legitimate. (*Hale's MSS.*; *Stark. Evid. Part IV.* 221, n. *a.* So where the child was born forty weeks and eleven days after the death of the first husband. (*Hale's MSS.*; *Alsop* v. *Bowtrell*, *Cro. Jac.* 541; *Godb.* 281.)

If a man die, and his widow soon after marry again, and a child is born within such time as renders it dubious, from the course of nature, to which husband it belongs, the issue is said to be more than ordinarily legitimate, and may, upon arriving at the years of discretion, choose which of the fathers it pleases. (1 *Bott*, 444.) But the question as to which is its father is for a jury to decide on. (*Hale's MSS*; *Cro. Jac.* 615; *Litt. Rep.* 177.)

3d. Who may prove illegitimacy, and how.

3dly. *What Witnesses may prove Illegitimacy, and how.*]—Any persons usually competent may be called to prove the illegitimacy.

The father and mother may be called to prove the legitimacy, (*Lomax* v. *Lomax*, *C. T. H.* 380; *B. N. P.* 241; *Pendrell* v. *Pendrell*, 2 *Stra.* 925,) though not always to prove the illegitimacy.

Father's evidence.

In *St. Peter's* v. *Old Swynford*, 2 *Sess. Cas.* 298, the *father* was permitted to bastardise the son; the chief justice declaring that he saw no reason why the father should be thought an incompetent witness, for his evidence in that case could no way discharge himself, but he would remain liable to maintain the bastard. But he cannot be called to prove non-access (*Post*, 374.)

Mother's evidence.

So in the case of *R.* v. *Bramley*, 6 *T. R.* 330, Lord *Kenyon*, C. J., said, "The evidence of the mother to prove that she and her supposed husband were never *legally married* was certainly admissible, though the justices at the sessions were to judge of the effect of it. In the case of *R.* v. *St. Peter's*, (*Burr. S. C.* 25, and *Bull. N. P.* 112,) it was expressly held that the supposed husband was a competent witness to disprove the marriage. There are also many other cases in which it has been decided that the parents may

2. *Proof of Illegitimacy.*

be called with respect to the legitimacy of their issue; and if they may be called to prove that they are legitimate children, there is no reason why they should be considered as incompetent when called upon to prove that the children are illegitimate. But in all these cases such testimony is open to great observation."

But where the child is born in *wedlock*, the *non-access* of the husband ought to be proved otherwise than upon the wife's oath; though she may on account of the necessity of the case prove she had criminal intercourse with other men. (*R.* v. *Reading*, 2 *Sess. Cas.* 175.)—In that case the defendant Reading was adjudged, by an order of bastardy, to be the putative father of a bastard child begotten of the wife of one Almont, of Sherborn. The said woman, on the appeal, gave evidence that the said Reading had carnal knowledge of her body in or about August, 1732, and several times since; and that her husband had no access to her from May, 1731, to the time of her examination in that court, being the 3d of October, 1733, and that the said Reading was the father of the said child. And the question, on the removal of the same into the Queen's Bench, was, whether the wife in this case should be admitted as a witness for or against her husband, and to bastardise her own child? And the whole court were of opinion, that the wife could be a witness to *no other fact but that of incontinence*, and that this she must be admitted to be witness to from the necessity of the thing; but not to the *absence of her husband*, which might properly be proved by other witnesses; and they likened it to the case of hue and cry, where the person robbed shall be admitted a witness of the fact of robbery, but not to prove any other matter relating thereto, as in what hundred the place was, and the like, because they may be proved by others. (And see *R.* v. *Stourton*, 5 *Adol. & Ell.* 180.)

In *Goodright* d. *Stevens* v. *Moss*, 2 *Cowp.* 591, *Lord Mansfield*, C. J., laid it down as a rule founded in decency, morality and policy, that where a child appears to have been born in wedlock, the evidence of the parents, especially of the mother, who is the offending party, is inadmissible to prove the non-access of her husband, and bastardise the issue. And see *R.* v. *Sowton*, 5 *Ad. & Ell.* 180, in which this doctrine was confirmed; and it was also held that neither the husband nor the wife can be examined or cross-examined as to collateral facts for the purpose of proving non-access.

And it has been held, that a woman cannot give evidence of the non-access of her husband to bastardise her issue, although he be dead at the time when the wife is examined, for the rule is grounded upon the general principle of public policy affecting the children born during marriage, as well as the parties themselves. (*R.* v. *Kea*, 11 *East*, 132.)

Order made as well on oath of wife *as otherwise* good.

In the case of *R.* v. *Bedall*, *Andr.* 8; 2 *Stra*, 1076, S. C., the order reciting that on the examination of the mother, *and on other proof*, it appeared that her husband had no access to her, was held to be good; for there the woman's oath is not set forth as the only evidence, but *other proof*, which must be intended legal proof.

R. v. *Luffe*, 8 *East*, 193. By an order of bastardy, dated Aug. 20, 1806, it was *inter alia* stated, "whereas it appeared unto us the said justices, as well upon the oath of the said Mary Taylor *as otherwise*, that her husband hath been beyond the seas, and that she did not see her said husband, nor *had access to him* from the 9th of April, 1804, until the 29th of June last past; and whereas it hath also appeared to us, the said justices, as well upon the complaint, &c. as upon the oath of the said M. T. that she the said M. T. on or about the 13th of July now last past was delivered of a male bastard child, in the said parish of B., and that the said male bastard child is *likely to become chargeable, &c.* we, therefore, *upon examination* of the causes and circumstances of the premises, *as well upon the oath of the said M. T. as otherwise*, do hereby adjudge, &c." There were three objections made to this order, *viz.* 1st, that the wife was admitted to prove the non-access of her husband; 2dly, that this being the child of a married woman, the justices had no jurisdiction to make an order of affiliation, unless the child appeared to have been actually chargeable, and not merely likely to become so; 3dly, that the non-access of the husband was not proved to have continued during

the whole time of the wife's pregnancy, which was necessary to bastardise the issue. It was held by the Court, that the words "as otherwise" should be intended as evidence given upon oath: that it did not appear to what particular facts the wife deposed, or what was proved by other evidence; and then the rule laid down in *R.* v. *Bedall* applied, that if there were other witnesses besides the wife, and she were competent to prove any part of the case, the Court would intend, in support of an order framed like the present, that she was examined only as to those facts which she was competent to prove; as to the second objection, it is a consequence which follows of course from establishing the *bastardy* of the child that is born out of *lawful matrimony*. A child born by adulterous intercourse is as much within the provisions of the act of Geo. II. as one which is born of a single woman. As to the third objection, that as it appeared that the husband returned within access of the wife about a fortnight before the child was born, he must be presumed to be the father of it: by the law of the land no man can be a bastard who is born after marriage, *unless for special matter*. The fact of access or non-access may be gone into. Circumstances which show a natural impossibility that the husband could be the father of the child of which the wife is delivered, whether arising from his being under the age of puberty, or from his labouring under disability occasioned by natural infirmity, or from the length of time elapsed since his death, are grounds on which the illegitimacy of the child may be founded; that on the ground of *improbability*, however strong, they (the Court) should not venture to proceed, but only upon such as showed absolute physical impossibility; that the general presumption would prevail, except a case of plain natural impossibility were shown, and to establish as an exception a case of such extreme impossibility as the present could not do harm.

2. *Proof of Illegitimacy.*

The 4 & 5 Will. IV. c. 76, s. 72, enacts, that no order of maintenance shall be made on the father unless the evidence of the mother of the bastard is corroborated in some material particular by other testimony. (See *post*, 377.)

The mother's testimony must be corroborated.

The parent's declaration, on oath or otherwise, may be adduced as evidence *after their decease*, of the fact of marriage and of the time of birth; (*Anon.* 12 *Vin.* 247; *B. N. P.* 294; *R.* v. *Bramley*, 6 *T. R.* 330; *Vowels* v. *Young*, 15 *Ves. jun.* 148;) but not in their lifetimes, except for the purpose of contradicting them; (see 2 *Stra.* 925; *B. N. P.* 113;) and the declarations of the wife are not admissible to prove her son not to be the son of her husband but of another man; (*R.* v. *Cope*, 1 *M. & Rob.* 275.) Nor can the declaration of a father or mother be received after their deaths to prove the want of access, so as to bastardise a child born during the coverture, for they could not be examined to the fact if alive. (1 *Nolan*, 335.)

Declaration by parents and others.

The declarations or memorandums of deceased members or relations of the family, or perhaps of others, such for instance as a surgeon living in the habits of intimacy with them, may be admitted in evidence. (See *Higham* v. *Ridgway*, 10 *East*, 120; 3 *T. R.* 723; *B. N. P.* 295; 1 *M. & Selw.* 689; 2 *Vin. Abr. Evid.* T. b, 91.)

A party charged as a reputed father of a bastard cannot be compelled to give evidence tending to prove the fact. (See *R.* v. *St. Mary's Nottingham*, 13 *East*, 58, n.)

Compelling parents to give evidence.

But justices have, from the power given them to examine in a case of bastardy, an incidental power to compel the woman to answer, and may commit her if she refuses. (See *R.* v. *Jackson*, 1 *T. R.* 655.) And by the 2 & 3 Vict. c. 85, *post*, 379, justices may enforce the attendance of witnesses.

As to competency of inhabitants in cases of bastardy, see *post*.

Competency of inhabitants.

III. Maintenance of Bastards at Common Law.

At common law the father is not liable for his child's support or his debts, unless he enter into some express or implied promise to become so, for it considers moral duties of this nature, like others of imperfect obligation, as

Maintenance of, at common law.

3. *Maintenance of.*

better left in their performance to the impulse of nature; and therefore a third person who may relieve the child, even from absolute want, cannot sue the father for remuneration, unless he has given the child authority to contract the debt, or has himself contracted it. (*Mortimer* v. *Wright*, 6 *Mee. & W.* 482; *Rolfe* v. *Abbott*, 6 *Car. & P.* 286; *Urmston* v. *Newcomen*, 4 *Ad. & Ell.* 899; *Clements* v. *Williams*, 8 *C. & P.* 58; *Seaborne* v. *Maddy*, 9 *C. & P.* 497.) It is mainly a question for a jury to decide on, whether the father authorised the supply of the articles, or the incurring of the subject-matter of the claim. (See *Law* v. *Wilkins*, 6 *Ad. & Ell.* 718; 1 *Nev. & Per.* 697, S. C.) (See the cases and law collected *post*, title "*Children.*") In *Furillio* v. *Crowther*, (4 *D. & R. M. C.* 1; 7 *D. & R.* 612, S. C.,) where the putative father had made various payments for maintenance, and then refused to continue its support until the mother obtained an order of filiation, it was held, that no action would lie at the suit of the mother for arrears of maintenance.

A parent, however, may, *under circumstances*, be indicted at common law for not supplying an infant with necessaries, &c. (See *R.* v. *Friend*, *Russ. C. C.* 20; *R.* v. *Ridley*, 2 *Campb.* 650; *ante*, 195.) And by a bill now before parliament it is proposed to impose a penalty of 10*l.* on persons maltreating bastards. If passed into a law, it will be found in the *Addenda* to this work, Vol. VI. under title "*Bastards.*"

Bastards born before the 14th August, 1834.

Where a bastard child is born, for whose support the parents neglect to provide necessaries, the parish officers are obliged to do it without an order of justices for that purpose. (*Hags* v. *Bryant*, 1 *H. Black.* 253.)

IV. Maintenance of Bastards by Statute Law (*a*).

As regards the maintenance of bastards born before the passing of the 4 & 5 Will. IV. c. 76, (14th August, 1834,) two justices were, by the 18 Eliz. c. 3, s. 2, empowered by an order of filiation, to compel the putative father or mother, or both, to pay a weekly sum for the child's maintenance; and by the 49 Geo. III. c. 68, s. 3, the order might be enforced by a justice committing the party disobeying it to the common gaol or house of correction, there to be imprisoned and kept to hard labour for three months, unless the sum was sooner paid.

The 4 & 5 Will. IV. c. 76, s. 69, repeals or supersedes all the prior

(*a*) An act of parliament will very probably be passed this session (7 & 8 Vict.) which will very materially alter the law upon this branch of the subject. It is proposed by it to take away the power of making an order of bastardy on the putative father except as therein provided. The putative father may be summoned to appear before a petty sessions, on the application of the mother, and the justices at such sessions may, after the birth of the child, make an order on him for the maintenance and costs, and enforce the same by distress and commitment; such application will have to be made within forty days from the service of the summons after the birth of the child. The money payable under the order is to be paid to the mother, or to a person appointed by the justices. The mother is to be made punishable under the vagrant act. Officers of parishes or unions are not to receive money under the order or interfere in any respect. Proceedings may be adopted against the putative father in case of the death or incapacity of the mother. Penalties are to be imposed for promoting the marriage of a mother of a bastard, or for improperly misapplying the monies ordered to be paid for the maintenance, or for maltreating a bastard. Orders existing at the time of the passing of the act are not to be affected, but orders made before 14 August, 1834, are to cease on 1st January, 1849. Clerks to justices are annually to make a return of summonses and orders, &c. to the clerk of the peace, who is to transmit copies thereof to the secretary of state, with a list of appeals. The act, if passed before the publication of this work, will be found in the *Addenda*, title "*Bastards*," Vol. VI.

legislative enactments respecting bastards born after the passing of that act, and as questions can but rarely arise respecting the maintenance or affiliation of bastards born before the passing of that act, it is considered not worth while to encumber this work with any notice of them. They will be found considered in the 26th edition of it.

4. *Maintenance of.*

By 4 & 5 Will. IV. c. 76, s. 71, "Every child which shall be born a bastard after the passing of this act shall have and follow the settlement of the mother of such child until such child shall attain the age of sixteen, or shall acquire a settlement in its own right, and such mother, so long as she shall be unmarried or a widow, shall be bound to maintain such child as a part of her family until such child shall attain the age of sixteen; and all relief granted to such child while under the age of sixteen shall be considered as granted to such mother: provided always, that such liability of such mother as aforesaid shall cease on the marriage of such child, if a female."

Bastards born after that time.

Mother bound to maintain.

Sect. 57. "Every man who from and after the passing of this act shall marry a woman having a child or children at the time of such marriage, whether such child or children be legitimate or illegitimate, shall be liable to maintain such child or children as a part of his family, and shall be chargeable with all relief, or the cost price thereof, granted to or on account of such child or children until such child or children shall respectively attain the age of sixteen, or until the death of the mother of such child or children; and such child or children shall, for the purposes of this act, be deemed a part of such husband's family accordingly."

When she marries husband to maintain them (*a*).

If the mother becomes unable to maintain the child, and therefore it becomes chargeable to the parish, then the putative father may be compelled to reimburse the parish for its maintenance and support, on application to the sessions for that purpose. This is provided for by the 4 & 5 Will. IV. c. 76, ss. 72, 73, 74, 75 and 76, as altered by the 2 & 3 Vict. c. 85. We will proceed to notice these provisions.

Where she is unable to maintain them.

By 4 & 5 Will. IV. c. 76, s. 72, "When any child shall hereafter be born a bastard, and shall by reason of the inability of the mother of such child to provide for its maintenance become chargeable to any parish, the overseers or guardians of such parish, or the guardians of any union in which such parish may be situate, may, if they think proper, after diligent inquiry as to the father of such child, apply to the next general quarter sessions of the peace within the jurisdiction of which such parish or union shall be situate, [now by the 2 & 3 Vict. c. 85, s. 1, *post*, 379, the application can be made only to justices in special or petty sessions,] after such child shall have become chargeable, for an order upon the person whom they shall charge with being the putative father of such child to reimburse such parish or union for its maintenance and support: and the court to which such application shall be made shall proceed to hear evidence thereon, and if it shall be satisfied, after hearing both parties, that the person so charged is really and in truth the father of such child, it shall make such order upon such person in that respect as to such court shall appear to be just and reasonable under all the circumstances of the case: provided always, that no such order shall be made unless the evidence of the mother of such bastard child shall be corroborated in some material particular by other testimony to the satisfaction of such court: provided also, that such order shall in no case exceed the actual expense incurred or to be incurred for the maintenance and support of such bastard child while so chargeable, and shall continue in force only until such child shall attain the age of seven years, if he shall so long live: provided also that no part of the monies paid by such putative father in pursuance of such order shall at any time be paid to the mother of such bastard child, nor in any way be applied to the maintenance and support of such mother."

In that case, on application of overseers, &c. putative father may be ordered to maintain them.

Mother's evidence to be corroborated.

What expense to be allowed.

How long to continue

Monies paid not applicable to support of mother.

Sect. 73. "No such application shall be heard at such sessions unless fourteen [by 2 & 3 Vict. c. 81, s. 1, *post*, 379, *seven*] days' notice shall have been

No application to be heard without previous notice.

(*a*) As to the law of settlements of bastards, see "*Poor*," Vol. IV.

4. *Maintenance of.*

4 & 5 Will. 4, c. 70.

If application be heard, costs may be calculated from birth of bastard child, if within six months.

given under the hands of such overseers or guardians to the person intended to be charged with being the father of such child of such intended application; and in case there shall not, previously to such sessions, have been sufficient time to give such notice, the hearing of such application shall be deferred to the next ensuing general quarter sessions: provided always, that whenever such application shall be heard, the costs of the maintenance of such bastard child shall, in case the court shall think fit to make an order thereon, be calculated from the birth of such bastard child, if such birth shall have taken place within six calendar months previous to such application being heard; but if such birth shall have taken place more than six calendar months previously to such application being heard, then from the day of the commencement of six calendar months next preceding the hearing of such application: provided also, that if upon the hearing of such application the court shall not think fit to make any order thereon, it shall order and direct that the full costs and charges incurred by the person so intended to be charged in resisting such application shall be paid by such overseers or guardians."

If party charged does not appear, justices may nevertheless proceed.

Sect. 74. "If such person so intended to be charged shall not appear by himself or his attorney at the time when such application shall come on to be heard before such court, according to such notice, such court shall nevertheless proceed to hear the same, unless such overseers or guardians shall produce an agreement under the hand of such person to abide by such order as such court shall make thereon without the hearing of evidence by such court: provided always, that such court may, notwithstanding such agreement, require that evidence shall be given in support of such application, if it thinks fit, before such order is made."

Party summoned, if suspected of intending to abscond, may be required to enter into recognizance for appearance.

Sect. 75. "Whenever such overseers or guardians shall have determined to make such application as aforesaid, it shall be lawful for one justice of the peace, at the request of such overseers or guardians, to summon the person so intended to be charged with being the father of such bastard child to appear before him; and if such justice shall be satisfied that such person has any intention to abscond or keep out of the way, in order to avoid the consequences of such application, such justice may require such person to enter into a recognizance to appear and answer thereto, and in case such person shall refuse or neglect to enter into such recognizance, may commit such person to the gaol or house of correction of the county, riding, or division within which such parish shall be situate, until he shall enter into such recognizance, or until such application shall be heard."

When payments get into arrear, putative father may be proceeded against by distress or attachment of wages.

Sect. 76. "If at any time after the expiration of one calendar month after an order shall have been made in pursuance of such application it shall appear to one justice, upon the oath of any one of such overseers or guardians, that the payments directed to be made by such order have not been made according thereto and are in arrear, it shall be lawful for such justice or any other justice by warrant under his hand and seal to cause such putative father of such bastard child to be brought before two justices of the peace; and in case such putative father shall refuse or neglect to make payment of such sum of money as shall appear to such justices to be due from him under such order, together with the costs of apprehension, it shall be lawful for such or any two justices to proceed to recover such sum and costs by distress and sale of the goods and chattels of such putative father, or by attaching the wages of such putative father, for the recovery of such sum and costs, in the same manner as wages may be attached under the provisions of this act."

2 & 3 Vict. c. 85.

By the 2 & 3 Vict. c. 85, intituled "*An Act to enable Justices of the Peace in Petty Sessions to make Orders for the Support of Bastard Children,*" [26th August, 1839,] reciting that it is expedient to give more speedy and effectual means for obtaining orders upon the putative fathers of bastard children for their support and maintenance, it is enacted, "That after the passing of this act, when any child which has been born a bastard since the passing of an act passed in the fifth year of the reign of his late majesty, intituled '*An Act for the Amendment and better Administration of the Laws relating to the Poor in England and Wales,*' and with respect to which no application shall have

Powers of quarter session transferred to special or petty session.

been made to any court of general quarter sessions under the provisions of the said act, shall, by reason of the inability of the mother of such child to provide for its maintenance, become chargeable to any parish, the guardians of any parish, or of the union in which any parish may be situate, or if there shall be no such guardians then the overseers of such parish, may, if they think proper, at any time within three calendar months after such child shall have become chargeable, apply to the justices of the peace holding any special or petty session in and for the division or borough within which such union or parish, or any part thereof, shall be situated, for an order upon the person whom they shall charge with being the putative father of such child, to reimburse such union or parish for its maintenance and support; and the justices then and there assembled, not being less than two, shall proceed with respect to the application, and shall have all the powers and duties in regard thereunto which are given to the court of general quarter sessions by the act 4 & 5 Will. IV. c. 76; and all enactments in the said act relating to the court of general quarter sessions shall be taken to apply to the said justices in special or petty session, except that the notice to the person intended to be charged with being the father of the child need not be given more than seven days, instead of fourteen days, before the session at which the application shall be heard; and after the passing of this act it shall not be lawful to make any such application to any court of general quarter sessions, nor shall any court of general quarter sessions have any authority to make any order upon any such application."

4. *Maintenance of.*

2 & 3 Vict. c. 85.

Seven days' notice of application to be given to the putative father.

Sect. 2. "That any justice of the peace, upon the request of either party, may summon any witness to appear and give evidence upon the matter of any such charge, and by warrant under his hand and seal may require any person to be brought before him who shall neglect or refuse to appear to give evidence at the time and place appointed in such summons, proof upon oath being first given of personal service of the summons upon the person against whom such warrant shall be granted, and that the reasonable expenses of attendance were paid or tendered to such person; and the justices before whom any such charge shall be heard may commit any person coming or brought before them who shall refuse to give evidence to any house of correction within their jurisdiction, there to remain without bail or mainprize for any time not exceeding fourteen days, or until such person shall sooner submit himself to be examined; and in case of such submission the order of any such justice shall be a sufficient warrant for the discharge of such person."

Justices may enforce attendance of witnesses.

Sect. 3. "Provided, that if the person whom the guardians or overseers shall charge with being the putative father of such child shall declare to the justices in such special or petty session that he is desirous that the charge shall be heard and determined at the quarter sessions of the peace, and shall then and there enter into a recognizance, with two sufficient sureties, conditioned personally to appear at the quarter sessions of the peace then next or next but one ensuing, as the justices shall think fit, to answer to the said charge, and to abide the judgment of the court at such sessions, and to pay all the costs incurred by the said guardians and overseers in bringing such charge before the said court in case the court shall adjudge him to be the putative father of such child, then the justices in special or petty session shall not proceed further to hear the charge, but shall take such recognizance and transmit it to the clerk of the peace; and in such case all further proceedings in the matter of such charge shall be had before the said court of quarter sessions as if this act had not been made."

Parties charged may enter into recognizance to try the charge at quarter sessions.

Sect. 4. "That the words 'parish,' 'guardian,' 'overseer,' and 'justice' in this act shall be deemed to have the same meaning as in the said act passed in the fifth year of the reign of his said late majesty."

Meaning of certain terms.

In what Cases the putative Father may be compelled to maintain the Child.] —When the child has, by reason of the inability of its mother to maintain it, become chargeable to the parish, then he may be compelled by an order of justices in special or petty sessions to reimburse the parish. (4 & 5 Will. IV. c. 76, s. 72, *ante*, 377.)

In what cases the putative father may be compelled to maintain the child.

4. *Maintenance of*

If the mother marry, the husband will be bound to maintain the child until the age of sixteen, or until the death of the mother. And by virtue of the 57th section, *ante*, 377, the putative father of a child, though born before the passing of the act, whose mother is married to another person, is no longer liable on an order of justices for the maintenance of such child, at least whilst the husband is of ability to maintain it. (*Lang* v. *Spicer*, 1 *M. & W.* 129.) And it would seem from what fell from Baron Parke in that case, that the affirmative words of the 57th section amounted to a repeal of the former statutes relating to bastardy, and destroyed altogether the effect of the order of filiation during the marriage of the mother.

A soldier, though in actual service, is not it seems protected by the Mutiny Act from the provisions of the act. (*R.* v. *Bowen*, 5 *T. R.* 156; *R.* v. *Archer*, 2 *T. R.* 156.)

In what time the application must be made.

Within what Time the Application against the Father must be made.]—It must be made within three calendar months after the child has become chargeable, 2 & 3 Vict. c. 85, s. 1, *ante*, 379.

By whom application to be made.

By whom Application to be made.]—The application for the order on the putative father is directed, by the 2 & 3 Vict. c. 85, s. 1, (*ante*, 379,) to be made by the guardians of any parish, or of the union in which any parish may be situate, or if there shall be no such guardians, then by the overseers of such parish." (*R.* v. *Justices of Wilts*, 12 *Ad. & Ell.* 793.) And by sect. 4, the words "parish," "guardian," "overseer," and "justice," shall have the same meaning as in 4 & 5 Will. IV. c. 76. Where an order recited that the application had been made by the "guardians and overseers" of a parish which formed part of a union, it was held that the order was not bad, and that the word "overseers" might be rejected as immaterial. (*R.* v. *Goodall*, 2 *Dowl. N. S.* 382.)

The interpretation clause of the 4 & 5 Will IV. s. 109, enacts, that the word "overseer" shall be construed to mean and include overseers of the poor, churchwardens, (so far as they are authorised or required by law to act in the management or relief of the poor, or in the collection or distribution of the poor rate,) assistant overseer, or any other subordinate officer, whether paid or unpaid, in any parish or union, who shall be employed therein in carrying that act or the laws for the relief of the poor into execution. And the word "guardian" shall be construed to mean and include any visitor, governor, director, manager, acting guardian, vestryman, or other officer in a parish or union, appointed or entitled to act as a manager of the poor and in the distribution or ordering of the relief to the poor from the poor rate, under any general or local act of parliament. In a case before the 4 & 5 Will. IV. c. 76, where parishes were united under the 22 Geo. III. c. 83, the guardian thereby appointed was substituted in the overseer's place, and one who was *de facto* such, being so received and acknowledged by the parish, though not legally appointed, was held competent to make the complaint. (See *R.* v. *Martyr*, 13 *East*, 55.) In *Exp. Martin*, (6 *B. & C.* 80; 9 *D. & R.* 65, S. C.,) before the 4 & 5 Will. IV. it was made a question whether a clerk to the guardians of the poor was the proper person to make the complaint, and whether it ought not to be made by the guardians themselves; the point was not decided. (See "*Notice of Application*," *post*, 381.)

To what justices application to be made.

To what Justices to be made.]—It will be seen that by the 2 & 3 Vict. c. 85, s. 1, *ante*, 379, the application for the order on the putative father must now in every case be made to the justices in special or petty sessions *in the first instance*, and not to the general quarter sessions as directed by sect. 72 of the 4 & 5 Will. IV. c. 76. But the charge may be removed from the special or petty sessions to the quarter sessions, in the manner provided by sect 3 of the 2 & 3 Vict. c. 85, *ante*, 379, when the further proceedings shall be conducted there "as if the latter act had not been made."

The 2 & 3 Vict. c. 85, s. 1, authorises the guardians of any parish, or of the union in which such parish is situate, or if there shall be no such guar-

dians, then the overseers of such parish, to apply to "the justices of the peace holding any special or petty sessions in and for the division or borough within which such union or parish, or any part thereof, shall be situated," for an order on the putative father. Difficulties have arisen in the construction of this part of the section as to the justices to whom the application should be made. And where a poor law union consisted of several places, over which different divisions of justices had jurisdiction, it was doubted whether a bastardy order could be made by one division, where the child has become chargeable in another. And an application having been made for such an order, and the justices of one division declining to make it, on the ground that they had no jurisdiction in another, a rule for a mandamus to compel them to make it was discharged. (*Ex parte Wallingford Union Guardians*, 9 *Dowl. P. C.* 987.) The safest course to pursue, where a union extends into several divisions or counties, is to make the application to those justices who have jurisdiction over the parish to which the child has become chargeable, or within whose jurisdiction the cause of complaint arose.

4. *Maintenance of.*

Before the passing of the 2 & 3 Vict. c. 85, it was held that the enactment of sect. 72 of the 4 & 5 Will. IV. c. 76, requiring the application to be made to the *next* general quarter sessions after the child becomes chargeable, was imperative, and must be taken to mean the *next practicable* sessions after the child becomes chargeable. (*R.* v. *Heath*, 5 *Ad. & Ell.* 343; *R.* v. *Justices of Oxfordshire*, 6 *N. & M.* 351; and see *R.* v. *Justices of Carnarvonshire*, 5 *N. & M.* 364.) But the order need not have shown on the face of it that the application was made at the next practicable general quarter sessions. (*Reg.* v. *Lewis*, 8 *Ad. & Ell.* 881; see *ante*, "*Appeal.*")

Notice to father of application.

Notice of Application to Father.]—The application to the special or petty sessions cannot be heard unless seven days' notice has been given, under the hands of the guardians, or if no guardians, under the hands of the overseers. to the putative father of such intended application; and it must be given within three calendar months after the child has become chargeable. (2 & 3 Vict. c. 85, s. 1; 4 & 5 Will. IV. c. 76, s. 73, *ante*, 377.) And it lies upon them to show that proper notice was given, and an objection to the notice is not waived though the father appear before the justices to oppose the application in obedience to the notice, provided he raises the objection at the time. (*R.* v. *Justices of Wilts*, 12 *Ad. & Ell.* 793.)

The notice must be signed by a majority of the board of guardians (being three at least, 4 & 5 Will. IV. c. 76, s. 38, Vol. IV.) or by the majority of the overseers of the parish, including the churchwardens in their character of overseers, where there are no guardians. (*Reg.* v. *Justices of Wiltshire*, 4 *Per. & D.* 406; 12 *Ad. & Ell.* 793, S. C.; *Reg.* v. *Justices of Cambridgeshire*, 7 *Ad. & Ell.* 480; *Reg.* v. *James*, 10 *Ad. & Ell.* 423.) But in the case of a township, which was a perpetual curacy, having its own church (where marriages and burials are performed) and its own churchwardens, raising its own church-rate, maintaining its own poor, and independent of the parish at large in all respects, except paying annually towards the repair of the parish church; the churchwardens of the township are not, by virtue of their office, overseers of the poor, and therefore a notice signed by the overseers only of such a township would now, where there are no guardians, be valid (*R.* v. *Justices of N. R. Yorkshire*, 6 *Ad. & Ell.* 863.)

It is prudent for the purposes of evidence to have both the notice served as well as a duplicate copy signed, and that the witness who swears to the service should also swear to the copy being a copy of that served. Where it appeared that the copy of the notice which was put in evidence at the sessions, in order to prove a service of the notice, had not the names of the overseers, &c. subscribed to it, it was held by the Court of Queen's Bench that the sessions were warranted in dismissing the application for the defect. (*R.* v. *Justices of Carnarvon*, *post*, 382.)

Recognizance, &c. of putative father, suspected of an

Compelling Father to appear—Recognizance, &c.]—If there be reason to believe that the putative father, against whom the affiliation is to be made,

4. *Maintenance of.*

Intention to abscond to appear.

intends to abscond, to avoid the consequences of such affiliation, a justice may, at the request of the overseers or guardians, summon the party and require him to enter into a recognizance to appear to answer at the sessions, or in default thereof may commit him until he does, or until the application shall be heard. (Sect. 75, *ante*, 378.) This proceeding is not to be until after the application has been determined on, and therefore it seems not until after he has had notice of the determination; for without such notice, the suspicion of his intending to abscond in order to avoid contingent possibilities, is a violent presumption. (*Theobald's Poor Law*, 19.) When the recognizance becomes forfeited by the non-appearance, it is estreated as a matter of course without motion of counsel. (See *post*, "*Recognizance*," Vol. V.)

Recognizance to appear at quarter sessions.

If the person charged with being the putative father shall desire that the charge should be heard at the quarter sessions, he must enter into a recognizance, with two sufficient sureties, conditioned personally to appear *at the quarter sessions then next or next but one, as the justices shall think fit*, and such recognizance shall then be transmitted to the clerk of the peace, and the charge heard accordingly. (Sect. 3.)

Where the order of the quarter sessions recited merely the fact of the notice having been served, and the recognizance entered into, the Court refused to entertain any objections to the recognizance or notice. (*Reg.* v. *Goodall*, 2 *Dowl. N. S.* 382.)

Proceedings at the hearing.

Proceedings on hearing—Proofs, &c.]—The putative father either appears by himself or his attorney at the special or petty sessions or not, whichever he does the justices should proceed to hear the application on its being proved that the required seven days' notice has been given; (4 & 5 Will. IV. c. 76, s. 74.) But if the putative father be desirous that the charge should be heard and determined at the quarter sessions, the justices in special or petty sessions cannot proceed further, but must transfer it to the quarter sessions, on the putative father entering into the proper recognizance. The hearing will then proceed at the quarter sessions in the same manner as at the special or petty sessions. No notice need be given of such hearing. (*R.* v. *Justices of Wilts*, 12 *Ad. & Ell.* 793.)

Under the old law, although it was indispensable that the putative father should be summoned to appear, previously to an order being made upon him, his presence during the mother's examination before the justices out of sessions, was not necessary to the validity of such order. (*R.* v. *Upton Gray*, *Cald.* 308; 1 *Bott*, 482.)

No proofs necessary if father agrees to an order.

If the overseers or guardians produce an agreement under the hand of the putative father, to abide the order of the justices, they must proceed to hear the case notwithstanding he does not appear by himself or his attorney; and they may make the order without hearing of evidence, further than proof of such signature, and the amount already paid for the child's maintenance for a period not exceeding six months: but notwithstanding such agreement the justices may, if they think fit, require evidence to be given in support of the application. (Sect. 74, *ante*, 378.)

Proof of notice.

If such agreement is not produced, then the proofs in support of the application must be gone into.

In case the complaint is heard at the petty sessions, proof should be adduced of the service of the notice on the putative father, duly signed, seven days before the application. The appearance of the father before the justices to oppose the application does not waive the necessity for this proof of notice. (*R.* v. *Justices of Carnarvon*, 5 *Nev. & M.* 364.) The notice should be proved by a duplicate copy which had been examined with the original. (See *id.*, and *ante*, 381.) But where, in pursuance of a notice from the guardians of a union, a party appeared at the petty sessions to answer an application for a bastardy order, and the hearing thereof was, upon his request, referred to the next quarter sessions, he entering into a recognizance to appear there and abide the judgment of the court, and he did appear there accordingly; it is not necessary at the hearing at the quarter sessions to prove the original notice to appear at the petty sessions, nor is any notice from the guardians of their intention to proceed at the quarter sessions required. (*Reg.* v. *Justices of Wiltshire*, 4 *P. &*

D. 406; 12 *Ad. & Ell.* 793, S. C.) And in another case, where the recognizance recited that notice had been sent to the putative father, this was holden to be a waiver of his right to have the notice proved at the quarter sessions, although no part of the case was entered into at petty sessions, and he merely appeared there for the purpose of declaring his intentions to remove the case. (*Reg.* v. *Stoddart*, 1 *Gale & D.* 654.)

4. *Maintenance of.*

We have already considered the proofs to be adduced in support of the child being a bastard, (*ante*, 371.)

Proof of bastardy.

Proof must be adduced of the child having become actually chargeable to the parish, within three calendar months before making the application, from the mother's inability to maintain it.

Chargeability of child.

It must also be proved that the party to whom the notice to appear has been given is the father of the child.

Defendant's being father.

Evidence must also be adduced of the amount already expended for the child's maintenance, not including sums paid to or laid out upon the mother, and of its future probable cost.

Amount of expenditure.

In general the order must be made upon the *vivâ voce* examination of witnesses, and cannot be founded upon affidavit without such evidence. (*R.* v. *Colbert*, *Comb.* 103; 2 *Nol.* 292.)

Examination of witnesses must be *viva voce*.

The mother's testimony, if living, is nearly always resorted to; but though it should nearly always be taken, it is not essential to the order, for it may be made on the evidence of others. (See *R.* v. *St. Mary, Nottingham*, 13 *East*, 57.) If resorted to, it must be corroborated in *some material particular* by that of some other competent person. This is expressly required by the 72d section of the act, *ante*, 377; and if not so corroborated the court must dismiss the application. And an order of filiation made upon the oath of the mother, and upon evidence in corroboration thereof, without stating it to be of some material particular, is bad. (*Reg.* v. *Read*, 1 *Per. & D.* 413; 9 *Ad. & Ell.* 619, S. C.) As to how far the mother can be examined to prove the bastardy, see *ante*, 373.

The mother's testimony.

We have already seen how far the testimony of the parent is admissible to prove the bastardy, *ante*, 373, and what is sufficient to prove that fact, *ante*, 371 to 375. The father's confession of his being the father will suffice to found the order upon him.

Father's testimony.

The bastard himself, if competent in other respects, may be examined on oath to prove circumstantial facts; as that his father, when accused of it, had acknowledged the witness was his child, or that the witness was constantly reputed to be such, or the like. (*R.* v. *St. Mary, Nottingham*, 13 *East*, 57.)

Child's testimony.

The 2 & 3 Vict. c. 85, s. 2, (*ante*, 379,) authorises any justice to summon witnesses upon the request of either party; and empowers the justices in special or petty sessions, before whom the charge shall be heard, to commit any person brought before them who shall refuse to give evidence. (See title "*Examination*," Vol. II.)

Compelling attendance of witnesses.

It seems that the mother or witness refusing to answer a lawful question, may be committed until she or he answer it. (See *Billings* v. *Prince*, 2 *Bla. Rep.* 1017; *R.* v. *Beard*, 2 *Salk.* 278; *Exp. Martin*, 6 *B. & Cres.* 80; 9 *D. & Ryl.* S. C.) It seems questionable whether it is any offence to secrete the woman with her own consent, in order to prevent her giving evidence about the father. (*R.* v. *Chandler*, 1 *Stra.* 612; 2 *Ld. Raym.* 1368, S. C.)

Commitment for not answering.

A justice might, under the old law, have bound those who procured the putative father or the mother to run away, (so that an order could not be made or performed to their good behaviour,) to be forthcoming at the next general gaol delivery or quarter sessions. (*Dalt.* c. XI. *Bastardy.*)

The Order.]—If the justices be satisfied that the person charged is really and in truth the father, they shall make such order upon him as to them shall appear just and reasonable, but not to exceed in any case the actual expense incurred after the birth of the child, and after it became actually chargeable to the parish; that is, incurred for the child alone, not reckoning any sums paid to or laid out for the relief to the mother; or to be incurred

The order.

4 *Maintenance of.*

while the child remains chargeable; nor to remain in force after the child shall have attained the age of seven. (Sects. 72, 73.) The sum generally ordered to be paid for the future maintenance is 1*s.* 6*d.* or 2*s.*

Form of the order.

The order, it seems, ought to show upon the face of it that it was made upon the complaint of the guardians or overseers, or with their consent, as the fact may be; for upon their complaint alone can the order be made. (*Ante*, 380; see *Reg.* v. *Justices of Hampshire*, 9 *Dowl.* 175.)

Also, that the putative father has had seven days' previous notice of the application. It may be questionable whether this omission would be cured even by the statement of the appearance of the party; though indeed every intendment should be made in favour of an order of justices. (See *R.* v. *Clegg*, 1 *Stra.* 475; *R.* v. *Clayton*, 3 *East*, 58; 2 *Nolan*, 299.)

The appearance or absence of the father perhaps need not be averred; (see *id.*;) and certainly not so when the order is made upon production of an agreement to it signed by the father, and such agreement is stated.

An order made before the 4 & 5 Will. IV. c. 76, was quashed, because neither the *sex* of the bastard, nor the *name* of it was mentioned, only a certain bastard child born of the body of such a woman. (*R.* v. *England*, 1 *Stra.* 503; 1 *Bott*, 497.)

It ought perhaps to show that the mother had a settlement in the parish, or that she was chargeable to it. (*R.* v. *Justices of Hampshire*, 9 *Dowl* 175.)

It must show that the child is chargeable to the parish by reason of the inability of the mother to maintain it. (See the cases before the 4 & 5 Will. IV. c. 76; *Comb.* 30; *Exp. Martin*, 6 *B. & Cres.* 33; 9 *D. & R.* 65, S. C.; *R.* v. *Hartington, Upper Quarter*, 4 *M. & Sel.* 559; *R.* v. *Matthews*, 2 *Salk.* 475.) But it is sufficient if it state the fact generally. (*Reg.* v. *Lewis*, 1 *Per. & D.* 112; 8 *Ad. & Ell.* 881, S. C.)

To give jurisdiction to magistrates to make an order of affiliation, under 18 Eliz. c. 3, s. 2, it was necessary that it should be for the relief of the parish in which the illegitimate child was born, and to which it was chargeable. (*R* v. *Wilson*, 4 *Nev. & M.* 243; 2 *Ad. & Ell.* 230.) And where an order of affiliation, in which the birth of an illegitimate child is alleged to have taken place in A., was confirmed by an order of sessions, subject to a case in which the birth was stated to have occurred in B., to which the putative father had fraudulently removed the mother, who was settled in A.: the order was held bad on the ground (*inter alia*) that it contained a false recital. (*Id.*) It was therefore necessary to set forth truly in the order that the child was born in the parish. (*Reg.* v. *Cash, Sett. & Rem* 59; *R* v. *Butcher*, 1 *Stra.* 437; 1 *Bott*, 499; *R.* v. *Childers*, 1 *Barnard.* 326; *R.* v. *Greaves, Nels. Bast.*; *R.* v. *Stanley, Cald.* 172; 1 *Bott*, 504; *R.* v. *Fox*, 6 *T. R.* 150; 1 *Burn*, 26th edit. 367) But this is not now requisite in an order under the 4 & 5 Will. IV. c. 76, s. 72.

As to the party charged being the putative father.

An order, before the 4 & 5 Will. IV. c. 76, must have contained an express adjudication of the party being the putative father of the child. (*R.* v. *Perkasse*, 2 *Sid.* 363; *R.* v. *Pitts, Dougl.* 661.) But in an order under that act this is not necessary; and if it follows the words of the section, and states that the justices being satisfied that A. B. is the father, it is sufficient. (*Reg.* v. *Lewis*, 1 *Per. & D.* 112; 8 *Ad. & Ell.* 881, S. C.) Upon an order of bastardy under the old law, it was stated that the husband had been absent six years, and that during his absence the defendant *had carnal knowledge* of the wife, and therefore they adjudge him to be the putative father. But by the Court—"This order must be quashed; for his lying with her is not a sufficient reason to infer him the father of this child; and though the justices need not show the grounds upon which they go, yet if they do, and they be not sufficient, their order will be bad." (*R.* v. *Browne*, 2 *Stra.* 811.)

It seems that the justices cannot make an order that the party is *not* the putative father. (*R.* v. *Jenkins*, 2 *Sess. Cas.* 161; 2 *Str.* 1050, S. C.; 1 *Bott*, 474.) Motion to quash an order of two justices under the old law, whereby they adjudge that such a person is *not* the putative father of a bastard child, and therefore they discharge him; and the rather, because in such a case the parish cannot appeal, because an appeal is only when the party

refuses to give security to come to sessions. And by the whole Court, the two justices have no such authority; for their whole power depends on the statute of 18 Eliz., and that is only to take order for punishment of the parties, and for relief of the parish, and this order is for neither the one nor the other.

4. *Maintenance of.*

The order, as regards the payment of the money to reimburse the parish, should closely follow the terms of the statute. For the by-gone maintenance a specific sum should be named. (See *ante*, 377.) The sessions have power to order the father to pay so far as is necessary to indemnify the parish for the expense of maintaining the infant, but no further. The payment therefore should be limited in the order to such time as the child shall be a burthen in the parish. And the reason of this is, because the putative father may at any time take the child and maintain it himself. An order to pay so much per week indefinitely is bad. (*R.* v. *Matthews*, 2 *Salk.* 475.) And in *R.* v. *Barebaker*, 1 *Salk.* 121; 2 *Salk.* 478, S. C.; 1 *Bott*, 495, an order, before the 4 & 5 Will. IV. c. 76, to pay so much money by the week till the child shall be fourteen years of age, was adjudged to be bad; for the justices had no power but to indemnify the parish; and that was only to oblige him (the father) to maintain the child as long as it is or may be chargeable. So an order that the putative father should pay so much a week, until the child should be able to get its living by working, was quashed; it should have been for so long time as the child was chargeable to the parish. (1 *Vent.* 210.) But in *R.* v. *Street*, 2 *Str.* 788; 1 *Bott*, 498, an order before the 4 & 5 Will. IV. c. 76, was made to pay so much weekly till the child was nine years old, if it should so long live: and by the Court—"It is a good order, for we cannot intend it able to provide for itself sooner." So in *R.* v. *Buckhall*, 1 *Barnard.* 261, exception was taken that an order made before that act appointed the sum of 2*s.* to be paid weekly till the child should come to the age of twelve years, without saying, if the child shall be so long chargeable to the parish: it was answered, that indeed the old authorities lay it down in general that orders of bastardy, as well as other orders relating to the poor, must be under the limitation mentioned; but the latter authorities have been, that orders of bastardy need not: and this, it was said, is founded upon good reason; for there cannot be any reasonable intendment that bastards, who have no kindred, will have provision from any body till such an age as is mentioned in the order: and of that opinion was the Court, and confirmed the order as to that point. An order, before the 4 & 5 Will. IV. c. 76, of payment "till the child shall be no longer chargeable," has been held good. (*R.* v. *Johnson*, *Comb.* 69.) It must now expressly limit the payment until the child attains the age of seven years. It may be for the payment of the money to the overseers. (*R.* v. *Weston*, 1 *Salk.* 122.) It must be for maintenance only: in *Brown's case*, *Comb.* 448, it was held that the justices cannot order a sum for putting out the child an apprentice. But in the aforesaid case of *R.* v. *Buckhall*, 1 *Barnard.* 261, where it was objected that the order was for the reputed father to pay 4*l.* to the overseers for binding the child out apprentice when it should come to the age of twelve years, and did not say, if the child shall want it; so that, though the child should be provided for in any other way, the sum must be still paid to the overseers, the objection was overruled by the Court, and the order (which was under the old law) as to that was held good.

As to the payment of the maintenance money.

The order is bad, if it allege that the justices heard evidence in corroboration of the mother's statement, without adding that the corroboration was *in some material particular*. (*Reg.* v. *Read*, 9 *Ad. & Ell.* 619.)

Should show corroboration of mother's statement.

The order may, it seems, include more than one bastard child, if begotten by the same father upon the same mother. (*R.* v. *Skinn*, 4 *Bott.* 470.)

Where several children may be included in one order.

If the order be made by the quarter sessions, it ought to state that the case had been transmitted from the special or petty sessions, and recite the proceedings at the special or petty sessions, in order to show that the quarter sessions had jurisdiction to make the order. (*Reg.* v. *Justices of Hampshire*, 9 *Dowl. P. C.* 71; *R.* v. *Guardians of Hartley Wintney Union*, 1 *Ad. & Ell. N. S.* 677.) Indeed, there is no distinction between orders by justices in

When made at sessions.

4. *Maintenance of.*

quarter sessions and out of quarter sessions; in either case it is necessary that the order should show on the face of it that they have jurisdiction. (Patteson, J. *ibid.*)

May be good in part and bad in residue.

The order may be invalid in one part and held good for the residue. (*R.* v. *Justices of Wiltshire*, 4 *Per. & Dav.* 406; *R.* v. *Sweet*, 9 *East*, 206; *R.* v. *Maulden*, 8 *B. & C.* 78; *R.* v. *St. Nicholas, Leicester*, 3 *A. & E.* 79.)

Custody of the order.

At the time of making an order of bastardy, the magistrates' clerk delivered an order in a correct form to the parish officers, but delivered to the reputed father an order in which the *mother* was ordered to pay 1*s.* 6*d.* weekly, instead of the father; but at the same time the magistrate told the reputed father that he must pay 1*s.* 6*d.* per week, and the parish officers afterwards served him with a copy of the order in their possession; it was held, that as the parish officers were the proper parties to have the custody of the order of bastardy, the one delivered to them must be deemed the original, and the defective order to the father only a "notice thereof," under 18 Eliz. c. 3, s. 2, the defect in which might be cured by the statement of the magistrate at the time of making the order, or by a subsequent service of a correct copy of the valid order; and that the father was not justified in refusing to pay the arrears of the maintenance. (*Wilkins* v. *Wright*, 2 *C. & M.* 191.

Defective order, how cured.

Costs of overseers or guardians.

Costs.]—If an order is made, the justices have no power to award costs against the putative father, for it is not given by the statutes. And although the case has been carried before the quarter sessions, after a recognizance entered into by the putative father, under the 3rd section of the 2 & 3 Vict. c. 85, by which he binds himself to pay such costs, still the sessions have no power to order the payment of the costs incurred by the overseers or guardians in bringing the charge before them, and if they did so order them, so much of the order would be quashed, though it would remain good for the residue. Such costs can be recovered only by means of the recognizance. (*Reg.* v. *Justices of Wiltshire*, 4 *Per. & Dav.* 406; 12 *Ad. & Ell.* 792, S. C.)

Costs of putative father.

If upon hearing the application the justices shall not think fit to make an order, they shall order and direct that the full costs incurred in resisting the application shall be paid by the overseers or guardians to the person charged. (4 & 5 Will. IV. c. 76, s. 73, and 2 & 3 Vict. c. 85, ss. 1, 3; *ante*, 377, 378.)

It would seem that if the application be entered at the sessions, even though the overseers, &c. decline to offer evidence in support of it, the sessions are bound to hear and determine it, with a view to give the party charged his costs. (*R.* v. *Justices of Essex*, 1 *Dowl. P. C.* 539.) But where by a rule of the quarter sessions it was ordered, that all intended applications for orders of maintenance in bastardy should be entered in a book kept in the office of the clerk of the peace; and no application should be received unless so entered, and that such application should be called on for trial in their order of entry: the overseers of N. entered an application, but when it was called on, did not appear to support it. The person intended to be charged having had notice, appeared in Court to resist the application, and applied for his costs under sect. 73. The Court made an order for costs, to be paid by the overseers: held, that the entry, the calling on of the case, and the attendance of the opposing party, were a sufficient application and hearing, within the meaning of the 73d section, to enable them to make the order for costs. (*Reg.* v. *Stamper*, 1 *Ad. & Ell. N. S.* 119; 4 *P. & D.* 539, S. C.)

An order of quarter sessions made under the 4 & 5 Will. IV. c. 76, s. 73, and the 2 & 3 Vict. c. 85, ss. 1, 3, requiring the overseers to pay the costs of the putative father of a bastard, against whom an application has been made, must state an application to the justices at petty sessions, the recognizance to appear at quarter sessions, and the transmission of that recognizance to the quarter sessions, and if it does not state those matters, the defect cannot be supplied by affidavit. (*Ante*, 385.)

Appeal.

Appeal.]—There is no appeal to the quarter sessions, under the 4 & 5

Will. IV. c. 76, s. 103, or the 2 & 3 Vict. c. 85, against an order of affiliation made at special or petty sessions. (*Reg.* v. *Justices of W. R. Yorkshire*, 1 *Ad. & Ell. N.S.* 325.) Nor where the charge has been removed, at the request of the putative father, to the quarter sessions, and the order of maintenance made there, as directed by the 2 & 3 Vict. c. 85, s. 3, is there any appeal from this order to another quarter sessions, under the 4 & 5 Will. IV. c. 76, s. 103. (*Ibid.*)

4. *Maintenance of.*

Certiorari.]—The order may be removed by the defendant into the Court of Queen's Bench by writ of *certiorari* for the purpose of quashing it. And as to this writ in general, and the proceedings on it, see *post*, "*Certiorari.*"

Certiorari.

A rule for a *certiorari* to remove an order of bastardy was discharged because not applied for in six months. (*R.* v. *Howlett*, 1 *Wils.* 35.)

The Court in giving their decision look to the matters as they appear on the face of the proceedings. They will quash the order if it appear that the persons making it had not sufficient jurisdiction so to do; (*R.* v. *Tenant*, 2 *Stra.* 716;) or if it appear that the reasons for the adjudication are not sufficient; (*R.* v. *Browne*, 2 *Stra.* 811;) or if the order be in other respects substantially defective. (*R.* v. *Pitts*, *Dougl.* 662; *ante.*)

If the order be defective only in one point, they may quash it as to that and confirm as to the rest. (*Ante*, 386.)

If the order be confirmed, the Court will not take security of the party for the performance, but will grant an attachment for non-performance. (See *R.* v. *Chaffey*, 2 *Ld. Raym.* 858.) If a recognizance has been taken in the Court below, although the Court of Queen's Bench does not take security for the performance of the order confirmed there, it seems to continue in force so as to entitle the parish to their remedy thereupon for any subsequent disobedience of the order. (2 *Roll.* 327.)

The Court used, before the 2 & 3 Vict. c. 85, when it quashed the order as bad, to bind the defendant to appear at the next sessions, and abide their order. (*R.* v. *Gibson*, *Bla. Rep.* 198; *sed vide R.* v. *Matthews*, 2 *Salk.* 475; *R.* v *Price*, 6 *T. R.* 147.)

Enforcing the Order.]—If after the order is made the payment get into arrear, the putative father may, by the 76th section, *ante*, 378, be proceeded against by distress and sale of his goods, or by attaching his wages. (See as to distresses under magistrates' warrants in general, title "*Distress under Justices' Warrant*," Vol. II.)

Enforcing the order.

Where a justice was called upon to enforce an order of filiation under the 49 Geo. III. c. 68, s. 3, on proof of the weekly sum ordered to be paid being due to the parish, and of the putative father's refusal to pay; it was held he had no jurisdiction to inquire how the weekly sum was expended; and therefore where a justice refused to commit such father to the house of correction, on the ground that the weekly sum expended by the parish officers was not wholly employed in the support of the bastard child, a mandamus was issued to the justice to compel him to make the committal. (*Reg.* v. *Codd*, 1 *Per & D.* 456; 9 *Ad. & Ell.* 682, S. C.)

In *Q* v. *Chaffey*, 2 *Ld. Raym.* 858; 3 *Salk.* 66, S. C.; 1 *Bott.* 472; an order under the 13 & 14 Car. II. c. 12, s. 19, to the churchwardens and overseers to seize of the putative father's goods what *they should judge proper* for securing of the parish was quashed; for that it should be what the *justices think proper*, and not what the churchwardens and overseers think proper.

When an order is *confirmed* by the Court of Queen's Bench, on a removal of it there for the purpose of quashing it, an attachment lies for non-performance (*supra*); but the Court will not in general make the party give security for performance of the order. (See *supra.*)

If the father disobey the order, he may be indicted for it, like for the disobedience of any other justice's legal order. (See *R.* v. *Robinson*, 2 *Burr.* 799; 1 *Bott.* 381.) Having taken a recognizance is no bar to the indictment, and both might be proceeded on. (2 *Nolan*, 338. See further, *post*, "*Order*," Vol. III.)

Indictment for disobedience of.

V. Right of the Father or Mother to the Custody of a Bastard Child.

Custody of bastards.
Cases deciding the mother has a right to.

It seems that in the case of illegitimate children the mother is the proper party to have the custody of them during the age of nurture. (See *R.* v. *Soper*, 5 *T. R.* 278; *R.* v. *Hopkins*, 7 *East*, 579; *Exp. Reece*, *F. N. B.* 148; *Re Lloyd*, 4 *Scott*, *N. R.* 200; 1 *M. & Gr.* 547, S. C.; and see 2 *Saund.* 83.)

In the case of *R.* v. *Soper*, 5 *T. R.* 278, a child of three years of age being brought up at the instance of its mother, on an *habeas corpus*, by the putative father, on whom an order of filiation had been made, and who had obtained the possession of the child by fraud, Lord *Kenyon*, C. J., said that the putative father had no right to the custody of the child, and it was accordingly restored to the mother.

Upon a motion on behalf of the mother of a bastard for a *habeas corpus* to the defendants, to bring it before the Court, in order that her bastard child, which the defendants had taken from her by force, might be restored to her, it was said by Lord *Ellenborough*, C. J , that as the mother had had the child in her quiet possession under her own care and protection during the period of nurture, and had been first divested of her possession by stratagem, and afterwards by force, in such a case every thing was to be presumed in her favour. And he said that, without touching the question of guardianship, it was a proper occasion, by means of this writ, to restore the child to the same quiet custody in which it was before the transactions happened which were the subject of complaint. (*R.* v. *Hopkins and Wife*, 7 *East*, 579; 3 *Smith*, 577, S. C.)

In *Exp. Ann Knee*, 1 *N. R.* 148, it was held that the mother of an infant illegitimate child is entitled to the custody of the child in preference to the father, though from these circumstances he may be better able to educate it. This was an application for an *habeas corpus* to bring up the body of an infant illegitimate child, in order to restore it to the mother. It appeared by the affidavits, that the child had been placed by consent of the father and mother under the care of a nurse; that it was afterwards removed by the father to another woman; that the father then went abroad, having entrusted Mr. *Brandon*, a friend, with the superintendence of the child; that Mr. *Brandon* (to whom the writ was prayed to be directed) wished to have the child placed with some person where the mother could have access to the child, and under those circumstances was willing to pay for its maintenance, but the mother insisted upon having it delivered up to her. The child being brought up, and the mother being present, *Shepherd*, Serjt. showed cause, and urged that it would be for the benefit of the child that it should be placed with some person whom the father might approve of, as the father, from his situation of life, was better able to maintain the child than the mother. *Best*, Serjt. *contrà*, insisted upon the right of the mother to the custody of her own child, and referred to *R.* v. *De Manneville*, 5 *East*, 221, and *R.* v. *Moseley*, 5 *East*, 224, (notis), and *R.* v. *Soper*, 5 *T. R.* 278. Sir *James Mansfield*, C. J., "There is no affidavit before the Court to show any ground of apprehension that the child would incur any danger from being left with the mother. It is not unlikely indeed that by granting this application we may be doing a great prejudice to the child, but still the mother is entitled to the child if she insists upon it. The application in this case may have arisen from pure affection, and the mother may be disposed to take care of the child, but it is not probable that it will be so advantageously brought up under her care as under the care of some person whom the father approves of. It often happens that the mother insists upon the custody of the child, not so much out of regard to the child itself as with the view to make the father pay a sum of money towards its maintenance and education. Nevertheless the mother must have the child unless some ground be laid by affidavit to prevent it. Let the child be delivered to the mother." Accordingly, the other judges, *Heath*, *Rooke*, and *Chambre*, being of the same opinion, the child was delivered to the mother in Court.

Where an illegitimate child of the age of twelve years had been placed at

school by her putative father, and was brought up to the Court by a writ of *habeas corpus* at the suit of her mother, who moved the Court that her daughter should be given up to her, the Court would not compel the daughter to go against her own will, but allowed her to exercise her own discretion. But it it would seem by the decision in that case that if she had been under the age of seven, in which case the Court would have considered her as of tender years, the order would have been, that she should be delivered to her mother. (In re *Lloyd*, 4 *Scott, N. R.* 200; 1 *M. & Gr.* 547, S. C.)

5. *Right to Custody of.*

Cases showing that the father has a right to.

But in *Pope* v. *Sale*, 7 *Bingh.* 487, *Tindal*, C. J., said, "That perhaps, on consideration of the authorities on the subject, it would be considered that the putative father has a right to the custody of the bastard child."

In the following case it was held, that the putative father may take his bastard child from the *parish*, and maintain him himself. (*Newland* v. *Osman*, Trin. 27 Geo. II. MS. (B.); 1 *Bott*, 466, S. C.) Debt upon bond conditioned to indemnify and save harmless the parish of Eling from a bastard child. *Plea*, that the defendant had maintained, supported, and nourished the said child to a certain day, that is to say, to the 27th October last, and that then he offered to take the child to maintain, which they refused, and that if the churchwardens or any of them have been damnified, it is of their own wrong. *Replication*, that for three weeks from and after the said 27th day of October, the defendant did not provide nourishment for the child, but failed, and by reason thereof the plaintiffs, after the three weeks, expended 3*s.* for the maintenance of the child, and so were damnified. Demurrer, and joinder in demurrer. The question of law is, whether a putative father may take a bastard child into his own custody to maintain it, or whether the parish shall have the care of it. And the case in 2 *Saund.* 83, was mentioned, wherein the Court held this to be a good plea. (*Burwell's case*, 1 *Vent.* 48.) That the father may maintain the child himself. (*Sherman's case*, 1 *Vent.* 210.) That the justices can only make an order to maintain, so long as the child shall be chargeable. It was considered by the Court that the putative father might take his child and maintain it himself, and that this was the reason always given why orders for the maintenance of such children must not be limited to any certain time. (*Foster*, J., dub.)

Cases leaving the point doubtful.

In the case of *Hulland* v. *Malkin and Bristow*, 2 *Wils.* 126; 1 *Bott*, 488, (which was on an action on a bond for indemnifying the plaintiff from the charges of a bastard child, but it went off upon an error in the pleadings,) the Court said, "We need not in this case say whether the father or the mother hath a right to have the child while under seven years of age." And by the Lord C. J. *Wilmot*, "I give no opinion whether the father has any power over the child, who is *nullius filius*. *Grotius* says, truly the mother is the only certain parent. And an order of justices to remove the mother always removes the child." (See *R.* v. *Smith*, *Set. Cas.* 64; 1 *Bott*, 497, S. C.)

So in the case of *Strangeways* v. *Robinson and another*, 4 *Taunt.* 498, (which was an action of debt on a bond conditioned for payment of a weekly sum for maintenance of a bastard child, so long as it should be chargeable, to which the defendants pleaded, that after the child attained the age of seven years, the putative father offered thenceforth to keep and maintain the child, and requested the overseers to deliver the child to him, without showing that the child was in their power and custody, and which plea was held bad), Sir J. *Mansfield*, C. J., observed, "I say nothing upon the grand point, whether, after the child is out of the age of nurture, any father whatsoever, be he who he may, can go to the mother and claim the custody of the child; upon that point the Court gives no opinion." Judgment for the plaintiff. And see *Middleham* v. *Bellerby*, 1 *M. & Sel* 311.

Power of mother to appoint a guardian.

The mother of an illegitimate child has no power to appoint a guardian for it under the 12 Car. II. c. 24, s. 8. Therefore the Court of Queen's Bench will not, on *habeas corpus*, order an illegitimate child to be delivered up by a person to whose care it had been committed by the mother, into the custody of a person who was appointed guardian and devisee, in trust, for its benefit, by the will of the mother. (*Exp. Glover*, 1 *Harr. & W.* 508.)

Custody of legitimate children.

As to the respective parents' rights to the custody of legitimate children see the case of *R.* v. *Greenhill*, 4 *Ad. & Ell.* 624; 8 *N. & M.* 244, S. C., and au-

5. *Right to Custody of.*

thorities there cited, and the stat. 2 & 3 Will. IV. c. 54, passed subsequently to that decision for amending the laws relative to that custody. In a late case where the father was convicted of felony the Court granted a *habeas corpus* in order to give the mother the custody of the bastard. (*Exp. Bailey*, 6 *Dowl.* 311.)

VI. Capacity of a Bastard as to Inheritance, &c.

Capacity of bastards as to inheritance.

A bastard can have no name of reputation (*a*) as soon as he is born, but after he is born, and hath gained by time a name of reputation, he may purchase by his reputed name, to him and to his heirs; though he can have no heirs but of his body. (1 *Inst.* 3; 6 *Rep.* 65.)

A bastard may take by gift or devise, provided he be sufficiently described and has gained a name by reputation. (See 1 *Ves. & B.* 423.) But this rule as to a bastard's taking by his reputation must be understood as giving a capacity to take by that name merely as a description, not as a child by claim of kindred; therefore a bastard cannot claim a share under a devise to children generally, though the will was strong in his favour by implication. (5 *Ves.* 530; 1 *Ves. & B.* 434.)

A bastard is *terminus à quo;* he is the first of his family, for he hath no relation of which the law takes any notice; but this must be understood as to civil purposes; for there is a relation as to moral purposes, therefore he cannot marry his own mother, or sister, or the like. (*Reg.* v. *Chafin*, 3 *Salk.* 66; 2 *Ld. Raym.* 858, S. C.; *Haines* v. *Jeffell*, 1 *Ld. Raym.* 66.)

Consideration of natural affection will not raise an use to a bastard; for though there is natural affection between them, yet the raising the use is a constitution of the law, and therefore the issue will never arise. (*Jenk.* 47; *Dyer*, 374.)

If the issue of a man who is a bastard purchase land, and die without issue, though the land cannot descend to any heir on the part of the father, yet to the heir on the part of the mother (being no bastard) it may; so if the bastard were attaint; for the heirs of the mother make not any conveyance by the bastard. (*Noy*, 159.)

If a bastard die intestate, without wife or issue, the Queen is entitled to the *personalty*, subject to his debts, and the ordinary of course grants administration to the patentee or grantee of the crown. (*Jones* v. *Goodchild*, 3 *P. Wms.* 33; *Rutherford* v. *Maule*, 4 *Hagg.* 213; 2 *Black. Com.* 505.) It is usual, however, for the crown to grant administration of it to some relation of the bastard's father or mother, reserving one tenth or other small proportion of it. (1 *Wood*, 308; 1 *Will. Exors.* 286.)

But the rule, that a bastard is *nullius filius*, applies only to the case of *inheritance;* it was so considered by Lord *Coke*. (See *Haines* v. *Jeffell*, *Ld. Raym.* 68; *Comb.* 356, S. C.)

Devise to.

A bastard cannot take as the issue of a particular father until it has acquired the reputation of being the child of that person, which cannot be before its birth. (*Co. Lit.* 3 b.) Hence, bastards unborn at the date of the will, and described as the children of the testator or of another man, to be born of a particular woman, cannot take under that description. (*Metham* v. *Duke of Devon*, 1 *P. Wms.* 529; see *Arnold* v. *Preston*, 18 *Ves.* 288; *Lomas* v. *Wright*, 2 *M. & K.* 769.) But if the bequest be to a natural child of which a particular woman is *enceinte without reference to any person as the father*, this difficulty does not exist, and the legacy will be supported. (*Gordon* v. *Gordon*, 1 *Meriv.* 141; *Evans* v. *Massey*, 2 *Price*, 22; *Dawson* v. *Dawson*, *Madd. & Geld.* 292; and see observation of Sir W. Grant in *Earle* v. *Wilson*, 17 *Ves.* 532; 2 *Will. Exors.*)

Marriage of.

As to the marriage of bastards, see *R.* v. *Hodnett*, 1 *T. R.* 96; *post*, "*Marriage*," Vol. V.

(*a*) In an indictment for the murder of a bastard child, it was held he was improperly described by his mother's name, he not having gained that name by reputation. (*Rex* v. *Clark*, *Russ. & R. C. C.* 358, *post*, *Indictment*, Vol. III.)

VII. Forms.

(1.) Notice to reputed father of application to obtain an order against him.

WHEREAS A. C., single woman, was, on the day of last, delivered of a male [or *female*] *bastard child; which child, on the day of last, by reason of the inability of its mother to provide for its maintenance, became chargeable to the parish of , in the county of , and from thence hitherto has been maintained and supported by the said parish. And whereas we, the undersigned, being churchwardens and overseers of the poor of the said parish,* [or *guardians of the poor of the said parish,* or *guardians of the union in which such parish is situate,* as the case may be,] *having made diligent inquiry in that behalf, find that you J. F. are the father of the said child. Therefore take notice that we, the churchwardens and overseers of the poor of the said parish,* [or *guardians of the poor of the said parish,* or *guardians of the union in which the said parish is situate*] *intend to make application on the day of next, to the justices assembled in petty* [or *special*] *sessions, to be then holden at for the division* [or *borough*] *of in the said county of , within which division* [or *borough*] *the said parish* [or *union*] *is situate, for an order upon you, J. F. to reimburse the said parish for the maintenance and support of the said child. Given under our hands this day of .*

O. O., *O. P.*, *&c.* — *Guardians of the poor of the said parish* [or *guardians of the union in which the said parish is situate.*]

[or

A. C., *B. C.* — *Churchwardens of the said parish.*

A. O., *B. O.* — *Overseers of the poor of the said parish.*]

To J. F. of

(2.) Information against him, where it is expected he will abscond.

to wit. *THE information and request of O. O. one of the overseers* [or *guardians*] *of the poor of the parish* [or *union*] *of , in the county of , on behalf of himself and the rest of the overseers and churchwardens* [or *guardians*] *taken and made before me, the undersigned, one of her Majesty's justices of the peace in and for the said county,* [*city, &c.*] *this day of in the year of our Lord* 1843, *who saith that the churchwardens and overseers* [or *guardians*] *of the poor of the said parish* [or *union*] *of , have determined to make application on the day of next, to the justices assembled in petty* [or *special*] *sessions, to be then holden at for the division* [or *borough*] *of in the said county of within which division* [or *borough*] *the said parish* [or *union, or a part thereof*] *of is situate, for an order upon J. F. of in the county of , being the person whom after diligent inquiry in that behalf they charge with being the putative father of a* [*fe*]*male bastard child, born on the day of , in the year of our Lord* 1843, *of the body of A. C. of the said parish* [or *union*] *of , a single woman, which child is now living in the said parish* [or *union*] *of , and by reason of the inability of its mother to provide for its maintenance, hath, within three calendar months now last past, become chargeable to the said parish* [or *union*] *in order to reimburse such parish* [or *union*] *of , for the maintenance and support of such child. And this informant requests that I will summon the said J. F. to appear before me, and if I shall be satisfied that the said J. F. has any intention to abscond or keep out of the way, in order to avoid the consequences of such application, that I will require the said J. F. to enter into the recognizance required by law.*

Exhibited before me, the day and year first above-written. — *J. P.*

(3.) Summons thereon.

to wit. *To J. F. of in the county of*

WHEREAS O. O. one of the overseers [or *guardians*] *of the poor of the parish* [or *union*] *of , in the said county of , on behalf of himself and the rest of the churchwardens and overseers* [or *guardians*] *hath this day made information before me, the undersigned, one of her Majesty's justices of the peace, in and for the said county,* [*city, &c.*] *that the churchwardens and overseers* [or *guardians*] *of the poor of the said parish* [or *union*] *of , have determined to make application on the day of next, to the justices assembled in petty* [or *special*] *sessions, to be then holden at , for the division* [or *borough*] *of , in the said county*

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of , within which division [or *borough*] *the said parish* [or *union*, or *a part thereof*] *is situate, for an order upon you, being the person whom, after diligent inquiry in that behalf, they charge with being the putative father of a* [*fe*]*male bastard child, born on the day of in the year of our Lord* 1843, *of the body of A. C. of the said parish* [or *union*] *of single woman, which child is now living in the said parish* [or *union*] *of , and by reason of the inability of its mother to provide for its maintenance, hath, within three calendar months now last past, become chargeable to the said parish* [or *union*] *of , in order to reimburse such parish* [or *union*] *for the maintenance and support of such child. And the said overseer* [or *guardians*] *hath, on behalf of himself and the rest of the overseers and churchwardens* [or *guardians*] *requested I will summon you to appear before me, and if I shall be satisfied that you have any intention to abscond or keep out of the way, in order to avoid the consequences of such application, that I will require you to enter into the recognizance required by law. These are therefore to require you personally to be and appear before me, or such other of her Majesty's justices of the peace, acting in and for the said county of , as shall be present at , in the said county, on , the day of , at o'clock, in the noon, then and there to enter into such recognizance accordingly, if required so to do. Given under my hand, the day of , in the year of our Lord* 1843.

J. P.

(4.) Recognizance of putative father, suspected of an intention to abscond, to appear at petty sessions, s. 75.

BE it remembered, that on the day of , in the year of our Lord 1843, *at , in the county of , J. F. of , in the county of , personally came before me the undersigned J. O. one of her Majesty's justices of the peace in and for the said county of , and acknowledged himself to be indebted to our Lady the present Queen, in the sum of pounds of lawful money of Great Britain, to be made and levied of his goods and chattels, lands and tenements to the use of our said Lady the Queen, her heirs and successors, if the said J. F. shall make default in the condition under-written. Whereas on the day of , O. O. one of the overseers* [or *guardians*] *of the poor of the parish* [or *union*] *of , in the county of , on behalf of himself and the rest of the churchwardens and overseers* [or *guardians*], *made information to J. P. one of her Majesty's justices of the peace in and for the said county, that the churchwardens and overseers* [or *guardians*] *of the poor of the said parish* [or *union*] *of , had determined to make application on the day of then next, to the justices assembled in petty* [or *special*] *sessions, to be then holden at for the division* [or *borough*] *of in the said county, within which division* [or *borough*] *the said parish* [or *union*, or *a part thereof*] *is situate, for an order upon the said J. F., being the person whom after diligent inquiry in that behalf they charged with being the putative father of a* [*fe*]*male bastard child, born on the day of , of the body of A. C. of in the said county, single woman, which was then living in the said parish* [or *union*] *of , and by reason of the inability of its mother to provide for its maintenance, had, within three calendar months now last past, become chargeable to the same, to reimburse such parish* [or *union*] *of , for the maintenance and support of such child. And the said overseers* [or *guardians*] *requested that the said J. F. might be summoned to appear before some one of her Majesty's justices, and if such justice shall be satisfied that he had any intention to abscond or keep out of the way in order to avoid the consequences of such application, that such justice will require him to enter into the recognizance required by law. Whereupon the said J. F. was summoned to appear before such of her Majesty's justices of the peace acting in and for the said county of , as should be present at , in the said county, on the day of , and the said J. F. now appearing before me, the undersigned, being one of her Majesty's justices of the peace in and for the said county of , accordingly, and I, the undersigned justice, finding the premises to be true, and that the said bastard child is now living in and at the charge of the said parish* [or *union*] *of , and being satisfied that the said J. F. has an intention to abscond and keep out of the way in order to avoid the consequences of such application, do require the said J. F. to enter into the above-written recognizance, which he is accordingly content to do. The condition therefore of the above-written recognizance is such, that if the above-bound J. F. shall personally appear on the day of next, before the justices then assembled in petty* [or *special*] *sessions, to be then holden at , for the division* [or *borough*] *of , in the said county of , within which division* [or *borough*] *the said parish* [or *union*, or *a part thereof*] *is situate, and then and there answer the above-written charge of the said overseers* [or *guardians*] *of the poor, and not depart the court without leave, then this recognizance to be void, otherwise to remain in full force.*

Taken and acknowledged before me, the day and year first above-written. *J. O.*

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To the constables of the parish of , in the county of , and to the keeper of , at , in the said county.

(5.) Commitment for refusing to enter into recognizance.

WHEREAS on the day of , O. O. one of the overseers [or guardians] of the poor of the parish [or union] of , in the said county, [city, &c.] of , gave information, on behalf of himself and the rest of the churchwardens and overseers [or guardians] to J. P. one of her Majesty's justices of the peace in and for the said county, that the overseers and churchwardens [or guardians] of the poor of the said parish [or union] of , had determined to make application on the day of then next, to the justices assembled in petty [or special] sessions, to be then holden at , for the division [or borough] of in the said county of , within which division [or borough] the said parish [or union] of [or a part thereof] is situate, for an order upon J. F. of , in the county of , being the person whom after diligent inquiry in that behalf they charged with being the putative father of a [fe]male] bastard child, born on the day of in the year of our Lord 1843, of the body of A. C. of the said parish [or union], single woman, which child was then living in the said parish [or union], and by reason of the inability of its said mother to provide for its maintenance, had, within three calendar months now last past, become chargeable to the same, in order to reimburse such parish [or union] for the maintenance and support of such child; and the said informant requested that the said J. F. might be summoned to appear before some one of her Majesty's justices of the peace in and for the said county of , and if the said justice should be satisfied that the said J. F. had any intention to abscond or keep out of the way in order to avoid the consequences of such application, that the said justice would require the said J. F. to enter into the recognizance required by law. And J. P. the said justice, did thereupon duly summon the said J. F. to appear accordingly, on the day of , at o'clock in the , at in the said county of , for that purpose. And whereas the said J. F. having appeared in pursuance of such summons before me the undersigned J. O. one of her Majesty's justices of the peace acting in and for the said county of , and it duly appearing by evidence upon oath to me the said undersigned justice, and I being satisfied that the said J. F. has an intention to abscond and keep out of the way in order to avoid the consequences of such application, I the said undersigned justice do require him to enter into a recognizance to our Lady the present Queen, in the sum of pounds, to appear at such petty [or special] sessions of the peace, and answer to the said charge and application; and the said J. F. not having shown any sufficient cause why he should not enter into such recognizance; but on the contrary now refusing and neglecting to enter into the same, contrary to the form of the statute in such case made and provided: Therefore I, the said undersigned justice, in pursuance of the said statute, do hereby require you the said constables or some or one of you, forthwith to convey the said J. F. to the said prison: and you, the said keeper, are hereby required to receive and safely keep him in your said prison, until he shall enter into such recognizance, or until such application shall be heard as aforesaid. Given under my hand and seal the day of in the year of our Lord 1843. J. O.

(6.) Recognizance of putative father to appear at quarter sessions.

BE it remembered, that on the day of , A. D. 18 , at , in the county of , A. B. of , in the county of , C. D. of , in the county of , and E. F. of , in the county of , came before us the undersigned G. H. and J. K., two of her Majesty's justices of the peace in and for the said county of , assembled here at aforesaid in petty [or special] sessions for the division of , in the said county, and acknowledged themselves to be jointly and severally indebted to our Lady the now Queen in the sum of of lawful money of the united kingdom, to be levied of their said goods and chattels, lands, and tenements, to the use of our said Lady the Queen, her heirs and successors, if the said A. B. shall make default in the condition hereunder written.

WHEREAS the guardians [or overseers] of the poor of the union [or parish] of have this day made application to us the undersigned justices of the peace, assembled in petty [or special] sessions at aforesaid, for the division [or borough] of , in the said county of , in which division [or borough] the said union [or parish, or a part thereof] is situate, for an order upon the said A. B., he being the person whom after diligent inquiry they charge with being the putative father of a [fe]male bastard child, born on the day of , A. D. 18 , of the body of S. T., of the said union [or parish] of , single woman, which child is now living in the said union [or parish] of , and by reason of the inability of its mother to provide for its maintenance has become chargeable to the said parish [or union], in order to reimburse such parish [or union] for the maintenance and support of such

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child. And the said A. B. having had due notice of such application, has this day appeared before us, and upon such application being made has declared to us that he is desirous that the said charge should be heard and determined at the quarter sessions of the peace, and that he is ready to enter into the above written recognizance, and the said C. D and E. F. have also agreed to enter into the said recognizance as sureties for the said A. B. The condition therefore of the above written recognisance is such, that if the said A. B. shall personally appear at the quarter sessions of the peace now next [or *next but one*] *ensuing, to be holden on the day of next, at , in and for the said county of , to answer the said charge, and abide the judgment of the court at such sessions, and pay all the costs incurred by the said overseers* [or *guardians*] *in bringing such charge before the said court, in case the court shall adjudge him the said A. B. to be the putative father of such child, then this recognizance to be void, otherwise to remain in full force.*

Taken and acknowledged before us the day and year, and at the place, first above written. — *G. H.* *J. K.*

(7.) Order of maintenance on the father where he appears before the justices.

AT a petty [or *special*] *sessions of the peace of our Lady the Queen holden at , in and for the division of , in the county of , this day of , in the year of our Lord 18 , before us J. P. and L. P., Esquires, two of her Majesty's justices of the peace for the said county.*

WHEREAS the churchwardens and overseers of the poor of the parish of [or *the guardians of the poor of the union*], *in the said county, having given due notice to J. F. of their intention to apply to the justices here assembled at these sessions, for the division of , in the said county, within which division* [*a part of*] *the said parish* [or *union*] *is situate, for an order upon him the said J. F. as the putative father of a certain male* [or *female*] *bastard child, of which one A. C. has been lately delivered, and which has within three calendar months now last past become chargeable to the said parish, to reimburse the said parish for the maintenance and support of the said child;* and the said churchwardens and overseers* [or *guardians*] *having now made such application accordingly, and the said J. F. being at the same time here present, and it having now been duly proved to the justices here,† in the presence and hearing of the said J. F. that the said child was, on the day of last past, at the parish of aforesaid, born a bastard of the body of the said A. C., and that the said child, on the day of , by reason of the inability of its said mother to provide for its maintenance, became, and from thence hitherto hath been and still is, chargeable to the said parish* [or *union*], *and it being proved now here by the evidence of the said A. C., the mother of the said child, (and which said evidence was corroborated in divers material particulars by the testimony of W. W., J. W., and other persons, to the satisfaction of the justices here,) that the said J. F. is the father of the said child: The justices here, having heard the evidence in this behalf adduced, and having heard the said parties, are satisfied of the facts aforesaid, and that the said J. F. is really and in truth the father of the said child; and it appears to the justices here to be just and reasonable, under all the circumstances of the case, that the said J. F. should pay unto the churchwardens and overseers* [or *guardians*] *of the poor of the said parish* [or *union*] *of for the time being, such sum or sums of money as they have expended, and also such sums as they may from time to time hereafter expend, for the maintenance and support of the said child, not exceeding the sum of per week. The justices here, therefore, do now hereby order that the said J. F. do pay unto the churchwardens and overseers* [or *guardians*] *first aforesaid the sum of by them expended for the maintenance and support of the said child, from the day of aforesaid, when the said child first became chargeable as aforesaid to the present day, and do also pay unto the churchwardens and overseers* [or *guardians*] *of the poor of the said parish of for the time being, weekly and every week, from henceforth, until the said child shall attain the age of seven years (if the said child shall so long live, and continue to be chargeable to the said parish), such sum and sums of money as shall be weekly expended by or on behalf of the said parish for the maintenance and support of the said child during the time last aforesaid, not exceeding the sum of in each and every week.*

Given under our hands and seals the day and year first above-written. — *J. P.* *L. P.*

(8.) The like, where he does not appear.

Proceed as in the preceding form to the asterisk,* and then thus:] *And the said application being now made accordingly, and the same coming on now to be heard before the justices here, according to the said notice, and it being now duly proved to the*

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justices here that seven days' notice of the said application, under the hands of the said churchwardens and overseers [or *guardians*], *was duly given to the said J. F., the said J. F. being now called, and not appearing either by himself or his attorney, the justices here nevertheless proceed to hear the said application, in pursuance of the statute in that case made and provided; and it being now duly proved to the justices here, that the said child was, on the day of last past, at the parish of aforesaid, born a bastard of the body of the said A. C., and that the said child, on the day of last past, by reason of the inability of its said mother to provide for its maintenance, became, and from thence hitherto hath been and still is, chargeable to the said parish* [or *union*], *and it being proved now here by the evidence of the said A. C., the mother of the said child (and which said evidence was corroborated in divers material particulars by the testimony of W. W., J. W., and other persons, to the satisfaction of the justices here) that the said J. F. is the father of the said child: The justices here, having heard the evidence in this behalf adduced, and having heard the said overseers* [or *guardians*], *are satisfied of the facts aforesaid, and that the said J. F. is really and in truth the father of the said child; and it appears to the justices here to be just and reasonable, under all the circumstances of the case, that the said J. F. should pay* [&c. conclude as in the preceding form.]

(9.) Order of maintenance on the father by the quarter sessions.

AT the general quarter sessions of the peace holden at , in the county of , in and for the said county of , on .

WHEREAS, at a petty [or *special*] *sessions of the peace holden at , in and for the division* [or *borough*] *of , in the said county of , on , before J. P. and C. P., Esquires, two of her Majesty's justices of the peace for the said county, the churchwardens and overseers* [or *guardians*] *of the poor of the parish of* [*a part of*] *the said parish being within the said division of , applied to the said justices in petty* [or *special*] *sessions then and there assembled for an order upon J. F., as the putative father of a certain male* [or *female*] *bastard child, of which one A. C. was then lately delivered, and which had within three calendar months then last past become chargeable to the said parish* [or *union*], *to reimburse the said parish* [or *union*] *for the maintenance and support of the said child: And the said J. F. being then and there present, and appearing before the said justices did then and there declare to the said justices in such sessions so assembled as aforesaid, that he was desirous that the said charge should be heard and determined at the quarter sessions of the peace in and for the said county, and did then and there enter into a recognizance, with two sureties, conditioned personally to appear at these sessions (being the quarter sessions of the peace for the said county then next* [*but one*] *ensuing) to answer to the said charge, and to abide the judgment of this court at these sessions, and to pay all the costs incurred by the said churchwardens and overseers* [or *guardians*] *in bringing such charge before the court, in case this court shall adjudge the said J. F. to be the putative father of the said child; and the said justices thereupon did not proceed further to hear the said charge: Which said recognizance being now read and heard, and the said J. F. in pursuance thereof now appearing in court here to answer to the said charge, the said churchwardens and overseers* [or *guardians*] *of the said parish* [or *union*] *accordingly now apply to the court here for an order upon the said J. F. as the putative father of the said bastard child, of which the said A. C. was lately delivered, and which hath within three calendar months last past become chargeable to the said parish* [or *union*], *to reimburse the said parish* [or *union*] *for the maintenance and support of the said child: And it having now been duly proved to the court here* [&c. conclude as in the form, *ante*, 394, No. 7, from the †, inserting the word "*court*" for the word "*justices.*"]

(10.) Information for recovery of arrears against father upon an order of filiation.

THE information and complaint of O. O. one of the overseers [or *guardians*] *of the poor of the parish* [or *union*] *of , in the county of , and taken upon oath before me the undersigned J. P. one of her Majesty's justices of the peace in and for the said county* [or *city, &c.*] *the day of , in the year of our Lord* 1843, *who on his oath aforesaid saith, that by an order made by the court of general quarter session of the peace* [or *at a petty, or special sessions of the peace*] *holden at , in and for the said county* [or *city, or in and for the division* or *borough of , within which such union* or *parish* or *a part thereof is situated*], *on the day of , in the year of our Lord* 1843, *by* [or *before and two of*] *her Majesty's justices of the peace in and for the said county* [or *city, &c.*] *then and there assembled, J. F. of , in the county of , was adjudged to be the father of a* [*fe*]*male bastard child then lately born of the body of A. C. single woman, belonging to and having a settlement in the said parish* [or *union*] *of , and that in and by the said order it was ordered, that he the said J. F. should forthwith pay or cause to be*

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paid to the churchwardens and overseers [or *guardians*] *of the poor of the said parish* [or *union*] *of* , *or some or one of them, the sum of* , *being the costs of the maintenance and support of such bastard child, calculated from the day of* , *when the said child first became chargeable to the said union* [or *parish*] *to the date of the said order; and it was further ordered by the said court* [or *justices*] *in and by the said order, that the said J. F. should pay or cause to be paid to the said overseers and churchwardens* [or *guardians*] *of the poor for the time being, or to some or one of them, the sum of weekly and every week from the day of making the said order for the maintenance and support of the said bastard child until such child should attain the age of seven years, if such child should so long live and so long continue chargeable. And this informant further saith, that he the said J. F. hath had due notice of the said order, and that the said bastard child is now living in the said parish* [or *union*] *of* , *under the age of seven years, and is chargeable to and maintained thereby at the expense of a week, and that the payments directed to be made by the said order have not been made according thereto by the said J. F. and there is now in arrear for the same the sum of* , [if for costs of maintenance previous to the making of the order, here state it] *for weeks' maintenance and support of the said bastard child at a week from the day of* , *to the day of* , *and that demand of payment thereof hath been made upon the said J. F. by this informant, but that the said J. F. hath refused and neglected to pay the same, and this informant therefore prayeth justice in the premises.* O. O.

Exhibited and sworn before me, the day and year first above written, } *J. P.*

(II.) Warrant to apprehend father for not complying with order.

To the constables of , in the county of , and all other her Majesty's officers of the peace in and for the said county [or *city, &c.*] *of , whom these may concern.* } *to wit.*

WHEREAS information and complaint have been this day made upon oath before me, the undersigned J. P., one of her Majesty's justices of the peace in and for the said county [or *city, &c*] *of , by O. O. one of the overseers* [or *guardians*] *of the poor of the parish* [or *union*] *of , in the said county* [*city, &c.*] *that by an order, made by the court of general quarter session of the peace* [or *at a petty or special session of the peace*] *holden at , in and for the said county* [or *city*, or *in and for the division* or *borough of within which such union* [or *parish* or *a part thereof*] *is situated,*] *on the day of , in the year of our Lord* 1843, *by* [or *before and two of*] *her Majesty's justices of the peace in and for the said county* [*city, &c.*] *then and there assembled, J. F. of , in the county* [*city, &c.*] *of , was adjudged to be the father of a* [*fe*]*male bastard child, lately born of the body of A. C. single woman, belonging to and having a settlement in the said parish* [or *union*] *of , and that in and by the said order it was ordered that the said J. F. should forthwith pay or cause to be paid to the overseers* [or *guardians*] *of the poor of the said parish* [or *union*] *of or some or one of them, the sum of , being the costs of the maintenance and support of such bastard child, calculated from the day of when the said child became chargeable to the said union* [or *parish*] *to the date of the said order, and it was further ordered by the said court* [or *justices*] *in and by the said order, that the said J. F. should pay or cause to be paid to the churchwardens and overseers* [or *guardians*] *of the poor of the said parish* [or *union*] *of , for the time being, or some or one of them, the sum of weekly and every week, from the day of making the said order for the maintenance and support of the said bastard child until such child should attain the age of seven years, if such child should so long live and so long continue chargeable. And that the said J. F. has had due notice of the said order, and that the said bastard child is now living in the said parish* [or *union*] *of under the age of seven years, and is chargeable thereto and maintained thereby at the expense of a week, and that the payments directed to be made by the said order have not been made according thereto by the said J. F., and there is now in arrear for the same the sum of* [if for costs of maintenance previous to the making of the order, here state it] *for weeks' maintenance and support of the said bastard child, at a week, from the day of to the day of , and that demand of payment thereof hath been made upon the said J. F. by the said informant, but that the said J. F. had refused and neglected to pay the same, and the same now remains unpaid. These are, therefore, in her Majesty's name, to command you the said constables, or some or one of you, forthwith to apprehend the said J. F. and carry him before two of her Majesty's justices of the peace in and for the said county of , to answer the premises, and to be dealt with according to law. Given under my hand and seal the day of , in the year of our Lord* 1843.

J. P. (L.S.)

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to wit. } *To the constables of, &c.* [as in preceding form.]

(12.) Warrant of distress for not complying with order.

WHEREAS information and complaint were on the day of , in the year of our Lord 1843, *made before J. P. one of her Majesty's justices of the peace in and for the said county, [city, &c.] of by O. O. one of the overseers* [or *guardians*] *of the poor of the parish* [or *union*] *of in the said county* [or *city, &c.*] *For that by an order made by the court of general quarter sessions of the peace* [or *at a petty or special sessions of the peace*] *holden at , in and for the said county of* [or *in and for the division* or *borough of within which such union* or *parish* or *part thereof is situated*], *on the day of , in the year of our Lord* 1843, *by* [or *before and , two of*] *her Majesty's justices of the peace in and for the said county of , then and there assembled, J. F. of , in the county of , was adjudged to be the father of a [fe]male bastard child, then lately born of the body of A. C. single woman, belonging to and having a settlement in the said parish* [or *union*] *of , and that in and by the said order it was ordered that he the said J. F. should forthwith pay or cause to be paid to the churchwardens and overseers* [or *guardians*] *of the poor of the said parish* [or *union*] *of , or some or one of them, the sum of , being the costs of the maintenance and support of such bastard child, calculated from the day of , when the said child became chargeable to the said union* [or *parish*] *to the date of the said order. And it was further ordered by the said court* [or *justices*] *in and by the said order, that the said J. F. should pay or cause to be paid to the said churchwardens and overseers* [or *guardians*] *of the poor for the time being, or to some or one of them, the sum of weekly and every week from the day of making the said order, for the maintenance and support of the said bastard child, until such child should attain the age of seven years, if such child should so long live, and so long continue chargeable; and that the said J. F. had had due notice of the said order; and that the said bastard child was then living in the said parish* [or *union*] *of , under the age of seven years, and was chargeable thereto and maintained thereby at the expense of a week; and that the payments directed to be made by the said order had not been made according thereto by the said J. F. and were then in arrear for the same, the sum of* [if for costs of maintenance previous to the making of the order, here state it] *for weeks' maintenance and support of the said bastard child, at a week, from the day of to the day of , and that demand of payment thereof had been made upon the said J. F. by the said informant: but that the said J. F. had refused and neglected to pay the same, and the same still remained unpaid: Whereupon the said J. F. being now brought before us, the undersigned, two of her Majesty's justices of the peace in and for the said county of , to show cause why the same should not be paid, hath not shown any cause why the same should not be paid, and doth refuse and neglect to pay the said sum of , and the same duly appearing to us, upon oath, to be due and in arrear from the said J. F. under the said order, together with the further sum of for the costs of his apprehension. These are, therefore, to require you forthwith to make distress of the goods and chattels of the said J. F. and if within the space of five days next after such distress by you taken, the said sums, together with the reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods and chattels so by you distrained; and out of the money arising by such sale thereof, that you detain the said sums, and also the reasonable charges of taking, keeping, and selling the said distress, rendering the overplus (if any) on demand, unto the said J. F.; and if no such distress can be found, that then you certify the same unto us, to the end that such further proceedings may be had therein as to law doth appertain. Given under our hands and seals the day of , in the year of our Lord* 1843.

J. L. (L.S.)
J. O. (L.S.)

(13.) Information for recovery of the weekly expenses.

} *THE information and complaint of O. O. one of the overseers* [or
to wit. } *guardians*] *of the poor of the parish* [or *union*] *of , in the county* [or *city, &c.*] *of , taken upon oath before me the undersigned J. P., one of her Majesty's justices of the peace in and for the said county* [or *city, &c.*] *the day of , in the year of our Lord* 1843, *who on his oath aforesaid saith, that by an order made by the court of general quarter sessions of the peace* [or *a petty or special sessions of the peace*] *holden at , in and for the said county* [or *city*, or *in and for the division* or *borough of within which such union* [or *parish* or *a part thereof*] *is situated*] *of on the day of , in the year of our Lord* 1843, *by* [*if at a petty session, before and two of*] *her Majesty's justices of the peace*

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in and for the said county [or *city, &c.*] *then and there assembled, J. F. of , in the county of , was adjudged to be the father of a* [*fe*]*male bastard child then lately born of the body of A. C. single woman, belonging to and having a settlement in the said parish* [or *union*], *and that in and by the said order it was (amongst other things) ordered, that the said J. F. should pay or cause to be paid to the churchwardens and overseers* [or *guardians*] *of the poor of the said parish* [or *union*] *for the time being, or to some or one of them, the sum of weekly and every week from the day of making the said order for the maintenance and support of the said bastard child, until such child should attain the age of seven years, if such child should so long live and so long continue chargeable. And this informant further saith, that he the said J. F. hath had due notice of the said order, and that the said bastard child is now living in the said parish* [or *union*] *of , under the age of seven years, and is chargeable thereto and maintained thereby at the expense of a week, and that the payments directed to be made by the said order have not been made according thereto by the said J. F.; and there is now in arrear for the same the sum of , for weeks' maintenance and support of the said bastard child, at a week, from the day of to the day of ; and that demand of payment thereof hath been made upon the said J. F. by this informant, but that the said J. F. hath refused and neglected to pay the same, and this informant therefore prayeth justice in the premises.*

Exhibited and sworn before me, the day and year first above written. } J. P. *O. O.*

(14.) Warrant to apprehend the father for not paying the weekly expenses.

to wit. } *To the constables of , in the county of , and all other her Majesty's officers of the peace in and for the said county* [or *city, &c.*] *whom these may concern.*

WHEREAS information and complaint have been this day made upon oath before me the undersigned J. P., one of her Majesty's justices of the peace in and for the said county [or *city, &c.*] *of , by O. O. one of the overseers* [or *guardians*] *of the poor of the parish* [or *union*] *of , in the said county* [or *city, &c.*] *that by an order made by the court of general quarter sessions of the peace* [or *at a petty* or *special sessions of the peace*] *holden at , in and for the said county* [or *city, &c.* or *in and for the division* or *borough of within which such union* or *parish or a part thereof is situated*] *of , on the day of , in the year of our Lord* 1843, *by* [or *before and two of*] *her Majesty's justices of the peace in and for the said county* [or *city, &c.*] *then and there assembled, J. F. of , in the county of was adjudged to be the father of a* [*fe*]*male bastard child, then lately born of the body of A. C. single woman, belonging to and having a settlement in the said parish* [or *union*], *and that in and by the said order it was (amongst other things) ordered, that the said J. F. should pay or cause to be paid to the churchwardens and overseers* [or *guardians*] *of the poor of the said parish* [or *union*] *of , for the time being, or some or one of them, the sum of weekly and every week from the day of making the said order, for the maintenance and support of the said bastard child, until such child should attain the age of seven years, if such child should so long live, and so long continue chargeable to the said parish* [or *union.*] *And that the said J. F. had had due notice of the said order, and that the said bastard child is now living in the said parish* [or *union*] *of , under the age of seven years, and is chargeable thereto and maintained thereby at the expense of a week, and that the payments directed to be made by the said order have not been made according thereto by the said J. F. and there is now in arrear for the same the sum of , for weeks' maintenance and support of the said bastard child at a week, from the day of to the day of , and that demand of payment thereof hath been made upon the said J. F. by the said informant, but that the said J. F. hath refused and neglected to pay the same, and the same now remains unpaid. These are therefore in her Majesty's name, to command you the said constables, or some or one of you, forthwith to apprehend the said J. F. and carry him before two of her Majesty's justices of the peace in and for the said county of , to answer the premises, and be dealt with according to law. Given under my hand and seal the day of , in the year of our Lord* 1843.

J. P. (L. S.)

(15.) Warrant of distress for not paying the weekly expenses.

to wit. } *To the constables of, &c.* [as in preceding form.]

WHEREAS information and complaint were on the day of , in the year of our Lord 1843, *made before J. P. one of her Majesty's justices of the peace in and for the said county,* [or *city, &c.*] *by O. O. one of the overseers* [or *guardians*] *of the*

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poor of the parish [or union] of , in the said county [or city, &c.] For that by an order made by the court of general quarter sessions of the peace [or at a petty or special sessions of the peace] holden at , in and for the said county [or city, or in and for the division or borough of , within which such union or parish or a part thereof is situated] on the day of , in the year of our Lord 1843, by [or before and two of] her Majesty's justices of the peace in and for the said county [or city, &c.] then and there assembled, J. F. of , in the county of , was adjudged to be the father of a [fe]male bastard child, then lately born of the body of A. C. single woman, belonging to and having a settlement in the said parish [or union] of , and that in and by the said order it was (amongst other things) ordered that the said J. F. should pay or cause to be paid to the churchwardens and overseers [or guardians] of the poor of the said parish [or union] for the time being, or to some or one of them, the sum of weekly and every week from the day of making the said order, for the maintenance and support of the said bastard child, until such child should attain the age of seven years, if such child should so long live, and so long continue chargeable to the said parish [or union.] And that the said J. F. had had due notice of the said order; and that the said bastard child was then living in the said parish [or union] of , under the age of seven years, and chargeable thereto and maintained thereby at the expense of a week; and that the payments directed to be made by the said order had not been made according thereto by the said J. F., and were then in arrear for the same, the sum of , for weeks maintenance and support of the said bastard child, at a week, from the day of , to the day of , and that demand of payment thereof had been made upon the said J. F. by the said informant; but that the said J. F. had refused and neglected to pay the same, and the same still remained unpaid. Whereupon the said J. F. being now brought before us the undersigned two of her Majesty's justices of the peace in and for the said county, to show cause why the same should not be paid, hath not shown any cause why the same should not be paid, and doth refuse and neglect to pay the said sum of , and the same duly appearing to us, upon oath, to be due and in arrear from the said J. F. under the said order, together with the further sum of , for the costs of his apprehension. These are, therefore, to require you forthwith to make distress of the goods and chattels of the said J. F, and if within the space of five days next after such distress by you taken, the said sums together with the reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods and chattels so by you distrained; and out of the money arising by such sale thereof, that you detain the said sums, and also the reasonable charges of taking, keeping, and selling the said distress, rendering the overplus (if any) on demand unto the said J. F., and if no such distress can be found, that then you certify the same unto us, to the end that such further proceedings may be had therein as to law doth appertain. Given under our hands and seals the day of , in the year of our Lord 1843.

J. L. (L. S.)
J. O. (L. S.)

(16.) Information to attach the wages of putative father.

} THE information and complaint of O. O. one of the overseers [or guardians] of the poor of the parish [or union] of , in the county of , taken upon oath before me the undersigned J. P. one of her Majesty's justices of the peace in and for the said county [or city, &c.] the day of , in the year of our Lord 1843, who on his oath aforesaid saith, that by an order made by the court of general quarter sessions of the peace, [or at a petty, or special sessions of the peace] holden at , in and for the said county [or city, or in and for the division or borough of within which such union [or parish or a part thereof] is situated,] on the day of , in the year of our Lord 1843, by [or before and two of] her Majesty's justices of the peace in and for the said county [or city, &c.] then and there assembled, J. F. of , in the county of , was adjudged to be the father of a [fe]male bastard child, then lately born of the body of A. C. single woman, belonging to and having a settlement in the said parish [or union] of , and that in and by the said order it was ordered, that the said J. F. should forthwith pay or cause to be paid to the churchwardens and overseers [or guardians] of the poor of the said parish [or union] of or some or one of them, the sum of , being the costs of the maintenance and support of such bastard child, calculated from the day of , when the said child became chargeable to the said parish [or union] to the date of the said order; and it was further ordered by the said court [or justices] in and by the said order, the said J. F. should pay or cause to be paid to the churchwardens and overseers [or guardians] of the poor of the said parish [or union] of for the time being, or to some or one of them, the sum of , weekly and every week, from the day of making the said order for the maintenance and support of the said bastard child until such child

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should attain the age of seven years, if such child should so long live, and so long continue chargeable to the said parish [or *union.*] *And this informant further saith, that the said J. F. hath had due notice of the said order, and that the said bastard child is now living in the said parish* [or *union*] *of* , *under the age of seven years, and is chargeable thereto and maintained thereby at the expense of* *a week; and that the payments directed to be made by the said order have not been made according thereto by the said J. F.; and there is now in arrear for the same the sum of* [if for costs of maintenance previous to the making of the order, here state it,] *for* *weeks' maintenance and support of the said bastard child, at* *a week, from the* *day of* *to the* *day of* , *and that demand of payment thereof hath been made upon the said J. F. by this informant, but that the said J. F. hath refused and neglected to pay the same, and the same now remains unpaid, contrary to the statute in such case made and provided. The said informant therefore prayeth justice in the premises; and that the said J. F. and T. M. of* , *in the county of* , *the master and employer of the said J. F., or some person on his behalf, may be summoned to show cause why any wages due, or which from time to time may become due from the said master and employer to the said J. F., should not be paid over in whole or in part to the churchwardens and overseers* [or *guardians*] *of the poor of the said parish* [or *union*] *of* , *in discharge of such arrears as aforesaid.*

Exhibited and sworn before me the day and year first above written } *J. P.*

(17.) Summons on master to attach the wages for the costs and payments.

To wit } *To J. F. of* , *in the county* , *and T. M. of* , *in the county of* .

WHEREAS information and complaint have been made on oath before me the undersigned J. P. one of her Majesty's justices of the peace in and for the said county, [or *city, &c.*] *of* *by O. O. one of the overseers* [or *guardians*] *of the poor of the said parish* [or *union*] *of* , *that by an order made by the court of general quarter sessions of the peace* [or *at a petty* or *special sessions of the peace*] *holden at* *in and for the said county* [or *in and for the division* or *borough of* , *within which such union* or *parish* or *a part thereof is situated*] *on the* *day of* , *in the year of our Lord* 1843, *by* [or *before* *and* *two of*] *her Majesty's justices of the peace in and for the said county then and there assembled, you the said J. F. were adjudged to be the father of a* [*fe*]*male bastard child then lately born of the body of A. C. single woman, belonging to and having a settlement in the said parish* [or *union*] *of* , *and that in and by the said order it was ordered that you the said J. F. should pay or cause to be paid to the churchwardens and overseers* [or *guardians*] *of the poor of the said parish* [or *union*] *of* , *or some or one of them, the sum of* , *being the costs of the maintenance and support of such bastard child, calculated from the* *day of* *when the said child became chargeable to the said union* [or *parish*] *to the date of the said order. And it was further ordered by the said court* [or *justices*] *that you the said J. F. should pay or cause to be paid to the churchwardens and overseers* [or *guardians*] *of the poor of the said parish* [or *union*] *for the time being, or to some or one of them the sum of* *weekly and every week, from the day of making the said order for the maintenance and support of the said bastard child, until such child should attain the age of seven years, if such child should so long live and so long continue chargeable to the said parish* [or *union.*] *And that you the said J. F. have had due notice of the said order, and that the said bastard child is now living in the said parish* [or *union*] *of* , *under the age of seven years, and is chargeable thereto and maintained thereby at the expense of* *a week, and that the payments directed to be made by the said order have not been made according thereto by you the said J. F., and there is now in arrear for the same the sum of* , [if for costs of maintenance previous to the making of the order, here state it] *for* *weeks' maintenance and support of the said bastard child, at* *a week, from the* *day of* *to the* *day of* , *and that demand of payment thereof hath been made upon you the said J. F. by the said informant, but that you have refused and neglected to pay the same, and the same now remains unpaid, contrary to the statute in such case made and provided. And further that you the said J. F. are in the employment of the said T. M. as a* . *These are therefore to summon you the said J. F. and T. M. personally to be and appear before such two of her Majesty's justices of the peace in and for the said county of* *as shall be present at* *in the said county of* *on the* *day of* , *at* *o'clock in the* *noon, then and there to show cause why any wages due or which may from time to time become due from you the said master and employer to the said J. F. should not be paid over in whole or in part to the said overseer* [or *guardians*] *of the poor, according to the form of the statute aforesaid. Herein fail not. Given under my hand the* *day of* , *in the year of our Lord* 1843.

J. P.

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(18.) Order on master to attach the wages in his hands for the costs and payments.

to wit. } *To T. M. of in the county of .*

WHEREAS information and complaint were on the day of made upon oath before J. P. one of her Majesty's justices of the peace in and for the said county [or *city, &c.*] *of by O. O. one of the overseers* [or *guardians*] *of the poor of the parish* [or *union*] *of in the said county* [or *city, &c.*], *that by an order made by the court of general quarter sessions of the peace* [or *at a petty or special sessions of the peace*] *holden at in and for the said county* [or *city* (or *in and for the division* or *borough*) *of , within which such union* (or *parish* or *a part thereof*) *is situated*] *on the day of in the year of our Lord* 1843, *by* [or *before and two of*] *her Majesty's justices of the peace in and for the said county of then and there assembled, J. F. of in the county of was adjudged to be the father of a* [*fe*]*male bastard child then lately born of the body of A. C. single woman, belonging to and having a settlement in the said parish* [or *union*] *of and that in and by the said order it was ordered that the said J. F. should forthwith pay or cause to be paid to the churchwardens and overseers* [or *guardians*] *of the poor of the said parish* [or *union*] *of or some or one of them, the sum of , being the costs of the maintenance and support of such bastard child, calculated from the day of when the said child became chargeable to the said union* [or *parish*] *to the date of the said order. And it was further ordered by the said court* [or *justices*] *in and by the said order, that the said J. F. should pay or cause to be paid to the churchwardens and overseers* [or *guardians*] *of the poor of the said parish* [or *union*] *of for the time being, or to some one of them, the sum of weekly and every week from the day of making the said order for the maintenance and support of the said bastard child until such bastard child should attain the age of seven years, if such child should so long live, and so long continue chargeable to the said parish* [or *union.*] *And that the said J. F. had had due notice of the said order, and that the said bastard child was then living in the said parish* [or *union*] *under the age of seven years and was chargeable thereto and maintained thereby at the expense of a week, and that the payments directed to be made by the said order had not been made according thereto by the said J. F. and that there was then in arrear for the same the sum of* [if for costs of maintenance previous to the making of the order, here state it,] *for weeks' maintenance and support of the said bastard child at a week from the day of to the day of , and that demand of payment thereof had been made upon the said J. F., but that he had refused and neglected to pay the same and that the same still remain unpaid, contrary to the statute in that case made and provided. And further, that the said J. F. was in the employment of T. M. of in the county of . And whereas it is this day made appear to us the undersigned, two of her Majesty's justices of the peace in and for the said county, that the said J. F. and his said master and employer have been duly summoned to show cause why any wages due, or which may from time to time become due from such master and employer should not be paid over in whole or in part to the said churchwardens and overseers* [or *guardians*] *of the poor, and we the undersigned justices being present at the time and place mentioned in such summons, and the said T. M. having appeared in pursuance of such summons, and not having shown any cause to the contrary, we therefore the said undersigned justices, whose hands and seals are hereunto subscribed and set in pursuance of the statute in that case made and provided, due proof upon oath having been this day given before us of the said order, and of the said sum being so due and in arrear as aforesaid, and of the said J. F. being now in the service of the said T. M. as a at the wages of and that there is now due* [or *on the day of there will be due in intermediate weekly payments*] *on account of such wages the sum of , in pursuance of the statute aforesaid hereby order and direct the said master and employer of the said J. F. to pay the sum of by weekly* [or *monthly* or otherwise] *instalments of on in each and every week for weeks out of such wages as aforesaid, to the said churchwardens and overseers* [or *guardians*] *of the poor or one of them, the first payment thereof to be made on the day of such sum being the amount of such arrears so remaining unpaid as aforesaid, according to the form of the statute aforesaid. Given under our hands and seals the day of in the year of our Lord* 1843.

J. L. (L. S.)
J. O. (L. S.)

(19.) Warrant of distress upon master for the wages

to wit. } *To the constable of the parish of in the county of .*

WHEREAS information and complaint were on the day of made

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attached for the costs and payments.

upon oath before J. P. one of her Majesty's justices of the peace in and for the said county [city, &c.] of by O. O. one of the overseers [or guardians] of the poor of the parish [or union] of in the said county [or city, &c.] of . For that by an order made by the court of general quarter sessions of the peace [or at a petty or special sessions of the peace] holden at in and for the said county [or city (or for the division or borough) of , within which the said union or parish (or a part thereof) is situated] on the day of , in the year of our Lord 1843, by [or before and , two of] her Majesty's justices of the peace in and for the said county of [or division or borough] then and there assembled, J. F. of , in the county of , was adjudged to be the father of a [fe]male bastard child then lately born of the body of A. C. single woman, belonging to and having a settlement in the said parish [or union] of and that in and by the said order it was ordered, that the said J. F. should forthwith pay or cause to be paid to the churchwardens and overseers [or guardians] of the poor of the said parish [or union] of or some or one of them, the sum of , being the costs of the maintenance and support of such bastard child, calculated from the day of when the said child became chargeable to the said union [or parish] to the date of the said order. And it was further ordered by the said court [or justices] in and by the said order, that the said J. F. should pay or cause to be paid to the churchwardens and overseers [or guardians] of the poor of the said parish [or union] of for the time being, or to some or one of them, the sum of weekly and every week, from the day of making the said order for the maintenance and support of the said bastard child, until such bastard child should attain the age of seven years, if such child should so long live, and so long continue chargeable. And that the said J. F. had had due notice of the said order, and that the said bastard child was then living in the said parish [or union] of under the age of seven years, and was chargeable thereto and maintained thereby at the expense of a week, and that the payments directed to be made by the said order had not been made according thereto by the said J. F. and that there was then in arrear for the same the sum of [if for costs of maintenance previous to the making of the order, here state it,] *for weeks' maintenance and support of the said bastard child at a week from the day of to the day of , and that demand of payment thereof had been made upon the said J. F. but that he had refused and neglected to pay the same, and the same still remained unpaid, contrary to the statute in such case made and provided. And further, that the said J. F. was in the service and employment of T. M. of in the county of . And whereas the said J. F. and the said T. M. the said master and employer, having been duly summoned to appear before two of her Majesty's justices of the peace in and for the said county [or city, &c.] of to show cause why any wages due, or which might from time to time become due from the said master and employer should not be paid over in the whole or in part to the said overseeers [or guardians] of the poor. And the said T. M. having appeared in pursuance of such summons and not having shown any cause to the contrary, J. P. and J. O. two of her Majesty's justices of the peace acting in and for the said county of being present at the time and place mentioned in such summons, did, by an order under their hands and seals bearing date the day of in pursuance of the statute in that case made and provided, after due proof upon oath of the said sum being so due as aforesaid, and of the said J. F. being then in the service and employment of the said T. M. at the wages of and that there was then due [or on the day of there will be due in intermediate weekly payments,] on account of such wages the sum of , did, in pursuance of the statute aforesaid, thereupon order and direct the said master and employer of the said J. F. to pay the sum of by weekly [or monthly or otherwise] instalments of on in each and every week for weeks out of such wages as aforesaid to the said churchwardens and overseers [or guardians] of the poor, or some or one of them, the first payment thereof to be made on the day of , being the amount of such arrears so remaining unpaid as aforesaid. And whereas it duly appeareth unto us J. J. and T. L. two of her Majesty's justices of the peace in and for the said county [or city, &c.] of upon oath, that the said master and employer hath had due notice of the said order, but hath refused and neglected to pay to the said churchwardens and overseers [or guardians] of the poor on production of the said order to him the money thereby directed to be paid, according to the terms of such order, and at the periods thereby fixed for such payments. And that the sum of , being for weeks at a week, now remains due and owing from the said master and employer under the said order, contrary to the form of the statute aforesaid. These are therefore to require you forthwith to make distress of the goods and chattels of the said master and employer, and if within the space of five days next after such distress by you taken, the said sum of and also the further sum of for costs, together with the reasonable charge*

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of taking and keeping the said distress, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and out of the money arising by such sale thereof, that you detain the said sums and also the reasonable charges of taking, keeping, and selling the said distress, rendering the overplus (if any) on demand to the said master and employer. And if no such distress can be made, that then you certify the same unto us, to the end that such further proceedings may be had therein as to the law doth appertain. Given under our hands and seals the day of in the year of our Lord 1843.

J. J. (L. S.)
T. L. (L. S.)

(20.) Commitment of master for wages attached for the costs and payments.

To wit. } *To the constables of the parish of in the county of and to the keeper of within the said county.*

WHEREAS information and complaint were on the day of made upon oath before J. P. one of her Majesty's justices of the peace in and for the said county [or *city, &c.*] *of by O. O. one of the overseers* [or *guardians*] *of the poor of the parish* [or *union*] *of , in the said county* [or *city, &c.*] *For that by an order made by the court of general quarter sessions of the peace* [or *at a petty* or *special sessions of the peace*] *holden at , in and for the said county* [or *city* (or *in and for the division* or *borough*) *of , within which the said union* (or *parish* or *a part thereof*) *is situated,*] *on the day of in the year of our Lord* 1843, *by* [or *before and , two of*] *her Majesty's justices of the peace in and for the said county* [or *city,* or *division* or *borough*] *then and there assembled, J. F. of in the county of was adjudged to be the father of a* [*fe*]*male bastard child then lately born of the body of A. C. single woman, belonging to and having a settlement in the said parish* [or *union*] *of and that in and by the said order it was ordered, that the said J. F. should forthwith pay or cause to be paid to the churchwardens and overseers* [or *guardians*] *of the poor of the said parish* [or *union*] *of or to some or one of them, the sum of , being the costs of the maintenance and support of such bastard child calculated from the day of when the said child became chargeable to the said union* [or *parish*] *to the date of the said order; and it was further ordered by the said court* [or *justices*] *in and by the said order, that the said J. F. should pay or cause to be paid to the churchwardens and overseers* [or *guardians*] *of the said parish* [or *union*] *of , for the time being, or to some or one of them, the sum of weekly and every week, from the day of making the said order for the maintenance and support of the said bastard child, until such bastard child attain the age of seven years, if such child should so long live, and so long continue chargeable to the said parish* [or *union.*] *And that the said J. F. had had due notice of the said order, and that the said bastard child was then living in the said parish* [or *union*] *of , under the age of seven years, and was chargeable thereto and maintained thereby at the expense of a week; and the payments directed to be made by the said order had not been made according thereto by the said J. F., and that there was then in arrear for the same the sum of* [if for costs of maintenance previous to the making of the order, here state it,] *for weeks' maintenance and support of the said bastard child, at a week, from the day of to the day of and that demand of payment thereof had been made upon the said J. F. but that he had refused and neglected to pay the same, and the same still remains unpaid, contrary to the statute in such case made and provided: And further, that the said J. F. was then in the service and employment of T. M. of in the county of . And whereas the said J. F. and the said T. M. the said master and employer, having been duly summoned to appear before two of her Majesty's justices of the peace in and for the said county of to show cause why any wages due, or which from time to time might become due, from the said master and employer, should not be paid over in whole or in part to the said churchwardens and overseers* [or *guardians*] *of the poor: And the said T. M. having appeared in pursuance of such summons, and not having shown any cause to the contrary, J. P. and J. O. two of her Majesty's justices of the peace acting in and for the said county of being present at the time and place mentioned in such summons, did, by an order under their hands and seals, bearing date the day of in the year of our Lord* 1843, *in pursuance of the statute in such case made and provided, after due proof upon oath of the said sum being so due and in arrear as aforesaid, and of the said J. F. being then in the service and employment of the said T. M. at the wages of , and that there was then due* [or *on the day of there will be due in intermediate weekly payments*] *on account of such wages, the sum of , did in pursuance of the statute aforesaid thereby order and direct the said master and employer of the said J. F. to pay the sum of by weekly* [or *monthly,* or otherwise] *instalments of on in each*

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and every week for weeks, out of such wages as aforesaid, to the said overseers [or guardians] of the poor, or to some or one of them; the first payment thereof to be made on the day of being the amount of such arrears so remaining unpaid as aforesaid. And whereas it duly appeared unto J. L. and T. L. two of her Majesty's justices of the peace in and for the said county of upon oath, that the said master and employer of the said J. F. had had notice of the said order, but had refused and neglected to pay to the said churchwardens and overseers [or guardians] of the poor, on production of the said order to him, the money thereby directed to be paid according to the terms of such order, and at the periods thereby fixed for such payment, and that the sum of being for weeks, at a week, now remained due and owing from the said master and employer, under the said order, contrary to the form of the statute aforesaid, whereupon J. L. and T. L. the said last-named justices, did issue a warrant under their hands and seals to levy the said sum of together with the sum of for costs, by distress and sale of the goods and chattels of the said master and employer; upon the return of which warrant, it duly appeareth unto us, the undersigned, two of her Majesty's justices of the peace in and for the said county of that no sufficient distress can be had upon the said goods and chattels to levy and raise the said sums. These are therefore to require you the said constables, or some or one of you, forthwith to apprehend the said T. M. the said master and employer, and convey him to the said prison; and you the said keeper are hereby also required to receive and safely keep him in your said prison, there to remain without bail or mainprize for the time of unless the said sums shall be sooner paid and satisfied. Given under our hands and seals the day of in the year of our Lord 1843. *J. K.* (L. S.)
L. M. (L. S.)

(21.) Information to attach wages for the weekly payments.

to wit. } *THE information and complaint of O. O., one of the overseers [or guardians] of the poor of the parish [or union] of , in the county [or city, &c.] of , taken upon oath before me the undersigned J. P., one of her Majesty's justices of the peace in and for the said county [or city, &c.] the day of , in the year of our Lord* 1843, *who on his oath aforesaid saith, that by an order made by the court of general quarter sessions of the peace [or at a petty or special sessions of the peace] holden at , in and for the said county, [or in and for the borough (or division) of , within which the said union (or parish, or a part thereof) is situated.] on the day of , in the year of our Lord* 1843, *by her Majesty's justices of the peace in and for the said county then and there assembled, J. F. of , in the county of , was adjudged to be the father of a [fe]male bastard child, then lately born of the body of A. C. single woman, belonging to and having a settlement in the said parish [or union] of , and that in and by the said order it was (amongst other things) ordered, that the said J. F. should pay or cause to be paid to the churchwardens and overseers [or guardians] of the poor of the said parish [or union] of for the time being, or to some or one of them, the sum of weekly and every week, from the day of making the said order for the maintenance and support of the said bastard child, until such child should attain the age of seven years, if such child should so long live, and so long continue chargeable to the said parish [or union]: And this informant further saith, that the said J. F. hath had due notice of the said order, and that the said bastard child is now living in the said parish [or union] of , under the age of seven years, and is chargeable thereto and maintained thereby at the expense of a week; and that the payments directed to be made by the said order have not been made according thereto by the said J. F. and there is now in arrear for the same the sum of for weeks' maintenance and support of the said bastard child, at a week, from the day of to the day of , and that demand of payment thereof hath been made upon the said J. F. by this informant, but that the said J. F. hath refused and neglected to pay the same, and the same now remains unpaid, contrary to the statute in such case made and provided: The said informant therefore prayeth justice in the premises; and that the said J. F. and T. M. of , in the county of , the master and employer of the said J. F. or some person on his behalf, may be summoned to show cause why any wages due, or which from time to time may become due, from the said master and employer to the said J. F. should not be paid over in whole or in part to the churchwardens and overseers [or guardians] of the poor of the said parish [or union] of in discharge of such arrears as aforesaid.*

Exhibited and sworn before me, the day and year first above-written. } *J. P.*

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to wit. } *To T. M. of , in the county of*

(22.) Order to attach wages for weekly payments.

WHEREAS information and complaint were on the day of , made upon oath before J. P. one of her Majesty's justices of the peace in and for the said county [or *city, &c.*] *by O. O., one of the overseers* [or *guardians*] *of the poor of the parish* [or *union*] *of , in the said county, that by an order made by the court of general quarter sessions of the peace* [or *at a petty* or *special sessions of the peace*] *holden at , in and for the said county of ,* [or *in and for the division* (or *borough*) *of , within which the said union* (or *parish*, or *part thereof*) *is situated,*] *on the day of , in the year of our Lord* 1843, *by her Majesty's justices of the peace, in and for the said county, then and there assembled, J. F. of , in the county of , was adjudged to be the father of a* [*fe*]*male bastard child, then lately born of the body of A. C. single woman, belonging to and having a settlement in the said parish* [or *union*] *of , and that in and by the said order it was (amongst other things) ordered, that the said J. F. should pay or cause to be paid to the churchwardens and overseers* [or *guardians*] *of the poor of the said parish* [or *union*] *of , for the time being, or to some or one of them, the sum of , weekly and every week, from the day of making the said order for the maintenance and support of the said bastard child, until such bastard child should attain the age of seven years, if such child should so long live, and so long continue chargeable to the said parish* [or *union*]: *And that the said J. F. had had due notice of the said order, and that the said bastard child was then living in the said parish under the age of seven years, and was chargeable thereto and maintained thereby at the expense of a week, and that the payments directed to be made by the said order had not been made according thereto by the said J. F. and that there was then in arrear for the same the sum of , for weeks' maintenance and support of the said bastard child, at a week, from the day of to the day of , and that demand of payment thereof had been made upon the said J. F. but that he had refused and neglected to pay the same, and that the same still remained unpaid, contrary to the statute in that case made and provided: And further, that the said J. F. was in the employment of T. M. of in the county of . And whereas it is this day made appear to us the undersigned, two of her Majesty's justices of the peace in and for the said county, that the said J. F. and his said master and employer have been duly summoned to show cause why any wages due, or which may from time to time become due from such master and employer should not be paid over in whole or in part to the said overseers* [or *guardians*] *of the poor, and we the said undersigned justices being present at the time and place mentioned in such summons, and the said T. M. having appeared in pursuance of such summons, and not having shown any cause to the contrary, we therefore the said undersigned justices, whose hands and seals are hereunto subscribed and set in pursuance of the statute in that case made and provided, due proof upon oath having been this day given before us of the said order, and of the said sum being so due as aforesaid, and of the said J. F. being now in the service of the said T. M. as a , at the wages of , and that there is now due* [or *on the day of , there will be due in intermediate weekly payments*] *on account of such wages the sum of , in pursuance of the statute aforesaid, hereby order and direct the said master and employer of the said J. F. to pay the sum of by weekly* [or *monthly*, or otherwise] *instalments of , on in each and every week for weeks, out of such wages as aforesaid, to the said churchwardens and overseers* [or *guardians*] *of the poor, or one of them, the first payment thereof to be made on the day of , such sum being the amount of such arrears so remaining unpaid as aforesaid, according to the form of the statute aforesaid. Given under our hands and seals the day of , in the year of our Lord* 1843.

J. L. (L. S.)
T. L. (L. S.)

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to wit. } *To the constables of the parish of , in the county of .*

(23.) Warrant of distress on master for wages attached for the weekly payments.

WHEREAS information and complaint were on the day of made upon oath before J. P., one of her Majesty's justices of the peace in and for the said county [or *city, &c.*] *by O. O., one of the overseers* [or *guardians*] *of the poor of the parish* [or *union*] *of , in the said county. For that by an order made by the court of general quarter sessions of the peace* [or *at a petty* (or *special*) *sessions of the peace*] *holden at in and for the said county* [or *in and for the division* (or *borough*) *of , within which the said union* (or *parish*, or *part thereof*) *is situated,*] *on the day of , in the year of our Lord* 1843, *by her Majesty's justices of the peace in and for the said county then and there assembled, J. F. of , in*

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the county of , was adjudged to be the father of a [fe]male bastard child then lately born of the body of A. C., single woman, belonging to and having a settlement in the said parish [or *union*] *of , and that in and by the said order it was (amongst other things) ordered that the said J. F. should pay or cause to be paid to the churchwardens and overseers* [or *guardians*] *of the poor of the said parish* [or *union*] *of for the time being, or to some or one of them, the sum of weekly and every week, from the day of making the said order for the maintenance and support of the said bastard child, until such bastard child should attain the age of seven years, if such child should so long live, and so long continue chargeable to the said parish* [or *union.*] *And that the said J. F. had had due notice of the said order, and that the said bastard child was then living in the said parish* [or *union*] *of , under the age of seven years, and was chargeable thereto and maintained thereby at the expense of a week, and that the payments directed to be made by the said order had not been made according thereto by the said J. F., and that there was then in arrear for the same the sum of* [or *on the day of there will be due in intermediate weekly payments*] *for weeks' maintenance and support of the said bastard child at a week, from the day of to the day of , and that demand of payment thereof had been made upon the said J. F., but that he had refused and neglected to pay the same, and the same still remained unpaid, contrary to the statute in such case made and provided. And further, that the said J. F. was in the service and employment of T. M. of , in the county of . And whereas the said J. F. and the said T. M., the said master and employer, having been duly summoned to appear before two of her Majesty's justices of the peace in and for the said county* [or *city, &c.*] *of , to show cause why any wages due, or which might from time to time become due from the said master and employer, should not be paid over in whole or in part to the said churchwardens and overseers* [or *guardians*] *of the poor. And the said T. M. having appeared in pursuance of such summons, and not having shown any cause to the contrary, J. P. and J. L., two of her Majesty's justices of the peace acting in and for the said county, being present at the time and place mentioned in such summons, did, by an order under their hands and seals bearing date the day of , in pursuance of the statute in that case made and provided, after due proof upon oath of the said sum being so due as aforesaid, and of the said J. F. being then in the service and employment of the said T. M., at the wages of , and that there was then due* [or *on the day of there will be due in intermediate weekly payments*] *on account of such wages, the sum of , did, in pursuance of the statute aforesaid, thereupon order and direct the said master and employer of the said J. F. to pay the sum of by weekly* [or *monthly*, or otherwise] *instalments of on in each and every week for weeks, out of such wages as aforesaid, to the said overseers* [or *guardians*] *of the poor, or some or one of them, the first payment thereof to be made on the day of , being the amount of such arrears so remaining unpaid as aforesaid. And whereas it duly appeareth unto us J. L. and T. L., two of her Majesty's justices of the peace in and for the said county, upon oath, that the said master and employer hath had due notice of the said order, but hath refused and neglected to pay to the said churchwardens and overseers* [or *guardians*] *of the poor, on production of the said order to him, the money thereby directed to be paid, according to the terms of such order, and at the periods thereby fixed for such payments. And that the sum of , being for weeks at a week, now remains due and owing from the said master and employer under the said order, contrary to the form of the statute aforesaid. These are therefore to require you forthwith to make distress of the goods and chattels of the said master and employer, and if within the space of five days next after such distress by you taken, the said sum of , and also the further sum of for costs, together with the reasonable charge of taking and keeping the said distress, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and out of the money arising by such sale thereof, that you detain the said sums, and also the reasonable charges of taking, keeping, and selling the said distress, rendering the overplus (if any) on demand to the said master and employer. And if no such distress can be made, that then you certify the same unto us, to the end that such further proceedings may be had therein as to the law doth appertain. Given under our hands and seals, the day of , in the year of our Lord 1843.*

J. L. (L. S.)
T. L. (L. S.)

(24.) Commitment of master for wages attached for weekly payments.

To the constables of the parish of , in the county of , and to the keeper of within the said county.

to wit.

WHEREAS information and complaint were on the day of made upon oath before J. P., one of her Majesty's justices of the peace in and for the said county of , by O. O., one of the overseers [or *guardians*] *of the poor of the*

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parish [or *union*] *of* , *in the said county* [or *city, &c.*] *For that by an order made by the court of general quarter sessions of the peace* [or *at a petty* or *special sessions of the peace*] *holden at* , *in and for the said county* [or *in and for the division* (or *borough*) *of* , *within which the said union* (or *parish*, or *part thereof*) *is situated,*] *on the day of* , *in the year of our Lord* 1843, *by her Majesty's justices of the peace in and for the said county* [or *borough* or *division*], *then and there assembled, J. F. of* , *in the county of* , *was adjudged to be the father of a* [*fe*]*male bastard child, then lately born of the body of A. C., single woman, belonging to and having a settlement in the said parish* [or *union*] *of* , *and that in and by the said order it was (amongst other things) ordered, that the said J. F. should pay or cause to be paid to the churchwardens and overseers* [or *guardians*] *of the poor of the said parish* [or *union*] *of* , *for the time being, the sum of weekly and every week, from the day of making the said order, for the maintenance and support of the said bastard child, until such bastard child should attain the age of seven years, if such child should so long live, and so long continue chargeable to the said parish* [or *union.*] *And that the said J. F. had had due notice of the said order, and that the said bastard child was then living in the said parish* [or *union*] *of* , *under the age of seven years, and was chargeable thereto and maintained thereby at the expense of a week; and the payments directed to be made by the said order had not been made according thereto by the said J. F., and that there was then in arrear for the same the sum of for weeks' maintenance and support of the said bastard child, at a week, from the day of to the day of* , *and that demand of payment thereof had been made upon the said J. F., but that he had refused and neglected to pay the same, and the same still remains unpaid, contrary to the statute in such case made and provided. And further, that the said J. F. was then in the service and employment of T. M., of* , *in the county of* . *And whereas the said J. F. and the said T. M., the said master and employer, having been duly summoned to appear before two of her Majesty's justices of the peace in and for the said county to show cause why any wages due or which from time to time might become due from the said master and employer, should not be paid over in whole or in part to the said churchwardens and overseers* [or *guardians*] *of the poor. And the said T. M. having appeared in pursuance of such summons, and not having shown any cause to the contrary, J. O. and T. O., two of her Majesty's justices of the peace acting in and for the said county, being present at the time and place mentioned in such summons, did, by an order under their hands and seals, bearing date the day of* , *in the year of our Lord* 1843, *in pursuance of the statute in such case made and provided, after due proof upon oath of the said sum being so due as aforesaid, and of the said J. F. being then in the service and employment of the said T. M. at the wages of* , *and that there was then due* [or *on the day of there will be due in intermediate weekly payments*] *on account of such wages, the sum of* , *did, in pursuance of the statute aforesaid, thereby order and direct the said master and employer of the said J. F. to pay the sum of by weekly* [or *monthly*, or otherwise] *instalments of* , *on in each and every week for weeks out of such wages as aforesaid, to the said churchwardens and overseers* [or *guardians*] *of the poor, or some or one of them; the first payment thereof to be made on the day of* , *being the amount of such arrears so remaining unpaid as aforesaid. And whereas it duly appeared unto J. L. and T. L., two of her Majesty's justices of the peace in and for the said county, upon oath, that the said master and employer of the said J. F. had had due notice of the said order, but had refused and neglected to pay to the said churchwardens and overseers* [or *guardians*] *of the poor, on production of the said order to him, the money thereby directed to be paid according to the terms of such order, and at the periods thereby fixed for such payment, and that the sum of* , *being for weeks, at a week, now remained due and owing from the said master and employer under the said order, contrary to the form of the statute aforesaid, whereupon J. L. and T. L., the said last-named justices, did issue a warrant under their hands and seals to levy the said sum of* , *together with the sum of for costs, by distress and sale of the goods and chattels of the said master and employer; upon the return of which warrant it duly appeareth unto us the undersigned, two of her Majesty's justices of the peace in and for the said county, that no sufficient distress can be had upon the said goods and chattels to levy and raise the said sums. These are therefore to require you the said constables, or some or one of you, forthwith to apprehend the said T. M., the said master and employer, and convey him to the said prison; and you the said keeper are hereby also required to receive and safely keep him in your said prison, there to remain without bail or mainprise for the time of* , *unless the said sums shall be sooner paid and satisfied. Given under our hands and seals the day of* , *in the year of our Lord* 1843.

J. L. (L.S.)
T. L. (L.S.)

Bathing.

When an offence.

IT is an established principle, that whatever openly outrages decency, and is injurious to public morals, is a misdemeanor at common law. (4 *Bla. Com.* 65; 1 *Hawk.* c. 5, s. 4; 1 *East's P. C.* c. 1, s. 1.) It is therefore indictable for a person to bathe in an indecent manner near a highway, or in any part of a public river. In *R.* v. *Crunden*, 2 *Campb.* 89, it was held an indictable offence for a man to undress himself on the beach, and to bathe in the sea near inhabited houses, from which he may be distinctly seen, although these houses may have been recently erected, and till then it may have been usual for men to bathe in great numbers at the place in question. See form of indictment, 2 *Chit. C. L.* 41.

By the Vagrant Act, a person may be treated as a rogue and vagabond who shall wilfully, openly, lewdly, and obscenely expose his person in any street, road, or public highway, or in the view thereof, or in any place of public resort, with intent to insult any female. See *post*, "*Vagrant*," Vol. VI.

Public no right to bathe, &c. in sea.

In *Blundell* v. *Catterall*, 5 *B. & Ald.* 268, it was held that the public at large have no common law right to bathe in the sea, and, as incident thereto, of crossing the shore on foot or with bathing machines for that purpose.

Battel, *appeal of*, see *ante*, "*Appeal*."

Battery, see *ante*, "*Assault*."

Bawdy-houses, see *post*, "*Disorderly Houses*," Vol. II.; "*Gaming*" and "*Lewdness*," Vol. III.

Beacon, see "*Ships*," Vol. V.

Beadle, *when he may apprehend an offender*, see *ante*, "*Arrest*;" *post*, "*Church*," "*Constable*."

Bear-baiting, see *post*, "*Cattle and Animals*," and *post*, "*Police*," Vol. V.

Beasts, *cruelty to*, see *post*, "*Cattle*;" *stealing of*, see "*Larceny*," Vol. III.

Bedford Level.

AS to the offence of destroying or damaging the banks and other works of, see the 7 & 8 Geo. IV. c. 30, s. 14; *post*, "*Malicious Injuries to Property*," Vol. V. p. 35. The prior enactment relative thereto was the 27 Geo. II. c. 19, s. 49, as amended by the 4 Geo. IV. c. 46, s. 1.

Beer, see *ante*, "*Alehouse*," "*Excise*," Vol. II.

Bees, *Stealing of, a Felony, post*, "*Larceny*," Vol. III.

Beggars, see "*Vagrants*," Vol. VI.

Behaviour, *surety for good behaviour*, see "*Surety*, Vol. V.

Benefit of Clergy, see *post*, "*Clergy*."

Benefit Societies, see "*Friendly Societies*," Vol. III.

Bent.

By stat. 15 Geo. II. c. 33, s. 6, whereas on the north-west coasts of England, and especially in the county of Lancaster, the sea is bounded, and the lands are prevented from being overflowed by large hills, the sand of which is so loose that in dry weather it is thrown by the winds on the adjacent lands, to the damage thereof and the danger of the inhabitants, who are exposed thereby to the inundation of the sea; to prevent which the landowners are at great charges annually to plant and maintain a sort of rush or shrub, called starr or bent, but many disorderly persons pluck up and carry away the same to make mats and brushes; therefore, if any person without consent of the owner shall cut, pull up, or carry away any starr or bent, planted or set on the said hills on the north-west coasts of England, on complaint thereof on oath to one justice, the offender shall be summoned; and on default of appearing, the justice shall issue his warrant to apprehend and bring him before him; and being convicted on oath of one witness or confession, he shall forfeit 20s., half to the informer and half to the owner of the bent by distress; and for want of sufficient distress, be sent to the house of correction for three months, to be kept to hard labour; and for a second offence, he shall be committed to the house of correction for one year, to be whipped and kept to hard labour. 15 Geo. 2, c. 33.

Sect. 7. And if any starr or bent shall be found within five miles of the said sand hills, the persons convicted of having the same in custody shall forfeit 20s. in like manner, and for want of sufficient distress shall be committed to the house of correction, there to be kept to hard labour for three months.

Sect. 8. But this shall not restrain any person from the exercise of any ancient prescriptive right to cut starr or bent on the sea coasts in the county of Cumberland.

Bestiality, see "*Sodomy*," Vol. V.

Bigamy, see "*Polygamy*," Vol. V.

Bill in Chancery, &c., *Proof of*, see "*Evidence*," Vol. II., p. 395; *Forgery of*, see "*Forgery*," Vol. III.

Bill of Exceptions, see *post*, "*Evidence*," Vol. II., p. 462.

Bills of Exchange, see "*Promissory Notes*," Vol. V.; *Stealing of*, see "*Larceny*," Vol. III.; *Forgery of*, see "*Forgery*," Vol. III.

Birds, *Stealing of*, see "*Larceny*," Vol. III.

Birth, *proof of*, see *post* "*Evidence*," Vol. II., p. 375, 388; *in cases of Bastardy*, see *ante*, 371.

Black Act.

Repeal of Black Act.

THE 9 Geo. I. c. 22, which was called the Black Act, and passed on the occasion of some devastations being committed near Waltham, in Hampshire, by persons in disguise or with their faces *blacked*, is now totally repealed by 7 & 8 Geo. IV. c. 27. But its provisions are consolidated and amended by the 7 & 8 Geo. IV. c. 30, being the act consolidating and amending the laws in general relative to malicious injuries to property. See title "*Malicious Injuries to Property*," Vol. V.

Repeal of Lord Ellenborough's Act.

The 43 Geo. III. c. 58 (commonly called Lord Ellenborough's Act) is now partially repealed by the 7 & 8 Geo. IV. c. 27, and what is not repealed by that act is so by the 9 Geo. IV. c. 31, consolidating and amending the laws in general relative to injuries to the *person*. See title "*Malicious Injuries to Persons*," *post*, Vol. V.

Black Lead, *stealing of*, see *post*, "*Mines*;" *Injuring Mines*, see *Malicious Injuries to Property*, Vol. V., p. 32.

Blasphemy and Profaneness.

AS to profane swearing, see *Swearing*, Vol. V.

Blasphemy.

All blasphemies against God, as denying his being or providence; and all contumelious reproaches of Jesus Christ; all profane scoffing at the Holy Scriptures, or exposing any part of them to contempt or ridicule; impostors in religion, as falsely pretending to extraordinary commissions from God, and terrifying or abusing the people with false denunciations of judgments; and all open lewdness grossly scandalous—are punishable by fine and imprisonment, and also such corporeal punishment as to the Court shall seem meet, according to the heinousness of the crime. (1 *Hawk.* c. 5, s. 6; 1 *East's P. C.* 3.)

Punishment for.

Also seditious words, in derogation of the established religion, are indictable, as tending to a breach of the peace. (1 *Hawk.* c. 5, s. 6.)

Writing against Christianity in general.

In *R* v. *Woolston*, 2 *Stra.* 834, *Fitzgib.* 64, the defendant was convicted on four informations, for his blasphemous discourses on the miracles of our Saviour: And attempting to move in arrest of judgment, the court declared they would not suffer it to be debated, whether to write against Christianity *in general* was not an offence punishable in the temporal courts at common law: they desired it might be taken notice of, that they laid their stress upon

the word *general*, and did not intend to include disputes between learned men upon particular controverted points. The next term he was brought up and fined 25*l.* for each of his four discourses, to suffer a year's imprisonment, and to enter into a recognizance for his good behaviour during his life, himself in 3000*l.* and 2000*l.* by others.

Blasphemy and Profaneness.

In the case of *R.* v. *Waddington*, 1 *B. & C.* 26, a publication stating Jesus Christ to be an impostor, and a murderer in principle, and a fanatic, is a libel at common law, Christianity being a part of the law of the land.

In the year 1656, James Naylor, for personating our Saviour, and suffering his followers to worship him, and pay him divine honours, was sentenced to be set in the pillory, and to have his tongue bored through with a red hot iron, and to be whipped, and stigmatized in the forehead with the letter B.

In *R.* v. *Annet*, 1 *Bla. R.* 395, the defendant was convicted on an information, for writing a most blasphemous libel in weekly papers, called the Free Inquirer; to which he pleaded guilty. In consideration of which, and of his poverty, of his having confessed his errors in an affidavit, and of his being seventy years of age, and some symptoms of wildness that appeared on his inspection in court, the court declared they had mitigated their intended sentence to the following, viz. to be imprisoned in Newgate for a month; to stand twice in the pillory with a paper on his forehead, inscribed blasphemy; to be sent to the house of correction, to hard labour, for a year; to pay a fine of 6*s.* 8*d.*, and find security, himself in 100*l.* and two sureties in 50*l.* each, for his good behaviour during life.

What discussion allowable.

Contumely and contempt are what no establishment can tolerate; but, on the other hand, it would not be proper to lay any restraint upon rational and dispassionate discussions of the rectitude and propriety of the established mode of worship; (4 *Bla. Com.* 51; 1 *Russ.* 219;) and Mr. Starkie, upon the subject, says, "that it may not be going too far from the principles and decisions that no author or preacher, who fairly and conscientiously promulgates the opinions, with whose truth he is impressed, for the benefit of others, is for so doing amenable as a criminal, that a malicious and mischievous intention is in such case the broad boundary between right and wrong; and that if it can be collected from the offensive levity with which so serious a subject is treated, or from other circumstances, that the act of the party was malicious, then, since the law has no means of distinguishing between different degrees of evil tendency, if the matter published contain any such tendency, the publisher becomes amenable to justice."—*Starkie on Libel*, 496, 497. See *per Cur.* in *R.* v. *Woolston*, *supra*, and the following cases on this subject: *R.* v. *Attwood*, *Cro. Jac.* 421; *R.* v. *Taylor*, *Vent.* 293; *R.* v. *Clendon*, *Str.* 789; *R.* v. *Hale*, *Str.* 416; *R.* v. *Wilkes*, 2 *Stark. Sl.* 141; *R.* v. *Williams*, *ib.*; *R.* v. *Eaton*, *ib.* 142; *R.* v. *Carlile*, 3 *B. & Ald.* 161; *R.* v. *Taylor*, 2 *Stark. Sl.* 143.

Proceedings in a court.

It is not lawful to publish even a correct account of the proceedings in a court of justice, if such an account contain matter of a scandalous, blasphemous, or indecent nature. (*R.* v. *Mary Carlisle*, 3 *B. & Ald.* 167.)

An obscene book.

An information was exhibited by the attorney-general against Edmund Curl, for printing and publishing two obscene books, the one styled "The Nun in her Smock;" the other, "The Art of Flogging;" setting out the several lewd passages, and concluding against the peace. And of this the defendant was found guilty. It was moved in arrest of judgment, that however the defendant may be punishable for this in the spiritual court, as an offence against good manners; yet it cannot be a libel, for which he is punishable in the temporal courts. But after long debate and consideration, the Court at last gave it as their unanimous opinion, that this was an offence properly within their jurisdiction; they said, that religion is a part of the common law, and therefore whatever is an offence against that, is evidently an offence against the common law. And the defendant was set in the pillory. (*R.* v. *Curl*, 2 *Stra.* 788; 1 *Burn.* 29.) And see further title *Lewdness*, *Libel*, Vol. III.

Not material whether oral or written.

It is immaterial whether the blasphemous publication be verbal or written. (See 2 *Stark. Sl.* 141.)

Blasphemy and Profaneness.

Statutes as to.

Penalties against blasphemy.

By stat. 3 Jac. 1, c. 21, if any person shall, in any stage play, interlude, show, may-game, or pageant, jestingly or profanely speak or use the holy name of God, or of Christ Jesus, or of the Holy Ghost, or of the Trinity, he shall forfeit 10*l.*; half to the king and half to him that shall sue.

And by stat. 9 & 10 Will. III. c. 32, reciting, "Whereas many persons have, of late years, openly avowed and published many blasphemous and impious opinions, contrary to the doctrines and principles of the Christian religion, greatly tending to the dishonour of Almighty God, and may prove destructive to the peace and welfare of this kingdom; wherefore, for the more effectual suppressing of the said detestable crimes," it is enacted, "that if any person or persons, having been educated in, or at any time having made profession of the Christian religion within the realm, shall by writing, printing, teaching, or advised speaking [deny any one of the persons in the Holy Trinity to be God] (*a*), assert or maintain there are more gods than one, or shall deny the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of divine authority, and shall, upon indictment or information in any of his Majesty's courts at Westminster, or at the assizes, be thereof lawfully convicted by the oath of two or more credible witnesses, such person or persons, for the first offence, shall be adjudged incapable and disabled in law, to all intents and purposes whatsoever, to have or enjoy any office or offices, employment or employments, ecclesiastical, civil, or military, or any part in them, or any profit or advantage appertaining to them or any of them; and if any person or persons so convicted as aforesaid shall, at the time of his or their conviction, enjoy or possess any office, place, or employment, such office, place, or employment shall be void, and is hereby declared void. And if such person or persons shall be a second time lawfully convicted as aforesaid of all or any of the aforesaid crime or crimes, that then he or they shall from henceforth be disabled to sue, prosecute, plead, or use any action or information, in any court of law or equity, or to be guardian of any child, or executor or administrator of any person, or capable of any legacy or deed of gift, or to bear any office, civil or military, or benefice ecclesiastical, for ever, within this realm, and shall also suffer imprisonment for the space of three years, without bail or mainprize, from the time of such conviction."

Limitations of prosecutions under act.

Sect. 2 provides and enacts, "That no person shall be prosecuted by virtue of this act, for any words spoken, unless the information of such words shall be given upon oath before one or more justice or justices of the peace, within four days after such words spoken, and the prosecution of such offence be within three months after such information."

Relief from penalties.

Sect. 3 provides and enacts, "That any person or persons convicted of all or any of the aforesaid crime or crimes in manner aforesaid, shall, for the first offence, (upon his, her, or their acknowledgment and renunciation of such offence or erroneous opinions, in the same court where such person or persons was or were convicted, as aforesaid, within the space of four months after his, her, or their conviction), be discharged from all penalties and disabilities incurred by such conviction, anything in this act contained to the contrary thereof in anywise notwithstanding.

The statutes do not alter the offence at common law.

This statute of 9 & 10 Will. III. has not altered the common law as to the offence of blasphemy, but only given a cumulative punishment. It is therefore still an offence at the common law to publish a blasphemous libel. (*R.* v. *Richard Carlile*, 3 *B. & Ald.* 161; *Reg.* v. *Hetherington*, 5 *Jur.* 529.)

It seems that the stat. 53 Geo. III. c. 160 (*b*), does not alter the common law, but only removes the penalties imposed by 9 & 10 Will. III. c. 32, on

(*a*) This part of the enactment as relates to denying the Holy Trinity is repealed by the 53 Geo. III. c. 160.

(*b*) By stat. 53 Geo. III. c. 160, intituled "*An Act to relieve Persons who impugn the Doctrine of the Holy Trinity from certain Penalties*," reciting, that whereas in the nineteenth year of his present Majesty an act was passed, intituled "*An Act for the further Relief of Protestant Dissenting Ministers and Schoolmasters*," and it is expedient to enact as hereinafter provided, it is enacted, "that so much of an act passed in the first year of the reign of King William and Queen Mary, intituled '*An Act for exempting his Majesty's Protestant Subjects dissenting from the Church*

persons denying the Trinity, and extends to them the benefits conferred on all other Protestant dissenters by stat. 1 Will. & M. c. 18, s. 1. (*R.* v. *Waddington*, 1 *B. & Cres.* 26.)

Blasphemy and Profaneness.

By stat. 22 Geo. II. c. 33, art. 2, all persons in or belonging to H. M.'s ships or vessels of war, being guilty of profane oaths, cursings, execrations, drunkenness, uncleanness, or other scandalous actions, in derogation of God's honour, and corruption of good manners, shall incur such punishment as a court-martial shall think fit to impose.

Navy.

The offence of blasphemy, and other offences against religion, are not triable at any quarter session. (5 & 6 Vict. c. 38, s. 1.)

Offence not triable at sessions.

Forms.

[Commencement as usual, as *ante*, p. 9,] *that the said C. D. on, &c. at, &c. unlawfully and wickedly did compose, print, and publish a certain scandalous, impious, blasphemous, and profane libel, of and concerning the Holy Scriptures and the Christian religion. And you the said keeper, &c.* [conclude as usual, as *ante*, p. 9.]

(1.) Commitment for blasphemous libel.

—— to wit.] *THE jurors for our Lady the Queen upon their oath present, that C. D., late of the parish of , in the county of , labourer, being a wicked and evil disposed person, and disregarding the laws and religion of the realm, and wickedly and profanely devising and intending to bring the Holy Scriptures and the Christian religion into disbelief and contempt among the people of this kingdom, on the day of , in the year of the reign of our Lady the now Queen Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully and wickedly did compose, print, and publish, and cause and procure to be composed, printed, and published, a certain scandalous, impious, blasphemous, and profane libel, of and concerning the Holy Scriptures and the Christian religion, in one part of which said libel there were and are contained, amongst other things, certain scandalous, impious, blasphemous, and profane matters and things, of and concerning the Holy Scriptures and the Christian religion, according to the tenor and effect following; that is to say:* [set out the libellous passage verbatim; and if there be another such passage in another part of the libel, state it thus: "*and in another part thereof, there were and are contained amongst other things, certain other scandalous, impious, blasphemous, and profane matters and things, of and concerning the said Holy Scriptures and the Christian religion, according to the tenor and effect following; that is to say*," and setting it forth conclude thus]: *To the evil example of all others, and against the peace of our Lady the Queen, her crown and dignity.*

(2.) Indictment for blasphemous libel.

See forms of indictments for libels, *post*, "*Libel*," Vol. III.

Bleaching Grounds, *Stealing from*. See "*Larceny*," Vol. III.

Blood, *Corruption of*. See *ante*, "*Attainder*."

Boats. See "*Ships*," "*Thames*," Vol. IV. *Stealing from*, see "*Larceny*," Vol. III.

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of England from the Penalties of certain Laws,' as provides that that act or any thing therein contained should not extend or be construed to extend to give any ease, benefit, or advantage to persons denying the Trinity as therein mentioned, be and the same is hereby repealed."

By sect. 2 it is enacted, "That the provisions of another act passed in the ninth and tenth years of the reign of King William, intituled '*An Act for the more effectual suppressing Blasphemy and Profaneness*,' so far as the same relate to persons denying as therein mentioned respecting the Holy Trinity, be repealed."

And two acts passed in the parliament of Scotland, the first in 1 Car. II. and the other in 1 Will. III. intituled "*Acts against the Crime of Blasphemy*," which acts respectively ordain the punishment of death, are hereby repealed.

Bodies (*dead*), and Schools of Anatomy.

Stealing a body.

IT is clear no action lies for violating or disturbing the remains of the dead; nor is the stealing a corpse felony; a corpse being *nullius in bonis*. (3 *Inst.* 203,) But in *R.* v. *Lynn*, 2 *T. R.* 733; 2 *Leach, Cr. C.* 497, S. C., it was determined that stealing dead bodies, though for the improvement of the science of anatomy, is an indictable offence as a misdemeanor, it being a practice contrary to common decency, and shocking to the general sentiments and feelings of mankind.

Stealing shroud, &c.

If the shroud, coffin, &c. be stolen, an indictment for the felony is sustainable, and the property should be laid in the representatives; (2 *East's P. C.* 652; 1 *Hale*, 515;) or if none, in the ordinary, and in case of doubt, it is best to add counts laying the property both ways. It is questionable if the apprehension of a person in the act of stealing a dead body from the churchyard is a lawful apprehension, so as to subject such person to an indictment for cutting, &c. a sexton, in order to obstruct such apprehension. (*R.* v. *Duffin, R. & R. C C.* 365.)

Selling bodies.

The taking away a dead body to dispose of it for gain and profit is an indictable offence. (*R.* v. *Gillies, Russ. & Ry. C. C. R.* 366, n.) To sell a dead body of a capital convict for dissection, where dissection is no part of the sentence, is a misdemeanor, indictable at common law. (*R.* v. *Cundick, D. & R. N. P. C.* 13; *R. & R. C. C.* 366, n. S. C.) An indictment charging that one E. L. was executed, and that the defendant was retained and employed by the gaoler for certain reward to bury the body, and that in pursuance of such retainer it became his duty to bury the body, but that he did not, nor would bury the body, but on the contrary thereof, for the sake of lucre and gain, sold it for the purpose of being dissected, is good; and to support such an indictment it is not necessary to give *direct* evidence that the defendant sold the body for the purpose of being dissected. (*Id.* See the 2 & 3 Will. IV. c. 75, *post*, 415.)

Preventing a burial.

A conspiracy to prevent a burial is indictable as a misdemeanor. (*Young's case*, 2 *T. R.* 734. See *post*, "*Conspiracy.*")

An indictment for wilfully obstructing W. C., clerk, in reading the service of the burial of the dead, in the parish church of A. and by threats and menaces hindering the burial, must state that W. C. was a clerk in holy orders, or that he had a right to bury the corpse, and must also set out the threats and menaces. (*R.* v. *Cheere*, 7 *D. & R.* 461.) As to burials in general, see *post*, "*Church.*"

Arresting a dead body.

A vulgar and erroneous notion once prevailed, that a dead body might be arrested for debt. (*Lindwood*, 278, and *Wood. Cr. Law*, 143.) But such a proceeding is clearly illegal and indictable.

In the case of *Quick* v. *Copleton*, 1 *Levinz*, 161; 1 *Sid.* 242, S. C.; a case of *Weeks* v. *Copleston*, 1 *Keb.* 866, was quoted where a woman who feared the dead body of her son would be arrested for debt, was holden liable on a promise to pay in consideration of forbearance, though she was neither executrix nor administratrix. But Lord *Ellenborough*, C. J., in *Jones* v. *Ashburnham*, 4 *East*, 460, denied the correctness of such a decision, and said, "It is impossible to contend that this last forbearance could be a good consideration for an *assumpsit*; for to seize a dead body upon any such pretence would be *contra bonos mores*, and an extortion on the relatives. It is contrary to every principle of law and moral feeling. Such an act is revolting to humanity, and illegal; and therefore any promise extorted by the fear of it could never be valid in law. It might as well be said, that a promise in consideration that one would withdraw a pistol from another's breast could be enforced against the party acting under such unlawful terror."

Gaoler refusing to deliver up a dead body.

And where upon request by the executors a gaoler refused to deliver up to them for interment the body of a debtor in execution who had died in gaol, until the amount of certain detainers was paid, the Court directed a mandamus to issue peremptory in the first instance, commanding him to

deliver it up. (*In re Wakefield, (Bailiff of,)* 1 *Gale & Dav.* 566; 2 *Ad. & Ell. N. S.* 248; and see the form of an indictment against the gaoler for such a refusal, 2 *A. & E. N. S.* 248 n. *R* v. *Scott.*) *Bodies (dead).*

By stat. 25 Geo. II. c. 37, s. 2, the body of a murderer (where the conviction and execution was in Middlesex or London) was to be conveyed by the sheriff to the hall of the surgeons' company, and dissected by such surgeons or their appointee; and when such execution happened in any other county or place in Great Britain, the body was to be delivered by the sheriff to such surgeon as the judge directed; but this enactment was repealed by the 2 & 3 Will. IV. c. 75, s. 16, *post*, "*Homicide*," Vol. III. by which the body is to be buried in the prison. The 4 & 5 Will. IV. c. 26, s. 1, *post*, "*Homicide*," Vol. III. abolishes the hanging the body in chains. Body of murderer.

Sect. 10. Rescuing the body from the sheriff during conveyance to the surgeon, or from the house of the surgeon, is felony, punishable by seven years' transportation. (See *post*, "*Homicide*," Vol. III.) Rescuing body.

As to the burial of bodies cast on shore, see *post*, "*Burial*." Bodies cast on shore.

As to the burial of a *felo de se*, see *post*, "*Felo de se*," Vol. II. Felo de se.

By the 2 & 3 Will. IV. c. 75, intituled "An Act for regulating schools of anatomy," reciting, "Whereas a knowledge of the causes and nature of sundry diseases which affect the body, and of the best methods of treating and curing such diseases, and of healing and repairing divers wounds and injuries to which the human frame is liable, cannot be acquired without the aid of anatomical examination: and whereas the legal supply of human bodies for such anatomical examination is insufficient fully to provide the means of such knowledge: and whereas, in order further to supply human bodies for such purposes, divers great and grievous crimes have been committed, and lately murder, for the single object of selling for such purposes the bodies of the persons so murdered: and whereas therefore it is highly expedient to give protection, under certain regulations, to the study and practice of anatomy, and to prevent, as far as may be, such great and grievous crimes and murder as aforesaid;" it is enacted, "That it shall be lawful for his Majesty's principal secretary of state for the time being for the home department in that part of the United Kingdom called Great Britain, and for the chief secretary for Ireland in that part of the United Kingdom called Ireland, immediately on the passing of this act, or so soon thereafter as may be required, to grant a license to practise anatomy to any fellow or member of any college of physicians or surgeons, or to any graduate or licentiate in medicine, or to any person lawfully qualified to practise medicine in any part of the United Kingdom, or to any professor or teacher of anatomy, medicine, or surgery, or to any student attending any school of anatomy, on application from such party for such purpose, countersigned by two of his Majesty's justices of the peace acting for the county, city, borough, or place wherein such party resides, certifying that, to their knowledge or belief, such party so applying is about to carry on the practice of anatomy." Schools of anatomy, &c. Secretary of state to grant licenses to practise anatomy.

Sect. 2. "It shall be lawful for his Majesty's said principal secretary of state or chief secretary, as the case may be, immediately on the passing of this act, or as soon thereafter as may be necessary, to appoint respectively not fewer than three persons to be inspectors of places where anatomy is carried on, and at any time after such first appointment to appoint, if they shall see fit, one or more other person or persons to be an inspector or inspectors as aforesaid; and every such inspector shall continue in office for one year, or until he be removed by the said secretary of state or chief secretary, as the case may be, or until some other person shall be appointed in his place; and as often as any inspector appointed as aforesaid shall die, or shall be removed from his said office, or shall refuse or become unable to act, it shall be lawful for the said secretary of state or chief secretary, as the case may be, to appoint another person to be inspector in his room." Secretary of state to appoint inspectors of schools of anatomy;

Sect. 3. "It shall be lawful for the said secretary of state, or chief secretary, as the case may be, to direct what district of town or country, or of both, and what places where anatomy is carried on, situate within such dis- and to direct what district every inspector shall superintend.

Schools of Anatomy, &c.

trict, every such inspector shall be appointed to superintend, and in what manner every such inspector shall transact the duties of his office."

2 & 3 Will. 4, c. 75. Inspectors to make returns of subjects removed for anatomical examination;

Sect. 4. "Every inspector to be appointed by virtue of this act shall make a quarterly return to the said secretary of state or chief secretary, as the case may be, of every deceased person's body that during the preceding quarter has been removed for anatomical examination to every separate place in his district where anatomy is carried on, distinguishing the sex, and, as far as is known at the time, the name and age of each person whose body was so removed as aforesaid."

and to inspect places where anatomy is practised.

Sect. 5. "It shall be lawful for every such inspector to visit and inspect at any time, any place within his district, notice of which place has been given, as is hereinafter directed, that it is intended there to practise anatomy."

Salaries to inspectors.

Sect. 6. "It shall be lawful for his Majesty to grant to every such inspector such an annual salary, not exceeding one hundred pounds, for his trouble, and to allow such a sum of money for the expenses of his office as may appear reasonable; such salaries and allowances to be charged on the consolidated fund of the United Kingdom, and to be payable quarterly; and that an annual return of all such salaries and allowances shall be made to parliament."

Persons having lawful custody of bodies may permit them to undergo anatomical examination in certain cases.

Sect. 7. "It shall be lawful for any executor or other party, having lawful possession of the body of any deceased person, and not being an undertaker or other party intrusted with the body for the purpose only of interment, to permit the body of such deceased person to undergo anatomical examination, unless, to the knowledge of such executor or other party, such person shall have expressed his desire, either in writing at any time during his life, or verbally in the presence of two or more witnesses during the illness whereof he died, that his body after death might not undergo such examination, or unless the surviving husband or wife, or any known relative of the deceased person, shall require the body to be interred without such examination."

Provision in case of persons directing anatomical examinations after their death.

Sect. 8. "If any person, either in writing at any time during his life, or verbally in the presence of two or more witnesses during the illness whereof he died, shall direct that his body after death be examined anatomically, or shall nominate any party by this act authorised to examine bodies anatomically to make such examination, and if, before the burial of the body of such person, such direction or nomination shall be made known to the party having lawful possession of the dead body, then such last-mentioned party shall direct such examination to be made, and, in case of any such nomination as aforesaid, shall request and permit any party so authorised and nominated as aforesaid to make such examination, unless the deceased person's surviving husband or wife, or nearest known relative, or any one or more of such person's nearest known relatives, being of kin in the same degree, shall require the body to be interred without such examination."

The body not to be removed from the place where such person may have died without a certificate.

Sect. 9. "In no case shall the body of any person be removed for anatomical examination from any place where such person may have died, until after forty-eight hours from the time of such person's decease, nor until after twenty-four hours' notice, to be reckoned from the time of such decease, to the inspector of the district, of the intended removal of the body, or, if no such inspector have been appointed, to some physician, surgeon, or apothecary, residing at or near the place of death, nor unless a certificate stating in what manner such person came by his death shall previously to the removal of the body have been signed by the physician, surgeon, or apothecary who attended such person during the illness whereof he died, or if no such medical man attended such person during such illness, then by some physician, surgeon, or apothecary who shall be called in after the death of such person to view his body, and who shall state the manner or cause of death according to the best of his knowledge and belief, but who shall not be concerned in examining the body after removal; and that in case of such removal, such certificate shall be delivered, together with the body, to the party receiving the same for anatomical examination."

Professors, surgeons, and others may receive

Sect. 10. "It shall be lawful for any member or fellow of any college of physicians or surgeons, or any graduate or licentiate in medicine, or any

Schools of Anatomy, &c.

2 & 3 Will. 4, c. 75.

Bodies for anatomical examination.

person lawfully qualified to practise medicine in any part of the United Kingdom, or any professor, teacher, or student of anatomy, medicine or surgery, having a license from his Majesty's principal secretary of state or chief secretary as aforesaid, to receive or possess for anatomical examination, or to examine anatomically, the body of any person deceased, if permitted or directed so to do by a party who had at the time of giving such permission or direction lawful possession of the body, and who had power, in pursuance of the provisions of this act, to permit or cause the body to be so examined, and provided such certificate as aforesaid were delivered by such party together with the body."

Such persons to receive with the body a certificate as aforesaid, which shall be transmitted to the inspector.

Sect. 11. "Every party so receiving a body for anatomical examination after removal, shall demand and receive, together with the body, a certificate as aforesaid, and shall, within twenty-four hours next after such removal, transmit to the inspector of the district such certificate, and also a return stating at what day and hour, and from whom the body was received, the date and place of death, the sex, and (as far as is known at the time) the christian and surname, age, and last place of abode of such person, or, if no such inspector have been appointed, to some physician, surgeon, or apothecary residing at or near the place to which the body is removed, and shall enter or cause to be entered the aforesaid particulars relating thereto, and a copy of the certificate he received therewith, in a book to be kept by him for that purpose, and shall produce such book whenever required so to do by any inspector so appointed as aforesaid."

Notice to be given to secretary of state of places where anatomy is about to be practised.

Sect. 12. "It shall not be lawful for any party to carry on or teach anatomy at any place, or at any place to receive or possess for anatomical examination, or examine anatomically, any deceased person's body after removal of the same, unless such party, or the owner or occupier of such place, or some party by this act authorised to examine bodies anatomically, shall, at least one week before the first receipt or possession of a body for such purpose at such place, have given notice to the said secretary of state or chief secretary, as the case may be, of the place where it is intended to practise anatomy."

How bodies are to be removed for examination.

Provision for interment.

Sect. 13. "Provided every such body so removed as aforesaid for the purpose of examination shall, before such removal, be placed in a decent coffin or shell, and be removed therein; and that the party removing the same, or causing the same to be removed as aforesaid, shall make provision that such body, after undergoing anatominal examination, be decently interred in consecrated ground, or in some public burial ground in use for persons of that religious persuasion to which the person whose body was so removed belonged; and that a certificate of the interment of such body shall be transmitted to the inspector of the district within six weeks after the day on which such body was received as aforesaid."

Persons described in this act not to be liable to punishment for having in their possession human bodies.

Sect. 14. "No member or fellow of any college of physicians or surgeons, nor any graduate or licentiate in medicine, nor any person lawfully qualified to practise medicine in any part of the United Kingdom, nor any professor, teacher, or student of anatomy, medicine, or surgery, having a license from his Majesty's principal secretary of state or chief secretary as aforesaid, shall be liable to any prosecution, penalty, forfeiture or punishment for receiving or having in his possession for anatomical examination, or for examining anatomically, any dead human body, according to the provisions of this act."

Act not to prohibit post-mortem examinations.

Sect. 15. "Nothing in this act contained shall be construed to extend to or to prohibit any post-mortem examination of any human body required or directed to be made by any competent legal authority."

So much of 9 Geo. 4, c. 31, as directs that the bodies of murderers may be dissected, repealed.

Sect. 16. "And whereas an act was passed in the ninth year of the reign of his late Majesty, for consolidating and amending the statutes in England relative to offences against the person, by which latter act it is enacted, that the body of every person convicted of murder shall, after execution, either be dissected or hung in chains, as to the court which tried the offender shall seem meet; and that the sentence to be pronounced by the court shall express that the body of the offender shall be dissected or hung in chains, whichsoever of the two the court shall order; be it enacted, that so much of

Schools of Anatomy, &c.

2 & 3 Will. 4, c. 75.

Such bodies to be hung in chains or buried, as the court shall direct.

the said last-recited act as authorises the court, if it shall see fit, to direct that the body of a person convicted of murder shall, after execution, be dissected, be and the same is hereby repealed; and that in every case of conviction of any prisoner for murder the court before which such prisoner shall have been tried shall direct such prisoner either to be hung in chains, or to be buried within the precincts of the prison in which such prisoner shall have been confined after conviction, as to such court shall seem meet; and that the sentence to be pronounced by the court shall express that the body of such prisoner shall be hung in chains, or buried within the precincts of the prison, whichever of the two the court shall order."

Limitation of actions.

Sect. 17. "If any action or suit shall be commenced or brought against any person for any thing done in pursuance of this act, the same shall be commenced within six calendar months next after the cause of action accrued; and the defendant in every such action or suit may, at his election, plead the matter specially, or the general issue not guilty, and give this act and the special matter in evidence at any trial to be had thereupon."

Offences against this act.

Sect. 18. "Any person offending against the provisions of this act in England or Ireland shall be deemed and taken to be guilty of a misdemeanor, and, being duly convicted thereof, shall be punished by imprisonment for a term not exceeding three months, or by a fine not exceeding fifty pounds, at the discretion of the court before which he shall be tried; and any person offending against the provisions of this act in Scotland shall, upon being duly convicted of such offence, be punished by imprisonment for a term not exceeding three months, or by a fine not exceeding fifty pounds, at the discretion of the court before which he shall be tried."

Interpretation of certain words in this act.

Sect. 19. "And in order to remove doubts as to the meaning of certain words in this act, be it enacted, that the words 'person' and 'party' shall be respectively deemed to include any number of persons, or any society, whether by charter or otherwise, and that the meaning of the aforesaid words shall not be restricted, although the same may be subsequently referred to in the singular number and masculine gender only."

Commencement of act.

Sect. 20. "This act shall commence and take effect from and after the first day of August in the present year."

Indictment for digging up and carrying away a dead body out of a churchyard.

—— (to wit.) *THE jurors of our Lady the Queen upon their oath present, that C. D. late of the parish of in the county of labourer, on the day of in the year of the reign of our Lady the now Queen Victoria, with force and arms, &c. at the parish aforesaid, in the county aforesaid, the churchyard of and belonging to the parish church of the same parish there situate, unlawfully and wilfully did break and enter, and the grave there in which one A. B. deceased, had lately before then been interred and then was, then and there with force and arms unlawfully, wilfully and indecently did dig open, and afterwards, to wit, on the same day and year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, the body of the said A. B. out of the grave aforesaid, unlawfully, wilfully and indecently did take and carry away, to the great indecency of christian burial, to the evil example of all others, and against the peace of our Lady the Queen, her crown and dignity.* [Add other counts as the case may require; see a form of indictment against a gaoler for refusing to deliver up a dead body, 2 Ad. & Ell. N. S. 248, n.

Bonds, *Forgery of*, see "*Forgery*," Vol. III.; *and Stealing of*, see "*Larceny*," Vol. III.

Books.

By stat. 7 Ann. c. 14, s. 10, if any book shall be otherwise taken or lost out of any parochial library, any justice may grant his warrant to search for it, and if it shall be found, it shall by order of such justice be restored to the library.

As to the evidence by books, see "*Evidence*, Vol. II. p. 386, 418, &c.

Borough, see *post*, "*Corporation*," Vol. II.; "*Parliament*;" "*Sessions*;" Vol. V.

Boundaries of Counties, &c. see "*County*," Vol. II.

Brandy, see "*Excise*," (*Spirits*,) Vol. II.

Brass, *Stealing of from Buildings, &c.* see "*Larceny*," Vol. III.; see *also* "*Pewter*," Vol. V.

Brawling in Churchyards, see *post*, "*Church*."

Breach of Peace, *what Amounts to, and Arrest in case of*; see *ante*, 269, 273. *Surety for Keeping the Peace*, see "*Surety for Good Behaviour*," Vol. V.

Breach of Prison, see "*Escape*," Vol. II.

Bread.

I. *Baking Bread in London, or within Ten Miles of the Royal Exchange*, 419 *to* 431.

[3 Geo. IV. c. cvi.]

II. *Baking Bread out of London, or Liberties thereof, and beyond the Weekly Bills of Mortality, and Ten Miles of the Royal Exchange, where an Assize is set*, 431 *to* 442.

[6 & 7 Will. IV. c. 37.]

I. Baking Bread in London, or within Ten Miles of the Royal Exchange. (*a*)

3 Geo. 4, c. cvi. Repeal of acts.

The stat. 3 Geo. 4, c. cvi. after reciting stat. 55 Geo. III. c. 99; 59 Geo. III. c. 127; 60 Geo. III. c. 1, and 1 Geo. IV c. 4, (*b*) and that it is expedient that the said recited acts of the 59 & 60 Geo. III., and of 1 Geo. IV., should be continued until 29th Sept. 1822; and that after the said 29th Sept. the said recited act of the 55 Geo III., and the several provisions therein contained, (except so much thereof as repeals any former act or acts,)

(*a*) This is, in many respects, a local act, but one which concerns so great a portion of the magistracy, that it is thought advisable to insert it.

(*b*) All these acts are local

1. *In London, &c.*

3 Geo. 4, c. cvi.

should be altogether repealed; and that in lieu of the several provisions and penalties contained in that act, and in the said recited act of 59 Geo. III., the regulations, provisions, and penalties hereinafter contained shall be substituted: enacts, "That the said recited acts of the fifty-ninth and sixtieth years of the reign of his said late majesty, and of the first year of the reign of his present majesty, and the several clauses and provisions therein contained, shall be and the same are hereby continued; and shall remain and continue in force until the said 29th day of September next; and that from and after the said 29th day of September, the said recited act of the 55th year of the reign of his said late majesty, and all and every the provisions therein contained, (except so much thereof as repeals any former act or acts,) shall be and the same are hereby repealed."

What articles bread to be made of.

By sect. 2, "It shall and may be lawful for the several bakers or sellers of bread within the city of London and the liberties thereof, within the weekly bills of mortality, and within ten miles of the Royal Exhange, to make and sell, or offer for sale, in his, her, or their shop, or to deliver to his, her, or their customer or customers, bread made of flour, or meal of wheat, barley, rye, oats, buck wheat, Indian corn, peas, beans, rice, or potatoes, or any of them, and with any common salt, pure water, eggs, milk, barm, leaven, potatoe, or other yeast, and mixed in such proportions as they shall think fit, and with no other ingredient or matter whatsoever, subject to the regulations hereinafter contained."

Bakers may make it of any weight or size. (a)

Sect. 3. "It shall and may be lawful for the several bakers or sellers of bread within the limits aforesaid, to make and sell, or offer for sale, in his, her or their shop, or to deliver to his, her, or their customer or customers, bread made of such weight or size as such bakers or sellers of bread shall think fit; any law or usage to the contrary notwithstanding."

Bread to be sold by weight only.

Sect. 4. "All bread sold within the limits aforesaid, shall be sold by the several bakers or sellers of bread respectively within the said limits by weight; and in case any baker or seller of bread within the limits aforesaid shall sell, or cause to be sold, bread in any other manner than by weight, then and in such case every such baker or seller of bread shall, for every such offence, forfeit and pay any sum not exceeding forty shillings, which the magistrate or magistrates, justice or justices, before whom such offender or offenders shall be convicted, shall order and direct: provided always, that nothing in this act contained shall extend or be construed to extend to prevent or hinder any such baker or seller of bread from selling bread usually sold under the denomination of French or fancy bread, or rolls, without previously weighing the same."

Proviso for French, &c. bread or rolls.

Avoirdupoise weight to be used.

Sect. 5. "The several bakers or sellers of bread respectively within the said limits, in the sale of bread shall use the avoirdupois weight of sixteen ounces to the pound, according to the standard in the exchequer, and the several gradations of the same for any less quantity than a pound; and in case any such baker or seller of bread shall at any time use any other than the avoirdupois weight, and the several gradations of the same, he, she, or they shall, for every such offence, forfeit and pay any sum not exceeding five pounds, nor less than forty shillings, as the magistrate or magistrates, justice or justices, before whom such conviction shall take place, shall from time to time order and adjudge."

Sect. 6 enacts, "That the peck loaf and its subdivisions shall not be made or sold during the space of two years from the commencement of the act." (29th September, 1822.)

Selling bread not previously weighed.

Sect. 7. "In case any such baker or seller of bread shall at any time before the expiration of two years from the commencement of this act, sell or deliver in his, her, or their shop, house, or premises, any bread which shall not have been previously weighed in the presence of the party purchasing the same, whether required by the purchaser so to do or not, except as aforesaid, then and in every such case every such baker or seller of bread so offending, shall,

(a) In 4 *M. & Sel.* 214, it was held not an indictable offence to sell bread of short weight to the poor.

upon conviction in manner hereinafter mentioned, forfeit and pay for every such offence any sum not exceeding the sum of ten shillings, as the magistrate or magistrates, justice or justices, before whom such conviction shall take place, shall from time to time order and adjudge."

1. *In London, &c.*

3 Geo. 4, c. cvi.

Sect. 8 enacts, "that every baker or seller of bread within the limits aforesaid, shall cause to be fixed in some conspicuous part of his, her, or their shop, on or near the counter, a beam and scales with proper weights, or other sufficient balance, in order that all bread there sold may from time to time be weighed in the presence of the purchaser or purchasers thereof, except as aforesaid; and in case any such baker or seller of bread shall neglect to fix such beam and scales, or other sufficient balance, in manner aforesaid, or to provide and keep for use proper beam and scales and proper weights or balance, or shall have or use any incorrect or false beam or scales or balance, or any false weight not being of the weight it purports to be, according to the standard in the exchequer, then and in every such case, he, she, or they shall, for every such false beam and scales and balance, or false weight, forfeit and pay any sum not exceeding five pounds, which the magistrate or magistrates, justice or justices, before whom such offender or offenders shall be convicted, shall order and direct."

Bakers to provide in their shops beams, scales, and weights, &c. and to weigh bread, &c.

False weights.

Sect. 9. "Every baker or seller of bread within the limits aforesaid, and every journeyman, servant, or other person employed by such baker or seller of bread, who shall convey or carry out bread for sale in any cart or other carriage, drawn by a horse, mule, or ass, shall be provided with, and shall constantly carry in such cart or other carriage, a correct beam and scales with proper weights, or other sufficient balance, in order that all bread sold by every such baker or seller of bread, or by his or her journeymen, servant, or other person, may from time to time be weighed in the presence of the purchaser or purchasers thereof, except as aforesaid; and in case any such baker or seller of bread, or his or her journeyman, servant, or other person, shall at any time carry out or deliver any bread, without being provided with such beam and scales with proper weights, or other sufficient balance, or whose weights shall be deficient in their due weight according to the standard in the exchequer, or shall at any time refuse to weigh any bread purchased of him, her, or them, or delivered by his, her, or their journeyman, servant, or other person, in the presence of the person or persons purchasing or receiving the same; then and in every such case every such baker or seller of bread shall, for every such offence, forfeit and pay any sum not exceeding five pounds, which the magistrate or magistrates, justice or justices, before whom such offender or offenders shall be convicted, shall order and direct."

Bakers, &c. delivering by cart, &c. to provide scales, weights, &c.

Sect. 10 enacts, "That no baker, or other person or persons who shall make bread for sale within the limits aforesaid, nor any journeyman or other servant of any such baker or other person, shall at any time or times, in the

Bread not to be adulterated. (a)

(a) It is a misdemeanor at common law knowingly to give any person food injurious to eat, whether the offence be excited by malice, or a desire of gain; nor is it necessary he should be a public contractor, or the injury done to the public service, to render him criminally liable. (2 *East's P. C.* 822; 4 *Bla. Co.* 162; *Reg* v. *Mackarty*, 6 *East*, 133.)

A baker who sells bread containing pernicious ingredients and unwholesome materials, or even alum in a shape which renders it noxious, is guilty of an indictable offence; although a small quantity of alum may be swallowed without injury, if taken in larger quantities, it deranges the stomach and occasions constipation of the bowels; its tendency is injurious to health, and it is unfit for the food of man. (*R.* v. *Treve*, 2 *East's P. C.* 821; *R.* v. *Dixon*, 3 *M. & Sel.* 11; 4 *Camp.* 12, S. C.)

But an indictment will not lie against a miller for receiving good barley to grind, and delivering a mixture of oat and barley in return which is unwholesome and musty. (*R.* v. *Hayes*, 4 *M. & Sel.* 214.)

It is not necessary in an indictment for such offence to set forth the materials which rendered the composition noxious; (*R.* v. *Dixon*, 3 *M. & Sel.* 16;) or to state that defendant intended to injure the parties for whom the stuff was designed. (*Id.*)

See form of indictment, 2 *Chit. C. L.* 556, 557.

1. *In London, &c.*

3 Geo. 4, c. cvi.

making of bread for sale within such limits, use any mixture or ingredient whatsoever in the making of such bread, other than and except as herein-before mentioned, on any account or under any colour or pretence whatsoever, upon pain that every such person, whether master or journeyman, servant or other person, who shall offend in the premises, and shall be convicted of any such offence, by the oath, or in case of a Quaker by affirmation, of one or more credible witness or witnesses, or by his, her, or their own confession, shall for every such offence forfeit and pay any sum not exceeding ten pounds nor less than five pounds, or in default thereof shall, by warrant under the hand and seal, or hands and seals of the magistrate or magistrates, justice or justices, before whom such offender shall be convicted, be apprehended and committed to the house of correction, or some prison of the city, county, borough, or place where the offence shall have been committed, or the offender or offenders shall be apprehended, there to remain for any time not exceeding six calendar months from the time of such commitment, unless the penalty shall be sooner paid, as any such magistrate or magistrates, justice or justices, shall think fit and order; and it shall be lawful for the magistrate or magistrates, justice or justices, before whom any such offender or offenders shall be convicted, to cause the offender's name, place of abode, and offence, to be published in some newspaper which shall be printed or published in or near the city of London, or the liberty of Westminster, and to defray the expense of publishing the same out of the money to be forfeited as last mentioned, in case any shall be so forfeited, paid, or recovered."

Commitment (*a*).

Names of offenders to be published.

Adulterating corn, &c. Selling flour of one sort of corn as flour of other sort.

Sect. 11. "If any person within the limits aforesaid shall put into any corn, meal, or flour, which shall be ground, dressed, bolted, or manufactured for sale within such limits, either at the time of grinding, dressing, bolting, or manufacturing the same, or at any other time, any ingredient or mixture whatsoever, not being the real and genuine produce of the corn or grain which shall be so ground; or if any person shall within the limits aforesaid knowingly sell, or offer or expose for sale, either separately or mixed, any meal or flour of one sort of corn or grain, as the meal or flour of any other sort of corn or grain, or any ingredient whatsoever mixed with the meal or flour so sold or offered or exposed for sale; then and in every such case every person so offending shall, upon conviction before any one or more magistrate or magistrates, justice or justices of the city, county, borough, or place where such offence shall have been committed, on the oath, or in the case of a Quaker by affirmation, of one or more credible witness or witnesses, or by his, her, or their own confession, forfeit and pay for every such offence any sum not exceeding twenty pounds, nor less than five pounds, which such magistrate or magistrates, justice or justices, before whom any such offender or offenders shall be convicted, shall think fit and order."

Bread made of mixed meal or flour to be marked with a Roman M.

Sect. 12. "Every person who shall make for sale, or sell or expose for sale, within the limits aforesaid, any bread, made wholly or partially of the meal or flour of any other sort of corn or grain than wheat, or of the meal or flour of any peas or beans, shall cause all such bread to be marked with a large Roman M; and if any person shall at any time within the limits aforesaid, make or sell, or expose for sale, any such bread without such mark as herein-before directed, then and in every such case every person so offending shall, upon conviction in manner herein-after mentioned, forfeit and pay for every pound weight of such bread, and so in proportion for any less quantity, which shall be so made for sale or sold or exposed for sale, without being so marked as aforesaid, any sum not exceeding ten shillings, as the magistrate or magistrates, justice or justices, before whom such conviction shall take place, shall from time to time order and adjudge."

Magistrates, &c. may search baker's premises, and if adulterated flour, &c. found, the same may be seized and disposed of, &c.

Sect. 13. "It shall be lawful for any magistrate or magistrates, justice or justices of the peace, within the limits of their respective jurisdictions, and also for any peace officer or officers, authorised by warrant (*b*) under the hand and seal or hands and seals of any such magistrate or magistrates, justice or

(*a*) See in general, *post*, "*Commitment in Execution.*"

(*b*) See "*Search Warrant*," Vol. V.

justices, (and which warrant any such magistrate or magistrates, justice or justices, is and are hereby empowered to grant,) at seasonable times in the day-time, to enter into any house, mill, shop, stall, bakehouse, bolting-house, pastry warehouse, outhouse, or ground, of or belonging to any miller, mealman or baker, or other person who shall grind grain, or dress or bolt meal or flour, or make bread for reward or sale, within the limits aforesaid, and to search or examine whether any mixture or ingredient not the genuine produce of the grain such meal or flour shall import or ought to be, shall have been mixed up with or put into any meal or flour in the possession of such miller, mealman, or baker, either in the grinding of any grain at the mill, or in the dressing, bolting, or manufacturing thereof, whereby the purity of any meal or flour is or shall be in anywise adulterated; or whether any mixture or ingredient, other than is allowed by this act, shall have been mixed up with or put into any dough or bread in the possession of any such baker or other person, whereby any such dough or bread is or shall be in anywise adulterated; and also to search for any mixture or ingredient which may be intended to be used in or for any such adulteration or mixture; and if on any such search, it shall appear that any such meal, flour, dough, or bread, so found, shall have been so adulterated by the person in whose possession it shall then be, or any mixture or ingrédients shall be found, which shall seem to have been deposited there in order to be used in the adulteration of meal, flour, or bread; then and in every such case, it shall be lawful for every such magistrate or magistrates, justice or justices of the peace, or officer or officers authorised as aforesaid respectively, within the limits of their respective jurisdictions, to seize and take any meal, flour, dough, or bread, which shall be found in any such search, and deemed to have been adulterated, and all ingredients and mixtures which shall be found and deemed to have been used or intended to be used in or for any such adulteration as aforesaid; and such part thereof as shall be seized by any peace officer or officers authorised as aforesaid, shall with all convenient speed after seizure be carried to the nearest resident magistrate or magistrates, justice or justices of the peace, within the limits of whose jurisdiction the same shall have been so seized; and if any magistrate or magistrates, justice or justices, who shall make any such seizure in pursuance of this act, or to whom any thing so seized under the authority of this act shall be brought, shall adjudge that any such meal, flour, dough, or bread so seized shall have been adulterated by any mixture or ingredient put therein, other than is allowed by this act, or shall adjudge that any ingredient or mixture so found as aforesaid shall have been deposited or kept where so found for the purpose of adulterating meal, flour or bread; then and in any such case, every such magistrate or magistrates, justice or justices of the peace, is hereby required, within the limits of their respective jurisdictions, to dispose of the same as he or they, in his or their discretion, shall from time to time think proper."

1. *In London, &c.*

3 Geo. 4, c. cvi.

Sect. 14. "Every miller, mealman, or baker, within the limits aforesaid, in whose house, mill, shop, stall, bakehouse, bolting-house, pastry warehouse, outhouse, ground, or possession, any ingredient or mixture shall be found, which shall, after due examination, be adjudged by any magistrate or magistrates, justice or justices of the peace, to have been deposited there for the purpose of being used in adulterating meal, flour, or bread, shall on being convicted of any such offence, either by his, her, or their own confession, or by the oath, or in the case of a Quaker by affirmation, of one or more credible witness or witnesses, forfeit and pay, on every such conviction, any sum of money not exceeding ten pounds nor less than forty shillings for the first offence; five pounds for the second offence, and ten pounds for every subsequent offence; or in default of payment thereof shall, by warrant under the hand and seal or hands and seals of the magistrate or magistrates, justice or justices, before whom such offender shall be convicted, be apprehended and committed to the house of correction, or some prison of the city, county, or place where the offence shall have been committed, or the offender or offenders shall be apprehended, there to remain for any time not exceeding six calendar months from the time of such commitment, (unless the penalty

Persons in whose premises ingredients for adulteration of meal or bread found, punishable.

1. *In London. &c.*

3 Geo. 4, c. cvi.

Names of offenders to be published.

be sooner paid,) as any such magistrate or magistrates, justice or justices, shall think fit and order; and it shall be lawful for the magistrate or magistrates, justices or justices, before whom any such offender shall be convicted, to cause the offender's name, place of abode and offence, to be published in some newspaper which shall be printed or published in or near the city of London, and to defray the expense of publishing the same out of the money to be forfeited as last mentioned, in case any shall be so forfeited, paid, or recovered."

Obstructing search.

Sect. 15. "If any person or persons shall wilfully obstruct or hinder any such search as herein-before is authorised to be made, or the seizure of any meal, flour, dough or bread, or of any ingredient or mixture which shall be found on any such search, and deemed to have been lodged with an intent to adulterate the purity or wholesomeness of any meal, flour, dough or bread, or shall wilfully oppose or resist any such search being made, or the carrying away any such ingredient or mixture as aforesaid, or any meal, flour, dough, or bread, which shall be seized as being adulterated, or as not being made pursuant to this act, he, she, or they so doing or offending in any of the cases last aforesaid, shall for every such offence, on being convicted thereof, forfeit and pay such sum, not exceeding ten pounds, as the magistrate or magistrates, justice or justices, before whom such offender or offenders shall be convicted, shall think fit and order: provided also, that if any person making, or who shall make bread for sale within the limits aforesaid, shall at any time make complaint to any magistrate or magistrates, justice or justices of the peace, within his or their jurisdiction, and make appear to him or them, by the oath, or in the case of a Quaker by affirmation, of any credible witness, that any offence which such person shall have been charged with, and for which he or she shall have incurred and paid any penalty under this act, shall have been occasioned by or through the wilful act, neglect, or default of any journeyman or other servant employed by or under such person so making complaint, then and in any such case, any such magistrate or magistrates, justice or justices, may and is or are hereby required to issue out his or their warrant, under his or their hand and seal, or respective hands and seals, for bringing any such journeyman or servant before any such magistrate or magistrates, justice or justices, or any magistrate or justice of the peace acting in and for the city, county, division, or place where the offender can be found, and on any such journeyman or servant being thereupon apprehended and brought before any such magistrate or magistrates, justice or justices, he or they, within his or their respective jurisdiction, is and are hereby authorised and required to examine into the matter of such complaint, and on proof thereof upon oath or affirmation to the satisfaction of any such magistrate or magistrates, justice or justices of the peace, who shall hear such complaint, then any such magistrate or magistrates, justice or justices, is and are hereby directed and authorised by any order under his or their respective hand or hands, to adjudge and order what reasonable sum of money shall be paid by any such journeyman or servant to his master or mistress, as or by way of recompence to him or her for the money he or she shall have paid by reason of the wilful act, neglect, or default of any such journeyman or servant, and if any such journeyman or servant shall neglect or refuse, on his conviction, to make immediate payment of the sum of money which any such magistrate or magistrates, justice or justices, shall order him to pay by reason of such his said wilful neglect or default, then any such magistrate or magistrates, justice or justices, within his or their respective jurisdiction, is or are hereby authorised and required by warrant under his or their hand and seal, or hands and seals, to cause such journeyman or servant to be apprehended and committed to the house of correction, or some other prison of the city, county, division, or place, in which such journeyman or servant shall be apprehended or convicted, to be there kept to hard labour for any term not exceeding six calendar months from the time of such commitment, as to such magistrate or magistrates, justice or justices shall seem reasonable, unless

Offences occasioned by wilful default of journeymen and servants.

Proceedings for.

Imprisonment.(a)

(a) See in general, *post*, "*Commitment in Execution.*"

payment shall be made of the money ordered after such commitment, and before the expiration of the said term of six months."

1. *In London, &c.*

3 Geo I, c. cvi.

Bakers not to bake bread, &c. on Sunday; nor sell bread, nor bake pies, &c. except between certain hours.

Sect. 16. "No master, mistress, journeyman or other person respectively, exercised or employed in the trade or calling of a baker within the limits aforesaid, shall, on the Lord's Day, or on any part thereof, make or bake any bread, rolls or cakes of any sort or kind; or shall, on any other part of the said day than between the hours of nine of the clock in the forenoon and one of the clock in the afternoon, on any pretence whatsoever, sell or expose to sale, or permit or suffer to be sold or exposed to sale, any bread, rolls, or cakes, of any sort or kind; or bake or deliver, or permit or suffer to be baked or delivered, any meat, pudding, pie, tart or victuals, except as hereinafter is excepted, or in any other manner exercise the trade or calling of a baker, or be engaged or employed in the business or occupation thereof, save and except so far as may be necessary in setting and superintending the sponge to prepare the bread or dough for the following day's baking; and every person offending against the last-mentioned regulations, or any one or more of them, or making any sale or delivery hereby allowed otherwise than within the bakehouse or shop, and being thereof convicted before any justice of the peace of the city, county or place where the offence shall be committed, within six days from the commission thereof, either upon the view of such justice, or on confession by the party, or proof by one or more credible witness or witnesses upon oath or affirmation, shall for every such offence pay and undergo the forfeiture, penalty and punishment hereinafter mentioned; (that is to say), for the first offence the penalty of ten shillings; for the second offence the penalty of twenty shillings; and for the third and every subsequent offence respectively the penalty of forty shillings; and shall moreover, upon every such conviction, bear and pay the costs and expenses of the prosecution, such costs and expenses to be assessed, settled and ascertained by the justice convicting, and the amount thereof, together with such part of the penalty as such justice shall think proper to be allowed to the prosecutor or prosecutors for loss of time in instituting and following up the prosecution, at a rate not exceeding three shillings *per diem*, and to be paid to the prosecutor or prosecutors for his, her, and their own use and benefit, and the residue of such penalty to be paid to such justice, and within seven days after his receipt thereof to be transmitted by him to the churchwardens or overseers of the parish or parishes where the offence shall be committed, to be applied for the benefit of the poor thereof; and in case the whole amount of the penalty, and of the costs and expenses aforesaid, be not forthwith paid after conviction of the offender or offenders, such justice shall and may, by warrant under his hand and seal, direct the same to be raised and levied by distress and sale of the goods and chattels of the offender or offenders; and in default or insufficiency of such distress, commit the offender or offenders to the house of correction, on a first offence for the space of seven days, for a second offence for the space of fourteen days, and on a third or any subsequent offence for the space of one month, unless the whole of the penalty, costs and expenses be sooner paid and discharged; provided nevertheless, that it shall be lawful for every master or mistress baker, residing within the limits aforesaid, to deliver to his or her customers, on the Lord's Day, any bakings until half an hour past one of the clock in the afternoon of that day, without incurring or being liable to any of the penalties in this act contained."

Distress. (*a*)

Imprisonment. (*b*)

Bakings may be delivered till half-past one on Sundays.

Miller, baker, &c. not to act as a justice in execution of act.

Sect. 17. "No person who shall follow or be concerned in the business of a miller, mealman or baker, shall be capable of acting or shall be allowed to act as a justice of the peace under this act, or in putting in execution any of the powers in or by this act granted; and if any miller, mealman or baker, shall presume so to do, he or they so offending in the premises shall, for every such offence, forfeit and pay the sum of 100*l.* to any person or persons who

(*a*) See the 5 Geo. IV. c. 18, and in general, *post*, "*Distress by Justices' Warrant*," Vol. II.

(*b*) See in general, *post*, "*Commitment in Execution.*"

1. *In London, &c.*

3 Geo. 4, c. cvi.

will inform or sue for the same, to be recovered, together with full costs of suit in any of his majesty's courts of record at Westminster, by action of debt, bill, plant or information, wherein no essoign, wager of law, or more than one imparlance shall be allowed."

Opposing execution of act.

Sect. 18. "In case any person or persons shall resist or make forcible opposition against any person or persons employed in the due execution of this act, every such person offending therein shall for every such offence forfeit any sum not exceeding ten pounds, at the discretion of the magistrate or magistrates, justice or justices of the peace, before whom he or she shall be convicted of such offence.

Recovery and application of penalties and forfeitures.

Sect. 19. "All penalties, forfeitures and fines by this act inflicted or authorised to be imposed, (the manner of levying and recovering and applying whereof is not herein otherwise directed,) shall upon proof and conviction of the offences respectively before any magistrate or justice of the peace for the city, county or place where the offence shall have been committed, (as the case may require,) either by the confession of the party offending, or by the oath (or in case of a Quaker on affirmation) of any credible witness or witnesses, (which oath or affirmation every such magistrate or justice is in every such case hereby fully authorised to administer,) be levied, together with the costs attending the information and conviction, by distress and sale of the goods and chattels of the party or parties offending, by warrant under the hand and seal of such magistrate or justice, (which warrant such magistrate or justice is hereby empowered and required to grant); and the overplus, (if any,) after such penalties, forfeitures and fines, and the charges of such distress and sale, are deducted, shall be returned upon demand unto the owner or owners of such goods and chattels; and in case such fines, penalties and forfeitures shall not be forthwith paid upon conviction, then it shall be lawful for such magistrate or justice to order the offender or offenders so convicted to be detained and kept in safe custody, until return can be conveniently made to such warrant of distress, unless the offender or offenders shall give sufficient security to the satisfaction of such magistrate or justice, for his or their appearance before such magistrate or justice on such day or days as shall be appointed for the return of such warrant of distress, such day or days not being more than seven days from the time of taking any such security, and which security the said magistrate or justice is hereby empowered to take by way of recognizance or otherwise; but if upon the return of such warrant it shall appear that no sufficient distress can be had thereupon, then it shall be lawful for any such magistrate or justice of the peace as aforesaid, and he is hereby authorised and required, by warrant or warrants under his hand and seal, to cause such offender or offenders to be committed to the common gaol or house of correction of the city, county or place where the offender shall be or reside, there to remain without bail or mainprize for any time not exceeding one calendar month, (save and except as herein otherwise directed,) unless such penalties, forfeitures and fines, and all reasonable charges attending the same, shall be sooner paid and satisfied; and the monies arising by such penalties, forfeitures and fines respectively, when paid or levied, if not otherwise directed to be applied by this act, shall be from time to time paid, one moiety thereof to the informer or person suing for and recovering the same, and the other moiety to the churchwardens or overseers of the poor of the parish or place in which such offence shall have been committed, to be by them applied and disposed for the benefit of the poor thereof."

Distress. (a)

Imprisonment. (b)

Form of summons.

Sect. 20. "Every summons to be served on every offender against any of the provisions of this act, shall be in the form or to the effect following:—

"To A. B. of .

"County of } WHEREAS complaint and information hath been made before me
C. C. one of her Majesty's justices of the peace or magistrate for the
to wit. } said [county, &c.] by E. F. of , that, &c. [here state the nature

(a) See the 5 Geo. IV. c. 18, and in general, *post*, "*Distress under Justices Warrant*," Vol. II.

(b) See in general, *post*, "*Commitment in Execution.*"

and circumstances of the case, as far as it shall be necessary to show the offence, and to bring it within the authority of the justice or magistrate, and in doing that follow the words of the act as near as may be]: *These are therefore to require you personally to appear before me* [or *such other justice or magistrate as shall be then and there present*] *at in the said* [*county, &c.*] *on the day of next, at the hour of in the noon, to answer to the said complaint and information made by the said E. F., who is likewise directed to be then and there present to make good the same. Herein fail not. Given under my hand this day of .*"

1. *In London, &c.*

3 Geo. 4, c. cvi.

Sect. 21. "Every information to be laid before any justice or magistrate for any offence against this act, shall be in the form and to the effect following:—

Form of information.

"*County of* } *BE it remembered, that on the day of , A. B. of*
to wit, } *in the said county, informeth me, one of her Majesty's justices of the peace* [or *magistrate*, as the case may be,] *for the said county, that of , in the said county,* [here describe the offence, with the time and place, and follow the words of the act as near as may be,] *contrary to the statute made in the third year of the reign of King George the Fourth, intituled 'An Act to repeal the acts now in force relating to bread to be sold in the city of London and the liberties thereof, and within the weekly bills of mortality and ten miles of the Royal Exchange; and to provide other regulations for the making and sale of bread and preventing the adulteration of meal, flour and bread within the limits aforesaid,' which hath imposed a forfeiture of for the said offence. Taken the day of before me . A. B.*"

Sect. 22. "All offences committed against this act shall be laid before the magistrate or magistrates, justice or justices, usually acting in and for the district in which the offence shall have been committed, in a summary way upon complaint, and the said magistrate or magistrates, justice or justices, is and are hereby empowered to issue his or their summons for the purpose of hearing and determining the same."

Informations to be laid before acting magistrate of district.

Sect. 23. "If it shall be made appear by the oath or affirmation of any credible person or persons to the satisfaction of any magistrate or magistrates, justice or justices, that any person or persons within the jurisdiction of any such magistrate or magistrates, justice or justices, is or are likely to give or offer material evidence on behalf of the prosecutor of any offender or offenders against the true intent and meaning of this act, or on behalf of the person or persons accused, and will not voluntarily appear before such magistrate or magistrates, justice or justices, to be examined and give his, her, or their evidence concerning the premises, every such magistrate or magistrates, justice or justices, is and are hereby authorised and required to issue his or their summons to convene every such person or persons before any such magistrate or magistrates, justice or justices, at such reasonable time as in such summons shall be fixed; and if any person so summoned, after having been paid or tendered a reasonable sum for his, her, or their costs and expenses, shall neglect or refuse to appear at the time by such summons appointed, and no just excuse shall be offered for such neglect or refusal, then (after proof upon oath or affirmation of such summons having been duly served upon the party or parties so summoned) every such magistrate and magistrates, justice and justices, is and are hereby authorised and required to issue his or their warrant under his hand and seal or their hands and seals, to bring every such person or persons before any such magistrate or magistrates, justice or justices; and on the appearance of any such person before any such magistrate or magistrates, justice or justices, every such magistrate or magistrates, justice or justices, is and are hereby authorised and empowered to examine upon oath or affirmation every such person; and if any such person on his or her appearance, or on being brought before any such magistrate or magistrates, justice or justices, shall refuse to be examined upon oath or affirmation concerning the premises without offering any just excuse for such refusal, any such magistrate or magistrates, justice or justices, within the limits of his or their jurisdiction, may by warrant under his hand and seal or their hands and seals

Power to summon witnesses.

Tender of expenses.

Commitment. (a)

(a) See *post*, "*Commitment in Execution.*"

1. *In London, &c.*

3 Geo. 4, c. cvi.

commit any person or persons so refusing to be examined to the public prison of the city, county, division, liberty or place in which such person or persons so refusing to be examined shall be, there to remain for any time not exceeding fourteen days, as any such magistrate or magistrates, justice or justices, shall direct."

Perjury, &c. (a)

Sect. 24. "If any person who shall take any oath or make any affirmation by this act directed to be taken or made, shall wilfully forswear himself or herself, or make any false affirmation, every such person shall be subject and liable to be prosecuted for perjury by indictment or information according to due course of law; and if convicted thereof, shall be subject and liable to the pains and penalties which persons convicted of wilful and corrupt perjury are subject and liable to."

Form of conviction.

Sect. 25. "The magistrate or magistrates, justice or justices, before whom any person shall be convicted in manner prescribed by this act, shall cause every such conviction to be drawn up in the form or to the effect following; that is to say,)

"to wit. } *BE it remembered, that on this day of , in the year of the reign of , A. B. is convicted before Majesty's justices of the peace for the said county of* , [or *for the division of the said county of* , or *for the city, liberty or town of* , as the case shall happen to be,] *for and do adjudge him* [or *her* or *them*, as the case may be,] *to pay and forfeit for the same the sum of . Given under* [*hand and seal*, (b)] *the day and year aforesaid.*"

Proceedings not to be quashed for want of form. (c)

Sect. 26. "No order, judgment, or conviction made touching or concerning any of the matters in this act contained, or of any proceedings to be had touching the conviction of any offender or offenders against this act, shall be quashed for want of form, or be removed or removable by certiorari or any other writ of process whatsoever into any of his Majesty's courts of record at Westminster; and where any distress shall be made for any sum or sums of money to be levied by virtue of this act, the distress itself shall not be deemed unlawful, nor the party or parties making the same be deemed a trespasser or trespassers, on account of any defect or want of form in the summons, conviction, warrant of distress, or any other proceeding relating thereto; nor shall the party or parties distraining be deemed a trespasser or trespassers *ab initio* on account of any irregularity which shall be afterwards committed by the party or parties distraining; but the person or persons aggrieved by such irregularity shall and may recover full satisfaction for the special damage, if any, in an action on the case; but no plaintiff or plaintiffs shall recover in any action for such irregularity as aforesaid, if tender of sufficient amends hath been made by or on behalf of the party distraining before such action brought."

Trespasser *ab initio*. (d)

Tender of amends.

Appeal to quarter sessions. (e)

Sect. 27. "If any person or persons convicted of any offence punishable by this act, shall think him, her or themselves aggrieved by the judgment of the magistrate or magistrates, justice or justices, before whom he, she or they shall have been convicted, it shall be lawful for such person or persons from time to time to appeal to the justices at the next general or general quarter sessions of the peace which shall be held for the city, county, division, liberty, town or place where such judgment shall have been given; and that the execution of such judgment shall in such case be suspended, the person or persons so convicted entering into a recognizance within twenty-four hours of the time of such conviction, with two sufficient sureties in double the sum which such person or persons shall have been adjudged to pay or forfeit, upon condition to prosecute such appeal with effect, and to be forthcoming to abide the judgment and determination of the justices at their said next general or general quarter sessions; which recognizance the magistrate or

Recognisance. (e)

(a) See *post*, "*Perjury*," Vol. V.

(b) These words are not in the form prescribed, but should be inserted.

(c) As to enactments of this nature, see *post*, "*Conviction*."

(d) See *post*, "*Distress for Rent*," Vol. II.

(e) See in general, *ante*, "*Appeal*."

magistrates, justice or justices, before whom such conviction shall be had, is and are hereby empowered and required to take; and the justices in the said general or general quarter sessions are hereby authorised and required to hear and finally determine the matter of every such appeal, and to award such costs as to them shall appear just and reasonable to be paid by either party; and if upon hearing the said appeal the judgment of the magistrate or magistrates, justice or justices, before whom the appellant or appellants shall have been convicted shall be confirmed, such appellant or appellants shall forthwith pay down the sum he, she or they shall have been adjudged to have forfeited, together with such costs as the said justices in their said general or general quarter sessions shall award to be paid to the prosecutor or informer, for defraying the expenses sustained by reason of any such appeal; and in default of the appellant's paying the same, any two justices or any one magistrate or justice of the peace having jurisdiction in the place into which any such appellant or appellants shall escape, or where he, she or they shall reside, shall and may by warrant under their hands and seals or his hand and seal, commit any such appellant or appellants to the common gaol of the city, county, division, or place where he, she or they shall be apprehended, until he, she or they shall make payment of such penalty and of the costs and charges which shall be adjudged on the conviction; and if the appellant or appellants in any such appeal shall make good his, her or their appeal, and be discharged of the said conviction, reasonable costs shall be awarded to the appellant or appellants against such informer or informers who would (in case of such conviction) have been entitled to a moiety of the penalty to have been recovered as aforesaid, and which costs shall and may be recovered by the appellant or appellants against any such informer or informers in like manner as costs given at any general or general quarter sessions are recoverable: provided always, that no person shall be detained in prison for any such offence for any greater length of time than three calendar months."

1. *In London, &c.*

3 Geo. 4, c. cvi. Costs. (*a*)

Commitment for non-payment of. (*b*)

Sect. 28. "If any such conviction shall happen to be made within six days before any general or general quarter sessions of the peace shall be held for the city, county, division, town corporate, borough or place where such conviction shall have been made, that the party or parties who shall think him, her or themselves aggrieved by any such conviction, shall and may, on entering into a recognizance in manner and for the purposes before directed, be at liberty to appeal either to the then next or next following general or general quarter sessions of the peace which shall be held for any county, division, city, town corporate, borough, liberty or place, where any such conviction shall have been made."

Where conviction had within six days of sessions, parties may appeal to following sessions. (*c*)

Sect. 29. "Every action or suit which shall be brought or commenced against any magistrate or magistrates, justice or justices, or any peace officer or officers, for any matter or thing done or committed by virtue of or under this act, shall be commenced within six calendar months next after the fact committed, and not afterwards, and shall be laid or brought in the city, county or place where the matter in dispute shall arise, and not elsewhere; and that the statute made in the twenty-fourth year of the reign of King George the Second, intituled '*An Act for rendering Justices of the Peace more safe in the execution of their office, and for indemnifying Constables and others acting in obedience to their Warrants,*' so far as the said act relates to the rendering the justices more safe in the execution of their office, shall extend and be construed to extend to the magistrate and magistrates, justice and justices of the peace acting under the authority or in pursuance of this act; and that no action or suit shall be had or commenced against, nor shall any writ be sued out, or copy of any writ be served upon any peace officer or officers, for anything done in the execution of this act, until seven days after

Limitation of actions. (*d*)

Venue.

24 Geo. 2, c. 44, extended to this act.

Notice of action

(*a*) See in general, *post*, "*Costs*," Vol. II.

(*b*) See in general, *post*, "*Commitment in Execution.*"

(*c*) See in general, *ante*, "*Appeal*"

(*d*) As to enactments of this nature, see *post*, "*Justices*," Vol. III.

1. *In London, &c.*

3 Geo. 4, c. cvi.

a notice in writing shall have been given to or left for him or them at his or their usual place of abode, by the attorney for the party intending to commence such action, which notice in writing shall contain the name and place of abode of the person intending to bring such action, and also of his attorney, and likewise the cause of action or complaint; and any peace officer or officers shall be at liberty and may, by virtue of this act, at any time within seven days after any such notice shall have been given to or left for him, tender or cause to be tendered any sum or sums of money, as amends for the injury complained of, to the party complaining, or to the attorney named in such notice; and if the same be not accepted, the defendant or defendants in any such action or actions may plead such tender in bar of such action or actions, together with the general issue, or any other plea, with leave of the court in which the action shall be commenced; and if upon issue joined on such tender the jury shall find the amends tendered to have been sufficient, they shall find a verdict for the defendant or defendants; and in every such case, or if the plaintiff shall become nonsuit, or discontinue his action, or if judgment shall be given for the defendant or defendants upon demurrer, or if any action or suit shall be brought after the time limited by this act for bringing the same, or shall be brought in any other county or place than as aforesaid, then and in every such case the jury shall find a verdict for the defendant or defendants, and the defendant or defendants shall be entitled to his or their costs; but if the jury shall find that no such tender was made, or that the amends tendered were not sufficient, or shall find against the defendant or defendants on any plea or pleas by him or them pleaded, they shall then give a verdict for the plaintiff, and such damages as they shall think proper, and the plaintiff shall thereupon recover his costs against every such defendant or defendants." But these provisions as to the limitation and the notice of action are altered by the 5 & 6 Vict. c. 97, which see *post*, "*Justices*," Vol. III.

Tender of amends.

Costs.

General issue may be pleaded.

Sect. 30. "If any action or suit shall be commenced against any other person or persons than a magistrate, justice, or peace officer, for any thing done in pursuance of this act, the defendant or defendants in any such action or suit may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon, and that the same was done in pursuance and by the authority of this act; and if it shall appear so to have been done, or if a verdict shall be recorded for the defendant or defendants, or if the plaintiff or plaintiffs shall be nonsuited, or discontinue his, her, or their action after the defendant or defendants shall have appeared, or if judgment shall be given upon a verdict or demurrer against the plaintiff or plaintiffs, the defendant or defendants in every such action shall and may recover treble costs, and have the like remedy for the same as any defendant or defendants hath or have in other cases by law for the recovery of his, her, or their costs." But now, by the 5 & 6 Vict. c. 97, s. 2, the defendant shall have only such costs taxed to him as will fully indemnify him.—See "*Justices*," Vol. III.

Treble costs.

Limitation of information.

Sect. 31. "No person shall be convicted of any offence under this act, unless the complaint is made within forty-eight hours after the offence shall have been committed, except in cases of perjury; and that no person who shall be prosecuted to conviction for any offence done or committed against this act, shall be liable to be prosecuted for the same offence under any other law."

Application of penalties.

Sect. 32. "All penalties and forfeitures by this act inflicted, and the application of which is not hereinbefore directed, shall, when recovered or paid, go and be disposed of in manner following; that is to say, one moiety thereof, where any offender or offenders shall be convicted, either by his, her, or their confession, or by the oath or affirmation of one or more credible witness or witnesses, shall go and be paid to the person or persons who shall inform against and prosecute to conviction any such offender or offenders; and the other moiety thereof, or in case there be no such person informing, then the whole thereof shall go and be paid to the churchwardens and overseers of the poor of the parish or parishes, for the use of the poor in the parish wherein

such offence shall be committed, in such manner as such churchwardens and overseers of the poor shall in their discretion think fit."

1. *In London, &c.*

3 Geo. 4, c. cvi.

Saving rights to the cities of London and Westminster, &c.

Sect. 33. "This act, or any thing herein contained, shall not extend or be construed to extend in any way to affect, lessen, or infringe upon the rights and privileges of the city of London, or of the worshipful Company of Bakers of the said city, or of the wardmote inquests of the said city, or of the city or liberties of Westminster, or borough of Southwark; or any right or custom of any lord or lords of any leets, or the rights of any clerk or clerks of the market, in any place which may be exercised and enjoyed by them or any of them, by virtue of any charters, bye-laws, prescriptions, usages, customs, privileges, grants or acts of parliament; but that all such rights and privileges shall be held, exercised and enjoyed by the parties respectively entitled thereto as fully and amply to all intents and purposes as the same were held, exercised and enjoyed before the passing of this act; any thing herein contained to the contrary notwithstanding."

Commencement of act.

By sect. 34, "the act is to commence after the 29th of September, 1822."

Public act.

By sect. 35, "the act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such by all judges, justices and others, without being specially pleaded."

II. Baking Bread out of London or Liberties thereof, and beyond the Weekly Bills of Mortality, and Ten Miles of the Royal Exchange.

6 & 7 Will. 4, c. 37.

By the 6 & 7 Will. IV. c. 37, intituled "*An Act to repeal the several Acts now in force relating to Bread to be sold out of the City of London and the Liberties thereof, and beyond the Weekly Bills of Mortality, and Ten Miles of the Royal Exchange; and to provide other Regulations for the Making and sale of Bread, and for preventing the Adulteration of Meal, Flour, and Bread, beyond the Limits aforesaid,*" [28th July, 1836,] reciting "Whereas by an act passed in the third year of the reign of his late Majesty, King George the Fourth, intituled '*An Act to repeal the Acts now in force relating to Bread to be sold in the City of London and the Liberties thereof, and within the Weekly Bills of Mortality, and Ten Miles of the Royal Exchange; and to provide other Regulations for the Making and Sale of Bread, and preventing the Adulteration of Meal, Flour, and Bread, within the Limits aforesaid,*' certain regulations and provisions were made relative to the making and selling of bread, and for preventing the adulteration of meal, flour, and bread, within the aforesaid limits, which have been found beneficial to the public as well as to the bakers within the said limits: and whereas it is deemed expedient that the several acts of parliament now in force relating to the making and selling of bread, or to the assize and price thereof, or to the adulteration of meal, flour, or bread, beyond the limits aforesaid, should be altogether repealed, and that in lieu thereof the regulations, provisions, and penalties hereinafter contained, and which are similar to those contained in the said recited act of the third year of the reign of his said late Majesty King George the Fourth, should be substituted: but inasmuch as the purposes aforesaid cannot be effected without the aid and authority of parliament;" it is therefore enacted, "That from and after the 1st day of October, 1836, all and every act or acts of parliament now in force relating to the making and selling of bread, or to the assize and price thereof, or to the punishment of persons who shall adulterate meal, flour or bread, or who shall sell bread deficient in its due weight, out of the city of London and the liberties thereof, and beyond the weekly bills of mortality, and ten miles of the Royal Exchange, be and the same are hereby repealed; and there shall be no longer any assize of bread beyond the limits aforesaid, or any regulation respecting the price thereof."

3 Geo. 4, c. cvi.

All acts relating to the making, &c. of bread, or to adulterating meal, &c. out of London and beyond bills of mortality, repealed.

Bread made of articles herein

Sect. 2. "It shall and may be lawful for the several bakers or sellers of bread out of the city of London and the liberties thereof, and beyond the

2. *Out of London, &c.*

6 & 7 Will. 4, c. 37.

mentioned may be sold.

weekly bills of mortality, and ten miles of the Royal Exchange, to make and sell, or offer for sale, in his, her, or their shop, or to deliver to his, her, or their customer or customers, bread made of flour or meal of wheat, barley, rye, oats, buckwheat, Indian corn, peas, beans, rice, or potatoes, or any of them, and with any common salt, pure water, eggs, milk, barm, leaven, potatoe, or other yeast, and mixed in such proportions as they shall think fit, and with no other ingredient or matter whatsoever, subject to the regulations hereinafter contained."

Bakers to make bread of any weight or size.

Sect. 3. "It shall and may be lawful for the several bakers and sellers of bread beyond the limits aforesaid to make and sell, or offer for sale, in his, her or their shop, or to deliver to his, her, or their customer or customers, bread made of such weight or size as such bakers or sellers of bread shall think fit, any law or usage to the contrary notwithstanding." (See 4 *M. & Sel.* 214, *ante*, 420, n. (*a*).)

Bread to be sold by weight, and in no other manner.

Sect. 4. "From and after the commencement of this act all bread sold beyond the limits aforesaid shall be sold by the several bakers or sellers of bread respectively beyond the said limits by weight; and in case any baker or seller of bread beyond the limits aforesaid shall sell or cause to be sold bread in any other manner than by weight, then and in such case every such baker or seller of bread shall for every such offence forfeit and pay any sum not exceeding forty shillings, which the magistrate or magistrates, justice or justices before whom such offender or offenders shall be convicted shall order and direct: provided always, that nothing in this act contained shall extend or be construed to extend to prevent or hinder any such baker or seller of bread from selling bread usually sold under the denomination of French or fancy bread or rolls without previously weighing the same."

Proviso for French and fancy bread and rolls.

Bakers to use avoirdupois weight.

Sect. 5. "The several bakers or sellers of bread respectively beyond the said limits in the sale of bread shall use avoirdupois weight of sixteen ounces to the pound, according to the standard in the Exchequer, and the several gradations of the same for any less quantity than a pound; and in case any such baker or seller of bread shall at any time use any other than the avoirdupois weight, and the several gradations of the same, he, she or they shall for every such offence forfeit and pay any sum not exceeding five pounds nor less than forty shillings, as the magistrate or magistrates, justice or justices before whom such conviction shall take place shall from time to time order and adjudge."

Bakers to provide in their shops weights, &c. and to weigh bread, &c.

Sect. 6. "Every baker or seller of bread beyond the limits aforesaid shall cause to be fixed in some conspicuous part of his, her, or their shop, on or near the counter, a beam and scales with proper weights, or other sufficient balance, in order that all bread there sold may from time to time be weighed in the presence of the purchaser or purchasers thereof, except as aforesaid; and in case any such baker or seller of bread shall neglect to fix such beam and scales, or other sufficient balance, in manner aforesaid, or to provide and keep for use proper beam and scales and proper weights or balance, or shall have or use any incorrect or false beam or scales or balance, or any false weight not being of the weight it purports to be, according to the standard in the Exchequer, then and in every such case he, she, or they shall for every such false beam and scales and balance, or false weight, forfeit and pay any sum not exceeding five pounds, which the magistrate or magistrates, justice or justices, before whom such offender or offenders shall be convicted shall order and direct."

Bakers, &c. delivering by cart, &c. to be provided with weights, &c.

Sect. 7. "Every baker or seller of bread beyond the limits aforesaid, and every journeyman, servant, or other person employed by such baker or seller of bread, who shall convey or carry out bread for sale in and from any cart or other carriage, shall be provided with and shall constantly carry in such cart or other carriage a correct beam and scales with proper weights, or other sufficient balance, in order that all bread sold by every such baker or seller of bread, or by his or her journeyman, servant or other person, may from time to time be weighed in the presence of the purchaser or purchasers thereof, except as aforesaid; and in case any such baker or seller of bread, or his or her journeyman, servant, or other person, shall at any time carry out

2. *Out of London, &c.*

6 & 7 Will. 4, c. 37.

or deliver any bread without being provided with such beam and scales with proper weights, or other sufficient balance, or whose weights shall be deficient in their due weight according to the standard in the Exchequer, or shall at any time refuse to weigh any bread purchased of him, her or them, or delivered by his, her, or their journeyman, servant, or other person, in the presence of the person or persons purchasing or receiving the same, then and in every such case every such baker or seller of bread shall for every such offence forfeit and pay any sum not exceeding five pounds, which the magistrate or magistrates, justice or justices before whom such offender or offenders shall be convicted shall order and direct."

Adulterating bread. (*a*)

Sect. 8. "No baker or other person or persons who shall make bread for sale beyond the limits aforesaid, nor any journeyman or other servant of any such baker or other person, shall at any time or times in the making of bread for sale beyond such limits use any mixture or ingredient whatsoever in the making of such bread, other than and except as hereinbefore mentioned, on any account, or under any colour or pretence whatsoever, upon pain that every such person, whether master or journeyman, servant, or other person, who shall offend in the premises, and shall be convicted of any such offence by the oath, or in case of a Quaker by affirmation, of one or more credible witness or witnesses, or by his, her, or their own confession, shall for every such offence forfeit and pay any sum not exceeding ten pounds nor less than five pounds, or in default thereof shall, by warrant under the hands and seals of the magistrate or magistrates, justice or justices, before whom such offender shall be convicted, be apprehended and committed to the house of correction or some prison of the city, county, borough, or place where the offence shall have been committed, or the offender or offenders shall be apprehended, there to remain for any time not exceeding six calendar months, with or without hard labour, from the time of such commitment, unless the penalty shall be sooner paid, as any such magistrate or magistrates, justice or justices, shall think fit and order; and it shall be lawful for the magistrate or magistrates, justice or justices, before whom any such offender or offenders shall be convicted, to cause the offender's name, place of abode, and offence to be published in some newspaper which shall be printed or published in or near the city, county, borough, or place where the offence shall have been committed, and to defray the expense of publishing the same out of the money to be forfeited as last mentioned, in case any shall be so forfeited, paid or recovered."

Names of offenders to be published.

Adulterating corn, meal, or flour.

Sect. 9. "If any person beyond the limits aforesaid shall put into any corn, meal, or flour which shall be ground, dressed, bolted, or manufactured for sale beyond such limits, either at the time of grinding, dressing, bolting, or manufacturing the same, or at any other time, any ingredient or mixture whatsoever not being the real and genuine produce of the corn or grain which shall be so ground; or if any person shall, beyond the limits aforesaid, knowingly sell or offer or expose for sale, either separately or mixed, any meal or flour of one sort of corn or grain as the meal or flour of any other sort of corn or grain, or any ingredient whatsoever mixed with the meal or flour so sold or offered or exposed for sale, then and in every such case every person so offending shall, upon conviction before any one or more magistrate or magistrates, justice or justices of the city, county, borough or place where such offence shall have been committed, on the oath, or in case of a Quaker, by affirmation, of one or more credible witness or witnesses, or by his, her, or their own confession, forfeit and pay for every such offence any sum not exceeding twenty pounds nor less than five pounds, which such magistrate or magistrates, justice or justices, before whom any such offender or offenders shall be convicted, shall think fit and order."

Selling flour or one sort of corn as the flour of another sort.

Bread made of mixed meal or flour to be marked with a Roman M.

Sect. 10. "Every person who shall make for sale, or sell or expose for sale, beyond the limits aforesaid, any bread made wholly or partially of peas or beans, or potatoes, or of any sort of corn or grain other than wheat, shall cause all such bread to be marked with a large Roman M; and if any person shall at any time, beyond the limits aforesaid, make or sell, or expose for sale,

(*a*) As to the offence at common law, see *ante*, 421, n. (*a*).

2. *Out of London, &c.*

6 & 7 Will. 4, c. 37.

any such bread without such mark as hereinbefore directed, then and in every such case every person so offending shall, upon conviction in manner hereinafter mentioned, forfeit and pay for every pound weight of such bread, and so in proportion for any less quantity which shall be so made for sale, or sold or exposed for sale, without being so marked as aforesaid, any sum not exceeding ten shillings, as the magistrate or magistrates, justice or justices, before whom such conviction shall take place shall from time to time order and adjudge: provided always, that nothing in this act contained shall extend or be construed to extend to require any bread made of the meal or flour of wheat only, and in the making of which potatoe yeast shall be used, to be marked as hereinbefore is mentioned."

Proviso.

Magistrates, &c. by warrants may search baker's premises, and if adulterated flour, &c. be found, same may be seized and disposed of, &c. (a)

Sect. 11. "It shall be lawful for any magistrate or magistrates, justice or justices of the peace, within the limits of their respective jurisdictions, and also for any peace officer or officers authorised by warrant under the hand and seal or hands and seals of any such magistrate or magistrates, justice or justices, (and which warrant any such magistrate or magistrates, justice or justices, is and are hereby empowered to grant,) at seasonable times in the daytime, to enter into any house, mill, shop, stall, bakehouse, bolting house, pastry warehouse, outhouse, or ground of or belonging to any miller, mealman, or baker, or other person who shall grind grain, or dress or bolt meal or flour, or make bread for reward or sale, beyond the limits aforesaid, and to search or examine whether any mixture or ingredient, not the genuine produce of the grain such meal or flour shall import or ought to be, shall have been mixed up with or put into any meal or flour in the possession of such miller, mealman, or baker, either in the grinding of any grain at the mill, or in the dressing, bolting, or manufacturing thereof, whereby the purity of any meal or flour is or shall be in anywise adulterated, or whether any mixture or ingredient other than is allowed by this act shall have been mixed up with or put into any dough or bread in the possession of any such baker or other person, whereby any such dough or bread is or shall be in anywise adulterated, and also to search for any mixture or ingredient which may be intended to be used in or for any such adulteration or mixture; and if on any such search it shall appear that any such meal, flour, dough, or bread so found shall have been so adulterated by the person in whose possession it shall then be, or any mixture or ingredient shall be found which shall seem to have been deposited there in order to be used in the adulteration of meal, flour, or bread, then and in every such case it shall be lawful for every such magistrate or magistrates, justice or justices of the peace, or officer or officers authorised as aforesaid respectively, within the limits of their respective jurisdictions, to seize and take any meal, flour, dough, or bread which shall be found in any such search, and deemed to have been adulterated, and all ingredients and mixtures which shall be found and deemed to have been used, or intended to be used, in or for any such adulteration as aforesaid; and such part thereof as shall be seized by any peace officer or officers authorised as aforesaid shall, with all convenient speed after seizure, be carried to the nearest resident magistrate or magistrates, justice or justices of the peace, within the limits of whose jurisdiction the same shall have been so seized; and if any magistrate or magistrates, justice or justices, who shall make any such seizure in pursuance of this act, or to whom any thing so seized under the authority of this act shall be brought, shall adjudge that any such meal, flour, dough, or bread so seized shall have been adulterated by any mixture or ingredient put therein other than is allowed by this act, or shall adjudge that any ingredient or mixture so found as aforesaid shall have been deposited or kept where so found for the purpose of adulterating meal, flour, or bread, then and in any such case every such magistrate or magistrates, justice or justices of the peace, is and are hereby required, within the limits of their respective jurisdictions, to dispose of the same as he or they in his or their discretion shall from time to time think proper."

(a) See "*Search Warrant*," Vol. V.; "*Warrant*," Vol. VI. A general warrant could not perhaps be granted, see "*Weights and Measures*," Vol. VI. p. 415.

2. *Out of London, &c.*

6 & 7 Will. 4. c. 37.

Penalty if ingredients for adulteration of meal or bread are found in any premises.

Sect. 12. "Every miller, mealman, or baker beyond the limits aforesaid, in whose house, mill, shop, stall, bakehouse, bolting house, pastry warehouse, outhouse, ground, or possession any ingredient or mixture shall be found which shall, after due examination, be adjudged by any magistrate or magistrates, justice or justices of the peace, to have been deposited there for the purpose of being used in adulterating meal, flour, or bread, shall, on being convicted of any such offence, either by his, her, or their own confession, or by the oath, or in case of a Quaker by affirmation, of one or more credible witness or witnesses, forfeit and pay on every such conviction any sum not exceeding ten pounds nor less than forty shillings, for the first offence, five pounds for the second offence, and ten pounds for every subsequent offence, or in default of payment thereof shall, by warrant under the hand and seal or hands and seals of the magistrate or magistrates, justice or justices, before whom such offender shall be convicted, be apprehended and committed to the house of correction or some prison of the city, county, or place where the offence shall have been committed, or the offender or offenders shall be apprehended, there to remain for any time not exceeding six calendar months, with or without hard labour, from the time of such commitment (unless the penalty be sooner paid), as any such magistrate or magistrates, justice or justices, shall think fit and order; and it shall be lawful for the magistrate or magistrates, justice or justices, before whom any such offender shall be convicted, to cause the offender's name, place of abode, and offence to be published in some newspaper which shall be printed or published in or near the city, county, borough, or place where the offence shall have been committed, and to defray the expense of publishing the same out of the money to be forfeited as last mentioned, in case any shall be so forfeited, paid, or recovered."

First offence; second offence; subsequent offence.

Name of offenders to be published.

Obstructing search.

Sect. 13. "If any person or persons shall wilfully obstruct or hinder any such search as hereinbefore is authorised to be made, or the seizure of any meal, flour, dough, or bread, or of any ingredient or mixture which shall be found on any such search, and deemed to have been lodged with an intent to adulterate the purity or wholesomeness of any meal, flour, dough, or bread, or shall wilfully oppose or resist any such search being made, or the carrying away any such ingredient or mixture as aforesaid, or any meal, flour, dough, or bread which shall be seized as being adulterated, or as not being made pursuant to this act, he, she, or they so doing or offending in any of the cases last aforesaid shall, for every such offence, on being convicted thereof, forfeit and pay such sum not exceeding ten pounds, as the magistrate or magistrates, justice or justices, before whom such offender or offenders shall be convicted, shall think fit and order: provided also, that if any person making or who shall make bread for sale beyond the limits aforesaid, shall at any time make complaint to any magistrate or magistrates, justice or justices of the peace, within his or their jurisdiction, and make appear to him or them, by the oath, or in case of a Quaker by affirmation, of any credible witness, that any offence which such person shall have been charged with, and for which he or she shall have incurred and paid any penalty under this act, shall have been occasioned by or through the wilful act, neglect, or default of any journeyman or other servant employed by or under such person so making complaint, then and in any such case any such magistrate or magistrates, justice or justices, may and is or are hereby required to issue out his or their warrant, under his or their hand and seal or respective hands and seals, for bringing any such journeyman or servant before any such magistrate or magistrates, justice or justices, or any magistrate or justice of the peace acting in and for the city, county, division or place where the offender can be found; and on any such journeyman or servant being thereupon apprehended and brought before any such magistrate or magistrates, justice or justices, he or they, within his or their respective jurisdictions, is and are hereby authorised and required to examine into the matter of such complaint, and on proof thereof upon oath or affirmation, to the satisfaction of any such magistrate or magistrates, justice or justices of the peace, who shall hear such complaint, then any such magistrate or magistrates, justice or jus-

Offences occasioned by wilful default of journeymen and servants.

Proceedings.

2. *Out of London, &c.*

6 & 7 Will. 4, c. 37.

If penalty on journeymen is not paid, magistrates may order imprisonment, &c. (a)

tices, is and are hereby directed and authorised, by any order under his or their respective hand or hands, to adjudge and order what reasonable sum of money shall be paid by any such journeyman or servant to his master or mistress as or by way of recompence to him or her for the money he or she shall have paid by reason of the wilful act, neglect, or default of any such journeyman or servant; and if any such journeyman or servant shall neglect or refuse, on his conviction, to make immediate payment of the sum of money which any such magistrate or magistrates, justice or justices, shall order him to pay by reason of such his said wilful neglect or default, then any such magistrate or magistrates, justice or justices, within his or their respective jurisdiction, is or are hereby authorised and required, by warrant under his or their hand and seal or hands and seals, to cause such journeyman or servant to be apprehended and committed to the house of correction, or some other prison of the city, county, division, or place in which such journeyman or servant shall be apprehended or convicted, to be there kept to hard labour for any term not exceeding one calendar month nor less than ten days from the time of such commitment, as to such magistrate or magistrates, justice or justices, shall seem reasonable, unless payment shall be made of the money ordered after such commitment and before the expiration of the said term."

Bakers not to bake on Lord's day, or sell bread, &c. except between certain hours. (b)

Sect. 14. Provided always, "That no master or mistress, journeyman or other person exercising or employed in the trade or calling of a baker beyond the limits aforesaid, shall on the Lord's day, or on any part thereof, make or bake any bread, rolls, or cakes of any sort or kind, or shall on any other part of the said day after the hour of half-past one of the clock in the afternoon sell or expose for sale, or permit or suffer to be sold or exposed for sale, any bread, rolls, or cakes of any sort or kind, or bake or deliver, or permit or suffer to be baked or delivered, any meat, pudding, pie, tart, or victuals, or in any other manner exercise the trade or calling of a baker, or be engaged or employed in the business or occupation thereof, save and except so far as may be necessary in setting and superintending the sponge to prepare the bread or dough for the following day's baking; and every person offending against the last-mentioned regulations, or any one or more of them, and being thereof convicted before any justice of the peace of the city, county, or place where the offence shall be committed, within six days from the commission thereof, either upon the view of such justice, or on confession by the party, or proof by one or more witness or witnesses upon oath or affirmation, shall for every such offence pay and undergo the forfeiture, penalty, and punishment hereinafter mentioned; (that is to say,) for the first offence the penalty of ten shillings, for the second offence the penalty of twenty shillings, and for the third and every subsequent offence respectively the penalty of forty shillings, and shall moreover, upon every such conviction, bear and pay the costs and expenses of the prosecution, such costs and expenses to be assessed, settled, and ascertained by the justice convicting, and the amount thereof, together with such part of the penalty as such justice shall think proper, to be allowed to the prosecutor or prosecutors for loss of time in instituting and following up the prosecution, at a rate not exceeding three shillings per diem, and to be paid to the prosecutor or prosecutors for his, her, or their own use and benefit, and the residue of such penalty to be paid to such justice, and within seven days after his receipt thereof to be transferred by him to some one of the overseers of the poor, or to some other officer (as the convicting justice or justices may direct), of the parish, township, or place in which the offence shall have been committed, to be by such overseer or officer paid over to the use of the general rate of the county, riding, or division in which such parish, township, or place shall be situate, whether the same shall or shall not contribute to such general rate; and no inhabitant of such county, riding, or division shall be deemed an incompetent witness in any proceeding under this act by reason of the application of such penalty or forfeiture to the use of the said general rate as aforesaid; and in case the whole amount of the penalty,

First offence; second offence; subsequent offence.

(a) See *post*, "*Commitment in Execution.*" (b) See "*Lord's Day*," Vol. III.

and of the costs and expenses aforesaid, be not forthwith paid after conviction of the offender or offenders, such justice shall and may, by warrant under his hand and seal, direct the same to be raised and levied by distress and sale of the goods and chattels of the offender or offenders, and in default and insufficiency of such distress commit the offender or offenders to the house of correction, with or without hard labour, on a first offence for the space of seven days, on a second offence for the space of fourteen days, and on a third or any subsequent offence for the space of one month, with or without hard labour, unless the whole of the penalty, costs, and expenses be sooner paid and discharged: provided nevertheless, that it shall be lawful for every baker residing beyond the limits aforesaid to deliver to his or her customers on the Lord's day any bakings until half an hour past one of the clock in the afternoon of that day, without incurring or being liable to any of the penalties in this act contained: provided always, that the provisions of this act, so far as they authorise the baking and preparing bread on Sundays, shall not extend to Scotland."

2. *Out of London, &c.*

6 & 7 Will. 4, c. 37.

Bakings may be delivered till half-past one on Sundays.

Sect. 15. "Provided always, that no person who shall follow or be concerned in the business of a miller, mealman, or baker shall be capable of acting or shall be allowed to act as a justice of the peace under this act, or in putting in execution any of the powers in or by this act granted; and if any miller, mealman or baker shall presume so to do, he or they so offending in the premises shall for every such offence forfeit and pay the sum of one hundred pounds to any person or persons who will inform or sue for the same, to be recovered, together with full costs of suit, in any of his majesty's courts of record at Westminster, by action of debt, bill, plaint, or information, wherein no essoign, wager of law, or more than one imparlance shall be allowed."

No miller or baker, &c. to act as a justice of the peace under this act.

Sect. 16. "In case any person or persons shall resist or make forcible opposition against any person or persons employed in the due execution of this act, every such person offending therein shall for every such offence forfeit any sum not exceeding ten pounds, at the discretion of the magistrate or magistrates, justice or justices of the peace, before whom he or she shall be convicted of such offence."

Opposing execution of the act.

Sect. 17. "All penalties, forfeitures and fines by this act inflicted or authorised to be imposed (the manner of levying and recovering and applying whereof is not herein otherwise directed) shall upon proof and conviction of the offences respectively before any magistrate or justice of the peace for the city, county, or place where the offence shall have been committed (as the case may require), either by the confession of the party offending, or by the oath, or in the case of a Quaker on affirmation, of any credible witness or witnesses, which oath or affirmation every such magistrate or justice is in every such case hereby fully authorised to administer, be levied, together with the costs attending the information and conviction, by distress and sale of the goods and chattels of the party or parties offending, by warrant under the hand and seal of such magistrate or justice (which warrant such magistrate or justice is hereby empowered and required to grant); and the overplus (if any), after such penalties, forfeitures and fines, and the charges of such distress and sale, are deducted, shall be returned upon demand, unto the owner or owners of such goods and chattels; and in case such fines, penalties, and forfeitures, shall not be forthwith paid upon conviction, then it shall be lawful for such magistrate or justice to order the offender or offenders so convicted to be detained and kept in safe custody until return can be conveniently made to such warrant of distress, unless the offender or offenders shall give sufficient security to the satisfaction of such magistrate or justice for his or their appearance before such magistrate or justice on such day or days as shall be appointed for the return of such warrant of distress, such day or days not being more than seven days from the time of taking any such security, and which security the said magistrate or justice is hereby em-

Recovery and application of penalties and forfeitures.

Distress(a).

(a) See *post*, "*Distress under Justices' Warrant*," Vol. II.

2. *Out of London, &c.*

6 & 7 Will. 4, c. 37.

powered to take by way of recognizance or otherwise; but if upon the return of such warrant, it shall appear that no sufficient distress can be had thereupon, then it shall be lawful for any such magistrate or justice of the peace as aforesaid, and he is hereby authorised and required, by warrant or warrants under his hand and seal, to cause such offender or offenders to be committed to the common gaol or house of correction of the city, county, or place where the offender shall be or reside, there to remain without bail or mainprize for any time not exceeding one calendar month, with or without hard labour (save and except as herein otherwise directed), unless such penalties, forfeitures, and fines, and all reasonable charges attending the same, shall be sooner paid and satisfied; and the monies arising by such penalties, forfeitures, and fines respectively when paid or levied, if not otherwise directed to be applied by this act, shall be from time to time paid, one moiety thereof to the informer or person suing for and recovering the same, and the other moiety to some one of the overseers of the poor, or to some other officer (as the convicting justice or justices may direct) of the parish, township, or place in which the offence shall have been committed, to be by such overseer or officer paid over to the use of the general rate of the county, riding, or division in which such parish, township, or place shall be situate, whether the same shall or shall not contribute to such general rate, and no inhabitant of such county, riding, or division shall be deemed an incompetent witness in any proceeding under this act by reason of the application of such penalty or forfeiture to the use of the said general rate as aforesaid."

Imprisonment. (a)

Form of summons.

Sect. 18. "Every summons to be served on any offender against any of the provisions of this act shall be in the form or to the effect following:

To A. B. of

County of —— *to wit.* } *WHEREAS complaint and information hath been made before me, C.D., one of her Majesty's justices of the peace* [or *magistrate*] *for the said county, &c., by E. F. of , that, &c.* [here state the nature and circumstances of the case, as far as it shall be necessary to show the offence, and to bring it within the authority of the justice or magistrate, and in doing that follow the words of the act as near as may be]: *these are therefore to require you personally to appear before me (or such other justice or magistrate as shall be then and there present) at in the said county, &c. on the day of next, at the hour of in the noon, to answer to the said complaint and information made by the said E. F., who is likewise directed to be then and there present to make good the same. Herein fail not. Given under my hand this day of .*

Form of information.

Sect. 19. "That every information to be laid before any justice or magistrate, for any offence against this act, shall be in the form or to the effect following:

County of —— *to wit.* } *BE it remembered, that on the day of A. B. of in the said county, informeth me one of her Majesty's justices of the peace* [or *magistrate*, as the case may be,] *for the said county, that of in the said county* [here describe the offence, with the time and place, and follow the words of the act as near as may be,] *contrary to the statute made in the year of the reign of the late King William the Fourth, intituled An Act* [set forth the title of this act], *which hath imposed a forfeiture of for the said offence. Taken the day of , before me, C. D.*

Information to be laid before acting magistrates of district.

Sect. 20. Provided always, "That all offences committed against this act shall be laid before the magistrate or magistrates, justice or justices, usually acting in and for the district in which the offence shall have been committed, in a summary way, upon complaint, and the said magistrate or magistrates, justice or justices, is and are hereby empowered to issue his or their summons for the purpose of hearing and determining the same."

Power to summon witnesses in prosecuting offences.

Sect. 21. "If it shall be made appear by the oath or affirmation of any credible person or persons, to the satisfaction of any magistrate or magistrates, justice or justices, that any person or persons within the jurisdiction of any such magistrate or magistrates, justice or justices, is or are likely to

(a) See *post*, "*Commitment in Execution.*"

give or offer material evidence on behalf of the prosecutor of any offender or offenders against the true intent and meaning of this act, or on behalf of the person or persons accused, and will not voluntarily appear before such magistrate or magistrates, justice or justices, to be examined, and give his, her, or their evidence concerning the premises, every such magistrate or magistrates, justice or justices, is and are hereby authorised and required to issue his or their summons to convene every such person or persons before any such magistrate or magistrates, justice or justices, at such seasonable time as in such summons shall be fixed; and if any person so summoned shall neglect or refuse to appear at the time by such summons appointed, and no just excuse shall be offered for such neglect or refusal, then after proof upon oath or affirmation of such summons having been duly served upon the party or parties so summoned, every such magistrate and magistrates, justice and justices, is and are hereby authorised and required to issue his or their warrant, under his hand and seal, or their hands and seals, to bring every such person or persons before any such magistrate or magistrates, justice or justices; and on the appearance of any such person before any such magistrate or magistrates, justice or justices, every such magistrate or magistrates, justice or justices, is and are hereby authorised and empowered to examine upon oath or affirmation every such person; and if any such person, on his or her appearance, or on being brought before any such magistrate or magistrates, justice or justices, shall refuse to be examined upon oath or affirmation concerning the premises, without offering any just excuse for such refusal, any such magistrate or magistrates, justice or justices within the limits of his or their jurisdiction, may, by warrant under his hand and seal, or their hands and seals, commit any person or persons so refusing to be examined to the public prison of the city, county, division, liberty, or place in which the person or persons so refusing to be examined shall be, there to remain for any time not exceeding fourteen days, with or without hard labour, as any such magistrate or magistrates, justice or justices, shall direct."

Examination upon oath.

Committal.

False evidence, perjury.

Sect. 22. "If any person who shall take any oath, or make any affirmation by this act directed to be taken or made, shall wilfully forswear himself or herself, or make any false affirmation, every such person shall be subject and liable to be prosecuted for perjury by indictment or information, according to the due course of law, and, if convicted thereof, shall be subject and liable to the pains and penalties which persons convicted of wilful and corrupt perjury are subject and liable to."

Form of conviction.

Sect. 23. "The magistrate or magistrates, justice or justices, before whom any person shall be convicted in manner prescribed by this act, shall cause every such conviction to be drawn up in the form or to the effect following: (that is to say)

—— } *BE it remembered, that on this day of in the year of*
to wit. } *the reign of A. B. is convicted before Majesty's justice of the*
peace for the said county of [or *for the division of the said county of*
or *for the city, liberty* or *town of* as the case shall happen to be,] *for*
and do adjudge him, or *her,* or *them,* as the case may be] *to pay and forfeit*
for the same the sum of . Given under the day and year aforesaid.

Proceedings not to be quashed for want of form. Certiorari (a). Parties not to be trespassers *ab initio.*

Sect. 24. "That no order, judgment, or conviction made touching or concerning any of the matters in this act contained, or of any proceedings to be had touching the conviction of any offender or offenders against this act, shall be quashed for want of form, or be removed or removable by certiorari, or any other writ or process whatsoever, into any of his majesty's courts of record at Westminster; and where any distress shall be made for any sum or sums of money to be levied by virtue of this act, the distress itself shall not be deemed unlawful, nor the party or parties making the same be deemed a trespasser or trespassers, on account of any defect or want of form in the summons, conviction, warrant of distress, or any other proceeding relating thereto; nor shall the party or parties distraining be deemed a tres-

(a) See *post*, "*Certiorari.*"

2. *Out of London, &c.*

6 & 7 Will. 4, c. 37.

passer or trespassers *ab initio* on account of any irregularity which shall be afterwards committed by the party or parties distraining, but the person or persons aggrieved by such irregularity shall and may recover full satisfaction for the special damage (if any) in an action on the case; but no plaintiff or plaintiffs shall recover in any action, for such irregularity as aforesaid, if tender of sufficient amends hath been made by or on the behalf of the party distraining before such action brought."

Tender of amends.

Appeal to quarter sessions. (a)

Sect. 25. Provided always, "That if any person or persons convicted of any offence punishable by this act, shall think him, her, or themselves aggrieved by the judgment of the magistrate or magistrates, justice or justices, before whom he, she, or they shall have been convicted, it shall be lawful for such person or persons from time to time to appeal to the justices at the next general or general quarter sessions of the peace which shall be held for the city, county, division, liberty, town or place where such judgment shall have been given, and that the execution of such judgment shall in such case be suspended, the person or persons so convicted entering into a recognizance within twenty-four hours of the time of such conviction, with two sufficient sureties in double the sum which such person or persons shall have been adjudged to pay or forfeit, upon condition to prosecute such appeal with effect, and to be forthcoming to abide the judgment and determination of the justices at their said next general or general quarter sessions; which recognizance the magistrate or magistrates, justice or justices, before whom such conviction shall be had, is and are hereby empowered and required to take; and the justices in the said general or general quarter sessions are hereby authorised and required to hear and finally determine the matter of every such appeal, and to award such costs as to them shall appear just and reasonable to be paid by either party; and if, upon hearing the said appeal, the judgment of the magistrate or magistrates, justice or justices, before whom the appellant or appellants shall have been convicted, shall be confirmed, such appellant or appellants shall forthwith pay down the sum he, she, or they shall have been adjudged to have forfeited, together with such costs as the said justices in their said general or general quarter sessions shall award to be paid to the prosecutor or informer for defraying the expenses sustained by reason of any such appeal; and in default of the appellant's paying the same, any two justices, or any one magistrate or justice of the peace having jurisdiction in the place into which any such appellant or appellants shall escape, or where he, she, or they shall reside, shall and may by warrant under their hands and seals, or his hand and seal, commit any such appellant or appellants to the common gaol of the city, county, division or place, where he, she, or they shall be apprehended, until he, she, or they shall make payment of such penalty, and of the costs and charges which shall be adjudged on the conviction; but if the appellant or appellants in any such appeal shall make good his, her, or their appeal, and be discharged of the said conviction, reasonable costs shall be awarded to the appellant or appellants against such informer or informers who would (in case of such conviction) have been entitled to a moiety of the penalty to have been recovered as aforesaid, and which costs shall and may be recovered by the appellant or appellants against any such informer or informers in like manner as costs given at any general or general quarter sessions are recoverable: provided always, that no person shall be detained in prison for any such offence for any greater length of time than three calendar months."

Recognizance.

Determination to be final.

Costs.

Appellant not paying sum adjudged against him, to be committed.

Costs to appellant making good his appeal.

Where conviction within six days of quarter sessions, time allowed for appeal.

Sect. 26. Provided also, "That if any such conviction shall happen to be made within six days before any general or general quarter sessions of the peace shall be held for the city, county, division, town corporate, borough, or place where such conviction shall have been made, the party or parties who shall think him, her or themselves aggrieved by any such conviction shall and may, on entering into a recognizance in manner and for the purposes before directed, be at liberty to appeal either to the then next or next following general or general quarter sessions of the peace which shall be held for any

(a) See in general, *ante*, "*Appeal*."

such county, division, city, town corporate, borough, liberty or place where any such conviction shall have been made."

2. *Out of London, &c.*

Sect. 27 and 28 relate to the recovery of penalties in Scotland.

6 & 7 Will. 4, c. 37. Penalties in Scotland.

Sect. 29. "Every action or suit which shall be brought or commenced against any magistrate or magistrates, justice or justices, or any peace officer or officers, for any matter or thing done or committed by virtue of or under this act, shall be commenced within six calendar months next after the fact committed, and not afterwards, and shall be laid or brought in the city, county or place where the matter in dispute shall arise, and not elsewhere, and that the statute made in the twenty-fourth year of the reign of King George the Second, intituled '*An Act for rendering Justices of the Peace more safe in the Execution of their Office, and for indemnifying Constables and others acting in obedience to their Warrants*,' so far as the said act relates to the rendering the justices more safe in the execution of their office, shall extend and be construed to extend to the magistrate and magistrates, justice and justices of the peace acting under the authority or in pursuance of this act; and that no action or suit shall be had or commenced against, nor shall any writ be sued out or copy of any writ be served upon, any peace officer or officers for any thing done in the execution of this act until seven days after a notice in writing shall have been given to or left for him or them at his or their usual place of abode, by the attorney for the party intending to commence such action, which notice in writing shall contain the name and place of abode of the person intending to bring such action, and also of his attorney, and likewise the cause of action or complaint; and any peace officer or officers shall be at liberty, and may by virtue of this act, at any time within seven days after any such notice shall have been given to or left for him, tender or cause to be tendered any sum or sums of money as amends for the injury complained of to the party complaining or to the attorney named in such notice; and if the same be not accepted, the defendant or defendants in any such action or actions may plead such tender in bar of such action or actions, together with the general issue or any other plea, with leave of the Court in which the action shall be commenced; and if upon issue joined on such tender, the jury shall find the amends tendered to have been sufficient, they shall find a verdict for the defendant or defendants; and in every such case, or if the plaintiff shall become nonsuit or discontinue his action, or if judgment shall be given for the defendant or defendants upon demurrer, or if any action or suit shall be brought after the time limited by this act for bringing the same, or shall be brought in any other county or place than as aforesaid, then and in every such case the jury shall find a verdict for the defendant or defendants, and the defendant or defendants shall be entitled to his or their costs; but if the jury shall find that no such tender was made, or that the amends tendered were not sufficient, or shall find against the defendant or defendants on any plea or pleas by him or them pleaded, they shall then give a verdict for the plaintiff, and such damages as they shall think proper; and the plaintiff shall thereupon recover his costs against every such defendant or defendants." [But this enactment as to the limitation of actions and the notice of action is materially altered by the recent act of 5 & 6 Vict. c. 97, for which see title "*Justices*," Vol. III.]

Limitation of actions.

Venue.

Part of 24 Geo. 2, c. 44, extended to 6 & 7 Will. 4, c. 37.

Service of writ upon peace officers.

Tender of amends.

Costs.

Sect. 30. "If any action or suit shall be commenced against any other person or persons than a magistrate, justice or peace officer for any thing done in pursuance of this act, the defendant or defendants in any such action or suit may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon, and that the same was done in pursuance and by the authority of this act; and if it shall appear so to have been done, or if a verdict shall be recorded for the defendant or defendants, or if the plaintiff or plaintiffs shall be nonsuited or discontinue his, her, or their action after the defendant or defendants shall have appeared, or if judgment shall be given upon a verdict or demurrer against the plaintiff or plaintiffs, the defendant or defendants in every such action shall and may recover treble costs, and have the like remedy for the same as any defendant or defendants hath or have in other cases by law for the recovery of his, her, or their costs."

In actions for executing act, general issue may be pleaded.

Treble costs.

2. *Out of London, &c.*

[But now by the 5 & 6 Vict. c. 97, s. 2, the defendant shall have such costs taxed to him as will fully indemnify him.—See "*Justices*," Vol. III.]

6 & 7 Will. 4, c. 37. Limitation of information.

Sect. 31. Provided also, "That no person shall be convicted of any offence under this act unless the complaint is made within forty-eight hours after the offence shall have been committed, or within such reasonable time as to the justice or justices shall seem fit, except in cases of perjury; and that no person who shall be prosecuted to conviction for any offence done or committed against this act shall be liable to be prosecuted for the same offence under any other law."

Application of penalties.

Sect. 32. "All penalties and forfeitures by this act inflicted, and the application of which is not herein-before directed, shall, when recovered or paid, go and be disposed of in manner following; (that is to say,) one moiety thereof, where any offender or offenders shall be convicted either by his, her or their confession, or by the oath or affirmation of one or more credible witness or witnesses, shall go and be paid to the person or persons who shall inform against and prosecute to conviction any such offender or offenders, and the other moiety thereof (or in case there be no such person informing then the whole thereof) shall go and be paid to some one of the overseers of the poor, or to some other officer, (as the convicting justice or justices may direct,) of the parish, township or place in which the offence shall have been committed, to be by such overseer or officer paid over to the use of the general rate of the county, riding or division in which such parish, township or place shall be situate, whether the same shall or shall not contribute to such general rate; and no inhabitant of such county, riding or division shall be deemed an incompetent witness in any proceeding under this act by reason of the application of such penalty or forfeiture to the use of the said general rate as aforesaid."

Proviso for rights of particular persons.

Sect. 33. Provided always, "That this act or any thing herein contained shall not extend or be construed to extend in any way to affect, lessen, or infringe upon any right or custom of the Universities of Oxford or Cambridge or either of them, or of any lord or lords of any leets, or the rights of any clerk or clerks of the market in any place which may be exercised and enjoyed by them or any of them by virtue of any charter, bye-laws, prescriptions, usages, customs, privileges, grants or acts of parliament, except so far as relates to the assize of bread and the regulations of the price and weight thereof; but that all such rights and privileges shall be held, exercised, and enjoyed by the parties respectively entitled thereto, as fully and amply to all intents and purposes as the same were held, exercised and enjoyed before the passing of this act, any thing herein contained to the contrary notwithstanding."

Commencement of act.

Sect. 34. "This act shall commence and take effect from and after the said 1st day of October, 1836."

Act not to extend to Ireland.

Sect. 35. "Nothing in this act contained shall extend to Ireland."

Breaking, *in case of a Burglary*, see *post*, "*Burglary*."

Breaking Gaol, see "*Escape*," Vol. II.; "*Prison Breaking*," "*Rescue*," Vol. V.

Breaking open Doors, see *ante*, "*Arrest*," p. 276; *post*, "*Hue and Cry*," Vol. III; "*Warrant*," Vol. VI.; *in case of a Distress*, see "*Distress*," Vol. II. p. 289.

Brewers, see *ante*, "*Alehouses*;" *post*, "*Excise*," Vol. II.

Bribery.

BRIBERY, in a strict sense, is taken for a great misprision of one in a judicial place taking any thing whatsoever, except meat and drink in small value, of any one who has to do before him any way, for doing his office, or by colour of his office, but of the Queen only; and is punishable at the common law by fine or imprisonment, both as to the party receiving and the party giving or offering the bribe. (1 *Hawk.* c. 67, s. 1, 2, 7; 3 *Inst.* 147.) What is.

But this definition, in confining the offence to *judicial* officers, seems too narrow. (See *R.* v. *Beale*, 1 *East*, 183; *R.* v. *Vaughan*, 4 *Burr.* 2494; *Com. Dig. Officer*, (1)).

A mere *attempt* to bribe is an offence. Thus an attempt to bribe a privy councillor to procure a reversionary patent of an office grantable by the Queen under the great seal was held indictable, though it did not succeed. (*R.* v. *Vaughan*, 4 *Burr.* 2495; *R.* v. *Pollman*, 2 *Campb.* 231; *ante*, "*Attempts.*") Attempts to bribe.

So in the case of an attempt to bribe at an election for *parliament*. (*R.* v. *Vaughan*, 4 *Burr.* 2500; *R.* v. *Plymton*, 2 *Ld. Raym.* 1377; and see *Hemslow* v. *Fawcett*, 3 *Ad. & Ell.* 51; *post*, "*Parliament*," Vol. V.) So of such an attempt at an election for a corporation. (*Harding* v. *Stokes*, 2 *M. & W.* 233.)

So is an attempt to bribe an officer of customs. (*R.* v. *Cassano*, 5 *Esp.* 231; *R.* v. *Everett*, 8 *B. & Cres.* 114; 2 *M. & Ry.* 35, S. C.) See 3 & 4 Will. IV. c. 51, s. 8, "*Excise*," Vol. II.

See forms of indictment for bribery, &c. and law, 2 *Chit. C. L.* 683 to 697.

See form of indictment for an attempt to bribe a constable, *Jervis's Arch. C. L.* 9 ed. 588.

Bricks and Tiles.

For the Duties on Bricks and Tiles and other Excise Regulations, see "*Excise*," Vol. II.

BY the 17 Edw. IV. c. 4, every person using the occupation of making of the tile called plain tile (otherwise called thak tile), roof tile or cres tile, corner tile, and gutter tile, shall make it good, seasonable, and sufficient, and well whited and annealed. Quality and size of tiles.

And the earth, whereof any such tiles shall be made, shall be digged and cast up before Nov. 1st next before they shall be made, and stirred and turned before Feb. 1st next following; and not wrought before March 1st next after; and the same earth before it be put to making of tile shall be truly wrought and tried from stones.

And the veins called malin or marle, and chalk, lying commonly in the ground near to the land convenient to make tile, after the digging of the said earth whereof any such tile shall be made, shall be well severed from the earth of which the tile shall be made.

And every such plain tile so to be made shall be 10½ inches long, 6¼ inches broad, and half an inch and half a quarter thick; roof tile or cres tile 13 inches long, half an inch and half a quarter thick, with convenient deepness; gutter tile and cover tile 10½ inches long, with convenient thickness, breadth, and deepness.

And if any person shall set to sale any such tile otherwise made, he shall forfeit to the buyer double value of the tile, and make fine and ransom at the Queen's will; to be recovered by action of debt, with costs. And also the justices of the peace and every of them may hear and determine offences against this act; who shall assess upon the offender no less fine than for every 1000 plain tile 5*s.*; for every 100 roof tile 6*s.* 8*d.*; and for every 100 corner or gutter tile 2*s.*

Bricks and Tiles.

Searching for tiles, &c.

And the said justices shall have power to call before them or any of them persons having experience or knowledge in making tile, to search and examine the digging, casting, turning, parting, making, whiting, and annealing aforesaid; and no person shall put any such tile to sale before it be searched, on pain of forfeiture. And if the searcher shall find any persons offending against this act, he shall present the defaulters at the next sessions, which shall be equal to a presentment of twelve men. And the searcher shall have of the tile maker for his labour for every 1000 plain tile searched one penny, for every 100 roof tile a halfpenny, and for every 100 corner and gutter tile a farthing. Searcher neglecting his duty shall forfeit 10s.; and the justices may hear and determine the faults of the searchers in like manner as of the tile makers.

Pantiles.

The reason why no provision was made concerning *pantiles*, among the other sorts of tiles, by the above-mentioned act of the 17th Edw. IV. is because *pantiles* are a modern invention, long after the date of that act.

Exemptions from duties.

Tiles for draining land are exempt by several statutes from all duties. (34 Geo. III. c. 15; 42 Geo. III. c. 93; and 46 Geo. III. c. 138.) And this exemption is, by stat. 55 Geo. III. c. 176, extended to tiles which are necessary for the "foundations and support" of such drains, according to the following description: "flat tiles not exceeding one inch in thickness, each thereof having at one end a semicircular projection, and at the other a semicircular arch or indent, such projection and arch being portions of circles of equal diameters, and each such tile being also not less than nine inches in length, and not exceeding seven inches in breadth, such flat tiles being also perforated with circular holes, each thereof being not less than two inches in diameter, and the sum of the areas of such holes in each such flat tile amounting to not less than a quarter part of the surface or superficial content of such flat tile, and no such flat tile being fit or proper for the purpose of being used in building, or in the roof or covering of any house, shed, or other building whatever."

Quality and size of bricks and pantiles.

By the 17 Geo. III. c. 42, s. 1, 2, "All bricks made for sale shall, when burnt, be not less than eight inches and a half long, two inches and a half thick, and four inches wide; and all pantiles not less than thirteen inches and a half long, nine inches and a half wide, and half an inch thick; on pain that the maker shall forfeit twenty shilling for every 1000 bricks, and ten shillings for every 1000 pantiles, and so proportionably for a greater or less number."

Sect. 3. "And the size of the sieves or screens for sifting or screening sea-coal ashes, to be mixed with brick earth in making of bricks, shall not exceed one quarter of an inch between the meshes."

Combinations to enhance the price.

Sect. 4. "All contracts for enhancing or fixing the price of bricks or tiles shall be void; and every brickmaker or tile-maker, or other person interested in the making for sale, offending therein shall forfeit twenty pounds; and every clerk, agent, or servant, ten pounds; half to the poor, and half to him who shall sue in six calendar months in one of the courts of Westminster." This seems an offence at common law, *post*, "*Conspiracy*."

Penalties.

Sect. 5. "All other penalties and forfeitures, not herein otherwise directed, shall be recovered before one justice, on proof by confession or oath of one witness, (the oath to be administered *gratis*); to be levied by distress and distributed half to the informer, and half to the poor of the parish where the offender dwells; and if sufficient distress shall not be found, or such penalties and forfeitures shall not be forthwith paid, the justice shall commit the offender to the common gaol or house of correction for the place where the matter shall arise, for any time not exceeding two calendar months, unless such penalties and forfeitures and all reasonable charges shall be sooner paid."

Conviction.

Sect. 6. "The conviction to be in this form, or to the like effect:—

"*BE it remembered, that on the day of , in the year of our Lord , A. B. is convicted before me C. D. one of her Majesty's justices of the peace for the of* [specifying the offence, and the time and place when and where the same was committed, as the case shall be]. *Given under my hand and seal the day and year aforesaid.*"

Sect. 7. "But no penalty in respect of the dimensions of bricks or tiles shall be recovered, unless the information shall be laid within one calendar month after sale or delivery of the bricks or tiles."

Limitation of proceedings.

Sect. 8. "Persons aggrieved may, within four calendar months after the cause of complaint shall have arisen, appeal to the general quarter sessions for the county, riding, division, or place, giving twenty-one days' notice at the least, in writing, of his intention to bring such appeal, and of the matter thereof, to the person or persons whose acts are complained against; and within eight days after such notice entering into recognizance before a justice with two sureties, conditioned to try such appeal at, and abide the order of, and pay such costs as shall be awarded at such sessions. And the justices at such sessions, on proof of such notice and recognizance, shall hear and determine the appeal in a summary way, and award such costs to the party appealing or appealed against as they shall think reasonable; and their determination shall be conclusive; and no order or other proceedings in the premises shall be quashed for want of form, or removed by *certiorari* or other process, into any of his majesty's courts of record at Westminster."

Appeal.

Bricks sold of improper size.

It has been decided that a person who had sold a quantity of bricks of less than the statutable dimensions, could not recover the value of such bricks so sold. (*Law* v. *Hodson*, 11 *East*, 300; and see *Bensley* v. *Bignold*, 5 *B. & Ald.* 335; and *Cope* v. *Rowlands*, 2 *M. & Wels.* 149, and cases there cited.)

Bridges, (*of County.*)

UNDER this title we shall treat only of County Bridges.

Those which are under the cognizance of the surveyor of the highways, as being repaired by the several parishes or districts, are treated of under "*Highways in General*," Vol. III.

I. *What is a Public, and what a County Bridge, and Freehold, &c. in*, 446.

II. *Who shall Repair it by Common Law*, 447.

III. *Who by Statute*, 453.

[9 Hen. III. c. 15; 22 Hen. VIII. c. 5, s. 2, 3; 43 Geo. III. c. 59, s. 5—7; 5 & 6 Will. IV. c. 50.]

IV. *Concerning the 300 feet at the ends of Bridges*, 454.

[22 Hen. VIII. c. 5, s. 9, 5 & 6 Will. IV. c. 50.]

V. *Manner, &c. of Repair; Widening, Diverting, &c.* 456.

[22 Hen. VIII. c. 5, s. 4; 14 Geo. II. c 33, s. 1; 43 Geo. III. c. 59; 54 Geo. III. c. 90, s. 2; 55 Geo. III. c. 143; 3 Geo. IV. c. 126, s. 32; 5 & 6 Will. IV. c. 50.]

VI. *Surveyors, &c.; Materials for Repairs, &c.* 457.

VII. *Assessments and Contracts, &c. for Repairs, &c.; Expenses of, &c.* 461.

[12 Geo. II. c. 29, 52 Geo. III. c. 110; 55 Geo. III. c. 143, s. 5; 4 & 5 Vict. c. 49.]

VIII. *Modes of Prosecution for Non-Repairs*, 470 *to* 477.

1. *By Criminal Information*, 470.
2. *By Presentment*, 470.
3. *By Indictment, and herein against whom it lies*, 472.

Form of, 472.

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Certiorari, 474.
Evidence and Witnesses, 475.
Trial, Jurors, 476.
Judgment, &c. 476.
[22 Hen. VIII. c. 5, s. 1, 5; 1 Anne, st. 1, c. 18; 12 Geo. II. c. 29, s. 13; 55 Geo. III. c. 143, s. 5.]
IX. *Injuries, &c. to Bridges*, 477.
[3 Geo. IV. c. 126, s. 121; 4 Geo. IV. c. 59, s. 72; 7 & 8 Geo. IV. c. 30, s. 13; 5 & 6 Will. IV. c. 50, s. 22.]
X. *Forms*, 477.

I. What is a Public and what a County Bridge, Freehold, &c. in.

What a public bridge.

A *public* bridge is a highway, and a bridge of common right, to be used by the public on all occasions like a highway. (2 *Lord Raym.* 1174; *Salk.* 359, pl. 8.) The same rules as to deciding what will be a public highway will for the most part here apply. *Post*, "*Highway*," Vol. III.

To constitute a public bridge, the circumstance of its being always open along a highway is *primâ facie* evidence thereof. (*R.* v. *Buckinghamshire*, 12 *East*, 192; *R.* v. *Salop*, 13 *East*, 95.)

It is not, however, necessary that the bridge should be always open, but if the public use it at particular seasons it will suffice, as if they use it at all times when it is dangerous to pass through the river. (*R.* v. *Northamptonshire*, 2 *M. & Sel.* 262.) And a bridge used only on occasion of floods, and lying out of and alongside the road, may be a public bridge. (*R.* v. *Devon*, *R. & M. C. N. P.* 144.)

But if a bar be put across the bridge, which is always kept locked, except in times of flood, such is not a public bridge; for the bar shows that the public have only a right to use the bridge at times of flood. (*R.* v. *Marquis of Buckingham*, 4 *Camp.* 189.)

A bridge erected for the mere purpose of connecting a private mill with the public highway, or for any other private purposes, although the public may occasionally participate with the private proprietor in the use of it, does not on that account necessarily become a public bridge. (*R.* v. *Buckinghamshire*, 12 *East*, 204.)

A useless or mere ornamental bridge is not a public bridge. (*R.* v. *West Riding, Yorkshire*, 5 *Burr.* 2594; 2 *Black.* 685, S. C.; *R.* v. *Inhabitants of West Riding, Yorkshire*, 2 *East*, 342; *R.* v. *Gloucestershire*, 2 *East*, 356, n.)

Upon a question whether a particular structure be a bridge or a culvert, the fact of its being without parapets is not decisive. (*R.* v. *Whitney*, 3 *Ad. & Ellis*, 69; 7 *Car. & P.* 208, S. C.) Nor is the fact that it is built over water flowing in a channel between banks, though nothing can be a bridge which is not built over such a flow of water. (*Id.*)

Must be over a river or flowing water to make it a county bridge.

The bridge, to make it a public one and render the county liable to repair it, must be a "common and public building over a river or water flowing in a channel more or less defined, whether such river or channel be occasionally dry or not." (See *R.* v. *Oxfordshire*, 1 *B. & Adol.* 289; *R.* v. *Whitney*, *suprà*; *Reg.* v. *Inhabitants of Derbyshire*, 2 *Gale & Dav.* 97.) And therefore where the road, by which a bridge was occasionally flooded by a river, and for convenient access to the bridge a raised causeway had been made having arches or culverts at intervals for the passage of the flood of water, which were equally necessary to the safety of the main bridge and the causeway, it was held that the inhabitants of the county were not bound to repair, such arches being at the distance of more than 300 feet from the end of the main bridge. (*R.* v. *Oxfordshire*, *suprà*.)

But where a structure, called Swarkeston Bridge, was 1275 yards long, at the eastern end were five arches, under which the river Trent flowed; at the western end eight arches, under one of which a stream constantly flowed; the

rest of the space consisted of a raised causeway, at different intervals in which there were twenty-nine arches, under most of which there were pools of water at all times, and under all of which the water of the Trent flowed in time of flood. There was no interval of causeway between the arches of the length of 300 feet. The county of Derby had immemorially repaired the whole structure. On an indictment against the inhabitants of the county, for the non-repair of the structure, describing the whole as a bridge: it was held, that it was properly so described, and that the verdict was properly entered for the crown. (*Reg.* v. *Inhabitants of Derbyshire, sup.*)

2. *Who shall Repair at Common Law.*

Freehold, &c. in bridges.

As the freehold of highways in general is vested in the adjoining proprietors, or lord of the manor, and not in the public, so the freehold in bridges is in him that hath the freehold of the soil; but the free passage is for the public. (2 *Inst.* 705.)

Where a person built and dedicated a bridge to the public, and the materials ceased to be part of the bridge, it was held that the property in them reverted to the original owner. (*Harrison* v. *Parker*, 6 *East*, 154.)

II. Who shall Repair at Common Law.

Liability of county.

The County.]—The inhabitants of a county are *primâ facie* bound by common law to repair all public bridges in the county. (2 *Inst.* 701.)

And this liability of the county exists without distinction as to whether the bridge be a foot, horse, or carriage bridge. (*R.* v. *West Riding, Yorkshire*, 5 *Burr.* 2594; *R.* v. *Salop*, 13 *East*, 95; 2 *Inst.* 700.)

But the county may relieve themselves from liability by showing that the whole, or that a part of the bridge is within a franchise, in which former case the whole, or in the latter case so much as is within the franchise, shall be repaired by those of the franchise; (1 *Hawk.* c. 77, s. 1; 1 *Inst.* 701;) or by showing that others are bound to repair *ratione tenuræ* or otherwise. (See *R.* v. *Salop*, 13 *East*, 95; *R.* v. *Bucks*, 12 *East*, 192; 2 *Inst.* 700.)

Liable though built by an individual, if before the 43 Geo. 3, c. 59.

The county are liable, notwithstanding the bridge was built by a private individual, if it was built for the public benefit, and before the 43 Geo. III. c. 59, s. 5; (*post*, 450;) or if built after that act, provided it were built in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor, &c. If indeed a man wantonly erects a useless, or a merely ornamental bridge, neither he nor the public are bound to sustain it. And if it is principally for his own benefit, and only collaterally of benefit to others, the county has nothing to do with it. But where it is of public utility, the county ought to sustain the burden of repairing it, since the public reap the benefit of it. Else it would be a great discouragement to public spirited persons to erect a beneficial bridge, provided they must either repair it themselves, or it must run to ruin. The authorities on this subject were all considered in *R.* v. *West Riding of Yorkshire*, (5 *Burr.* 2594; 2 *Bla. R.* 685). In the case of *Glusburne* Bridge, decided before the 43 Geo. III. c. 59, s. 5, where to an indictment against the riding for the non-repair, the plea stated, that there was an ancient foot-bridge over the stream, which the township of *Glusburne*, who were bound to repair it, took down, and in lieu thereof erected the carriage bridge in question, and had repaired the new bridge since its erection; that the new bridge was of public utility, and used constantly, till carried away by a flood; that the ancient foot-bridge stood sixty yards below the new bridge in the same highway; and all the Court held the riding liable to the repair, on the general principle, that if a private person build a bridge which afterwards become a public convenience, the county is bound to repair it.

If indeed a person erect a bridge in a highway of a slight and incommodious nature, and evidently intended to throw a burden on the county, it may be indicted and abated as a common nuisance. (*R.* v. *West Riding of Yorkshire*, 2 *East*, 348; and see the enactment of the 43 Geo. III. c. 59, s. 5, *post*, 450.)

The county is liable to repair a public bridge built in the highway, and

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used by the public above forty years, though originally erected for the convenience of an individual. (*R.* v. *Glamorganshire*, 2 *East*, 356, n.)

And where a person about forty-five years back erected a mill and dam thereto for his own profit, *per quod* he deepened the water of a ford, through which there was a public highway, but the passage through which was, before the deepening, very inconvenient at times to the public, and the miller afterwards built a bridge over it which the public had ever since used, the Court of Queen's Bench held that the county and not the miller were chargeable with the reparation. (*R.* v. *Kent*, 2 *M. & Sel.* 513.)

By their act of incorporation the proprietors of the Surrey Canal were required to erect and maintain bridges over the canal where it intersected any public highway, bridle-way, or footpath, and also for the use of the owners and occupiers of land, &c. adjoining to the canal. In 1804 the company erected a swivel bridge (of sufficient dimensions to allow a carriage to traverse it) across the canal, at a spot where there had formerly been a public way, which at the most was only a bridle-way. This bridge was originally intended for the exclusive accommodation (as a carriage-way) of the tenants of an estate adjoining called the Rolls Estate. The neighbourhood having become extremely populous, and a district church having been built near the bridge, the public, from 1822 to 1832, freely and without interruption used it as a carriage-way. In 1832 the company for the first time imposed a toll upon all carriages traversing the bridge, with the exception of those belonging to the tenants of the Rolls Estate; and in 1840 they removed the old swivel bridge, and erected a convenient stone bridge in the place of it. In an action of trespass against the defendant for passing over the bridge without paying toll, the judge told the jury, that, supposing the bridge in question to have been originally erected for the exclusive accommodation of the tenants of the Rolls Estate, still, if, in consequence of the acts of the company, an idea grew up in the minds of the public that the company had dedicated the way to the public use, they might find such dedication. This was held not a misdirection; and the Court thought the evidence warranted the jury in finding a dedication. (*Surrey Canal Company* v. *Hall*, 1 *Scott, N. R.* 264.)

Liable though built by the crown.

So the county is liable to the repair notwithstanding the bridge was erected and repaired by the crown and for the benefit of the sovereign. Thus in an indictment against the inhabitants of the county of Bucks for not repairing the half of Datchet Bridge, they pleaded specially, and traversed the bridge being a public one. The defendants were found guilty, subject to a special case. The case stated that Queen Anne, for her convenience in passing to and from Windsor Castle, built a bridge over the Thames at Datchet, in the common highway leading from London to Windsor, in lieu of an ancient ferry, with a toll which belonged to the crown. She and her successors repaired the bridge till 1726, when it having in part fallen in and become impassable, the whole was removed, and the materials converted to the use of the king, who re-established the ferry. The question was, whether this was a public bridge and the defendants liable to repair and rebuild? The opinion of the Court was, that this bridge, situated in a principal highway, and used, as it so long was, for all persons as a public bridge, and being also of great public use and convenience, was and is a bridge repairable, as to the half part now in question, by the county of Bucks, in which it was, until the period of its late dilapidation and destruction, situate. (*R.* v. *Bucks*, 12 *East*, 192.)

Liable though built under act of parliament or by trustees of turnpike road before the 43 Geo. 3.

The county or riding are even liable to the repair of a public bridge erected by commissioners under an act of parliament before the 43 Geo. III. c. 59, s. 5, though the latter are empowered to raise tolls in order to support it, or though other funds are provided for the repairs, there being no special provision for exonerating them from the common law liability or transferring it to others. (*R.* v. *West Riding of Yorkshire*, 2 *East*, 342.) *Et per* Lord *Ellenborough*, C. J., "By the common law counties are chargeable with the repair of public bridges, unless it be shown, as the statute 22 Hen. VIII. c. 5, (which was founded on the common law, and of which hereafter, *post*, 453,) says, 'what persons, lands, tenements, and bodies politic, ought to make and repair such bridges.' In the absence of such proof, that burden is, by the

operation of the common law, thrown on the inhabitants of the county in which the bridge lies. But in order to effect this, it is not enough that a new bridge shall be built in a highway used by the public, it must also be useful to the public. I do not lay stress on the idea of the public having adopted the bridge by passengers going over it, because if it occupy the highway they cannot help using it. I only rely on the using of it so far as to show that it does not appear to have been treated as a nuisance, but to have been acquiesced in by the public. If, however, it be built in a slight or incommodious manner, no person can at his choice impose such a burden on the county, and it may be treated altogether as a nuisance, and indicted as such. But if the public lie by without objection, and make use of it for some time, it is evidence that they adopt the act, and the bridge becoming of public benefit, the burden of repair ought properly to fall upon the public. Now that this bridge is for the common good, is proved by the use of it by all the king's subjects passing that way, by its not having been treated as a nuisance, but acquiesced in. Then, after having enjoyed the benefit of it, shall the public object to it when they begin to feel the burden of repair? The rule laid down by *Aston*, J. in the *Glusburne* Bridge case, seems to be the true one, that 'if a man built a bridge, and it becomes useful to the county in general, the county shall repair it.' And as to the adoption of it by the public, there is good sense in not relying on that, except as evidence of its being a public bridge and of utility to the public." *Per Grose*, J. "It being stated in the plea that the bridge was erected by the trustees of a turnpike road under a public act of parliament, I cannot suppose that it was not a public bridge built for the benefit of the public, and of public utility; and not merely for ornament, or for private benefit. If it were shown that a bridge had been built at first in a slight and imperfect manner, for the purpose of throwing the expense immediately on the county, I should think that it was a public nuisance and indictable." *Lawrence*, J. agreed, and said, "The principle to be collected from the *Glusburne* Bridge case is, that if the bridge be of public utility, the county who derive advantage from it must support it. But it is said that we cannot collect that the bridge in question is of such a description. But when we observe that it was erected by trustees of a turnpike road under an act of parliament, we cannot suppose it was erected for other purposes than for the public utility."

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In the same case as to the particular question of the liability of the trustees of the road, Lord *Ellenborough*, C. J. said, "As to the objection that it ought to be repaired by the commissioners of the turnpike by whom it was erected, and who have authority to raise tolls for the purposes of the act, I cannot find any authority for them to erect bridges under this act; however, I will suppose they were authorised to erect the bridge: yet no fund having been specially provided by the legislature for the repair of it, the burden must necessarily fall where the common law has placed it, viz. on the riding. I am aware of the extent of this opinion, and if the trustees under similar acts throw this burden generally on the counties, it may be necessary to make special legislative provision in future." *Per Lawrence*, J. "As to the objection that the trustees are empowered to take tolls, that is, supposing that they are to derive some private advantage from the tolls, which is not the case, whatever tolls are raised must be laid out on the maintenance of the roads. It might as well be contended, that if a parish were to build a new bridge on a road within their limits, they would be bound to keep it in repair afterward, and that the county would not be liable, as that the trustees are in this case, because the bridge is built in the turnpike road; in truth, the trustees are merely substituted in lieu of the parish;" and *Le Blanc*, J. observed, "That the circumstance of the bridge being built by trustees under an act of parliament, to which the defendants must be considered as parties and assenting, and by those to whom the legislature delegated the trust of determining whether it were proper to build the bridge, made the case stronger against the defendants than where an individual had in the first instance exercised his own discretion."

Liable though built by trustees of a road if before the 43 Geo. 3.

And this common law liability of a county to repair a public bridge is so

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strong, that although a public bridge has been erected and constantly repaired by trustees under act of parliament, and although there be funds for the repairs, the county are still liable to repair it if it was built before the 43 Geo. III. (*R.* v. *Oxfordshire*, 4 *B. & Cres.* 194; 6 *D. & R.* 231, S. C.)

And where trustees of a turnpike act built a bridge across a stream where a culvert would have been sufficient, but a bridge was better for the public, the county cannot refuse to repair such bridge on the ground that it was not absolutely necessary. (*R.* v. *Lancashire*, 2 *B. & Adol.* 813.)

In 1 *Ld. Raym.* 725, Lord *Holt* says, "The inhabitants of every parish of common right ought to repair the highways, and, therefore, if particular persons are made chargeable to repair the said ways by a statute lately made, and they become insolvent, the justices of the peace may put that charge upon the rest of the inhabitants."

Where an act of parliament appoints trustees for taking down an old bridge and building a new one in its room, the county is not liable to repair until the purposes of the act are accomplished, and the powers it confers cease to operate. (16 *East*, 395.)

Liable though built by public company, if before the 43 Geo. 3.

Where the Medway Navigation Company, being empowered under a local act to make the river navigable and to take tolls, "and to amend or alter such bridges or highways as might hinder the passage or navigation, *leaving them or others as convenient in their room*," had forty years before destroyed a ford across the river, in the common highway, by deepening its bed, and built a bridge over the same place; it was held that they and not the county were bound to keep such bridge in repair, they being under a continuing condition to preserve the new passage in lieu of the old one, which they destroyed for their own benefit. (*R.* v. *Kent*, 13 *East*, 220.)

And where certain persons and their successors were authorised by act of parliament to make a river navigable, and to cut the soil of any person for making any new channel, &c. by virtue of which they cut through a highway and render it impassable, and a bridge was built over the cut, over which the public passed, and which had been repaired by the proprietors of the navigation; the Court of Queen's Bench held, that the proprietors and not the county were liable to repair. After argument in this case, Lord *Ellenborough*, C. J. said, "The undertakers of this navigation have a duty, as it seems to me, arising out of the execution of their own powers under this act. The act enables them to cut new channels as occasion shall require; and if occasion requires them to cut through a public highway, their duty is to furnish a substitute to the public by means of a bridge." *Bayley*, J. said, "This differs from the last case of *R.* v. *Kent* (*supra*); there the county derived a very essential benefit from the bridge; they had before but a passage through the ford, which is always an inconvenient one; but what benefit does this county derive from passing over a bridge instead of the solid highway." Judgment for the crown. (*R.* v. *Kerrison*, 3 *M. & Sel.* 526.)

So where a canal company before the 43 Geo. III. cut and deepened a ford across a highway, and thereby rendered a bridge necessary for the use of the public, which they built; it was held they were bound to repair it, the bridge being necessary for the purposes of the company, and not for the public. (*R.* v. *Lindsey, Lincolnshire*, 14 *East*, 317.)

Bridges built after the 43 Geo. 3, not liable to repair unless built to satisfaction of county surveyor, &c.

43 Geo. 3, c. 59.

In order to protect a county from the charge of repairing bridges, which in point of utility were not equal to the expense, "And for the more clearly ascertaining the description of bridges hereafter to be erected, which inhabitants of counties shall and may be bound or liable to repair and maintain;" it is enacted by stat. 43 Geo. III. c. 59, s. 5, "that no bridge hereafter to be erected or built in any county by or at the expense of any individual or private person or persons, body politic or corporate, shall be deemed or taken to be a county bridge, or a bridge which the inhabitants of any county shall be compellable or liable to maintain or repair, unless such bridge shall be erected in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor or person appointed by the justices of the peace at their general quarter sessions assembled, or by the justices of the peace of the county of Lancaster, at their annual general sessions; and

which surveyor or person so appointed is hereby required to superintend and inspect the erection of such bridge when thereunto requested by the party or parties desirous of erecting the same; and in case the said party or parties shall be dissatisfied, the matter shall be determined by the said justices respectively at their next general quarter sessions, or at their annual general sessions in the county of Lancaster." (See the other sections of this act *post*, p. 458.)

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Surveyor, &c. to inspect erection. Sessions to arbitrate in disputes.

Trustees appointed by a local turnpike act are individuals or private persons within the meaning of this statute, and therefore a bridge erected by such trustees, after the passing of that act, but not under the direction or to the satisfaction of the county surveyor, &c., is not a bridge which the inhabitants of the county are liable to repair. (*R.* v. *Derby*, 3 *B. & Adol.* 147.)

The act applies only to bridges newly built, and not to those repaired or widened. (*R.* v. *Lancashire*, 2 *B. & Adol.* 813.) A county bridge having been washed away in 1807, except the buttresses, which remained unmoved, was, after the passing of 43 Geo. III. c. 59, rebuilt wider than before, and without notice to the county surveyor, by the parish, partly with the old materials, and in the same line of passage over the river; it was held that the county was liable to repair, and that this was not a new bridge within the meaning of the act. (*R.* v. *Devonshire*, 2 *Nev. & M.* 212; 5 *B. & Adol.* 383, S. C.)

Parishes and Townships.]—A portion of a county, as a parish or township, or the like, may by immemorial custom be liable to repair a particular bridge or all bridges within the parish, in the same way as a township or other district in a parish may by custom be liable to repair a highway. And in *R.* v. *Hendon*, 4 *B. & Adol.* 628, it was held, that a parish may be indicted for non-repair of a bridge, without stating any other ground of liability than immemorial usage.

Parishes.

In *R.* v. *Ecclesfield*, 1 *B. & Ald.* 359, Lord *Ellenborough*, C. J. said, "As the case of parishes, and highways within them, is analogous to that of counties and bridges, the charge of repairing a highway shall fall upon the parish, in default of usage and custom to charge the particular portion of the parish wherein it is situate; and as a hundred, or parish, or other known portion of a county, may by usage and custom be chargeable to the repair of a bridge erected within it, so in like manner a township or other known portion of a parish may by usage and custom be chargeable to the repair of the highways within it. And upon an attentive perusal of the passages of Lord *Coke's* commentary, we think it plain, that in drawing the distinction between bodies politic and natural persons, the learned writer speaks of individual persons, and not of an aggregate of the inhabitants of parishes or other places."

Townships.

Corporations.]—By reason of prescription, corporate bodies may be liable to repair a public bridge. (2 *Inst.* 700; *R.* v. *Oswestry*, 5 *M. & S.* 561; *Reg.* v. *Birmingham and Gloucester Railway Company*, 2 *G. & D.* 236.) But herein there is a diversity between bodies politic or corporate, spiritual or temporal, and natural persons, for the bodies politic or corporate, spiritual or temporal, may be bound by usage and prescription only, because they are local and have a succession perpetual; but a natural person cannot be bound by act of his ancestor, without a lien, or binding, and assets. (2 *Inst.* 700.)

Corporations.

Public Bodies.]—As to the liability of public bodies to repair, see *ante*, p. 448, 449.

Public bodies.

Individuals.]—Individuals also, by reason of the tenure of their lands or tenements, may be liable to repair a public bridge (2 *Inst.* 700.) And where any person is liable to repair such a bridge, his tenant for years (being in possession) will be under the same obligation, and liable to an indictment for not repairing it. (*R.* v. *Bucknall*, 2 *Lord Raym.* 804, 856; 1 *Salk.* 367; 2 *Saunders*, 158, *n.* (9). But the onus of the repair, *ratione tenuræ*, falls ulti-

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mately upon the owner, and not upon the occupier. (*Baker* v. *Greenhill*, 6 Jur. 710—Q. B.)

On indictment for non-repair of a bridge, charging the defendants as liable, *ratione tenuræ*, they produced at the trial a record setting forth a presentment in the time of Edw. III. against a bishop of L. (not connected with the present defendants), who was thereby charged with non-repair of the same bridge and liability to repair. The record stated a trial of this presentment at the Spring assizes in the year 20 Edw. III., and an acquittal of the bishop as not liable; it further stated, that the jury being asked who was bound to repair, said they did not know, and being asked when and by whom it was first built or repaired, said about sixty years since, and then of alms, and that a bishop of L. bestowed 40*s.* on the workmen repairing it of his alms and not otherwise. In addition to this record, the defendants put in a writ of privy seal of June 28th, 20 Edw. III., for a grant of pontage to the town of K. (where the bridge was), reciting as the cause of the grant, that the bridge was ruinous and no person bound to repair in certain, according to that which was found by inquest. They also put in the grant of pontage dated in the same year. The Court held that this evidence was admissible on behalf of the defendants. The Court also considered that the special findings of the jury might have been regular, according to the practice in the time of Edw. III., and that, at all events, the acquittal of the bishop, followed by the writ and grant of pontage, was evidence to negative the existence of a prescriptive liability to repair the bridge in any person. (*Reg.* v. *Sutton*, 8 *Ad. & Ell.* 516; 3 *Nev. & P.* 569, S. C.)

Bridge enlarged by an individual.

In the case of *R.* v. *West Riding of Yorkshire* (2 *East*, 353, n.), defendants were indicted for not repairing a public carriage bridge; plea, that certain townships had immemorially repaired: issue taken thereon. The facts were that there had been immemorially a foot bridge till 1745, when the townships enlarged it to a horse bridge, and afterwards to a carriage bridge, at their own expense; that the riding had never repaired it. It was held that this evidence did not maintain the defendant's plea; and further, that where a party is bound to repair a foot bridge, he shall not discharge himself by turning it into a horse or carriage bridge, but shall still repair it as a foot bridge, i. e. *pro ratâ*.

Converting a foot into a horse bridge.

Repairing of house adjoining bridge.

A tenant at will of a house, which adjoins to a public bridge, is bound to repair the house, so that the public be not prejudiced by the want of repair, although, being only tenant at will, he be not bound to repair as to his landlord. (*Reg.* v. *Watson*, 2 *Ld. Raym.* 856; 1 *Salk.* 357, S. C.)

Infants.

Guardian.

An infant, whose guardian is in possession of an estate in respect of which there is a liability to repair a bridge, is not liable to an indictment for non-repair either as owner or occupier A guardian in socage may be liable. (*R.* v. *Sutton*, 5 *Nev. & M.* 353; 1 *Har. & W.* 429, S. C.)

Lords or tenants of manors.

A liability being laid, *ratione tenuræ*, in the lords of a manor to repair a bridge by reason of the demesnes of the manor is good. (*R.* v. *Bucknall*, 2 *Lord Raym.* 804.) And as the obligation is by reason of the demesnes of the manor, if part of the demesnes be granted to an individual, he will be obliged to contribute to the repairs. (*Id.*; *Deac. C. Dig.* 168.) If a manor be held by the service or tenure of repairing a common bridge or highway, and that manor afterwards comes to be divided into several hands; every one of these alienees, being tenants of any parcel either of the demesnes or services, shall be liable to the whole charge, and they are contributory among themselves. And though the lord of the manor might upon the several alienations agree to discharge those that had purchased of him of such repairs, yet that shall not alter the remedy for the public, but only bind the lord and those that claim under him. As the whole manor, and every part of it, in the possession of one tenant, was once chargeable with the reparations, so it shall remain, notwithstanding any act of the proprietor: it shall not be in his power to apportion the charge whereby the remedy for the public benefit shall be made more difficult, or by alienations to persons unable, to render it, in respect of the parts which should come into such hands, quite frustrate. (*R.* v. *Duchess of Buccleugh*, 1 *Salk.* 358.)

III. Who liable to repair by Statute.

By the Great Charter, 9 Hen. III. c. 15, "no town nor freeman shall be distrained to make bridges nor banks, but such as of old time and of right have been accustomed." And none can be compelled to make new bridges where never any were before, but by act of parliament. (2 *Inst.* 701.) This statute is no more than declaratory of the common law. (2 *Inst.* 700.)

Who to repair by statute. 9 Hen. 3, c. 15.

By the 22 Hen. VIII. c. 5, (called the Statute of Bridges,) after reciting by section 2, that "in many parts of this realm it cannot be known and proved what hundred, riding, wapentake, city, borough, town, or parish, nor what person certain or body politic ought of right to make such bridges decayed, by reason whereof such decayed bridges, for lack of knowledge of such as own to make them, for the most part lie long without any amendment, to the great annoyance of the king's subjects."

22 Hen. 8, c. 5.

Sect. 3, for remedy thereof, enacts, "that in every such case the said bridges, if they be without city or town corporate, shall be made by the inhabitants of the shire or riding within the which the said bridge decayed shall happen to be; and if it be within any city or town corporate, then by the inhabitants of every such city or town corporate wherein such bridges shall happen to be; and if part of any such bridges so decayed happen to be in one shire, riding, city, or town corporate, and the other part thereof in another shire, riding, city, or town corporate, or if part be within the limits of any city or town corporate, and part without and part within one riding and part within another, that then in every such case the inhabitants of the shires, ridings, cities, or towns corporate shall be charged and chargeable to amend, make, and repair such part and portion of such bridges so decayed as shall lie and be within the limits of the shire, riding, city, or town corporate, wherein they be inhabited at the time of the same decays." This statute is only in affirmance of the common law. (2 *Inst.* 700.)

Bridges out of cities, &c.

Bridges in cities, &c.

Bridges broken in the Highways.]—This extendeth only to common bridges in the Queen's highways, and not private bridges, to mills, or the like; the remedy in which case is not by indictment, but by action. (2 *Inst.* 701; 1 *Hawk.* c. 77, s. 19.)

Construction of stat. 22 Hen. 8, c. 5.

Within a City or Town Corporate.]—It hath been questioned whether a borough, which hath no bridge within its own limits, be not liable to contribute to the repairs of a county bridge. (1 *Hawk.* c. 77, s. 19; 1 *Keb.* 68.)

It seems that where the Queen enlarges the boundaries of a city by annexing part of the county to the county of the city, the enlarged part is to be considered as parcel of the old county of the city, so as to charge the inhabitants with the repairs of bridges, which were situate at the time of the statute within the county at large; for as the statute lays *no absolute charge till the bridge is in decay*, and as the bridges in question (which were within the county of Norfolk when the statute was made) were not then actually in decay, the statute had no operation on them before they were annexed to the city of Norwich. (*R.* v. *Norwich*, 1 *Stra.* 177; and see *R.* v. *St. Peter, York*, 2 *Lord Raym.* 1249; *Deacon, C. Dig.* 165.)

The inhabitants of a town are not bound to repair a bridge out of the town. (*R.* v. *Gamlingay*, 3 *T. R.* 513.)

Where townships have enlarged a bridge, which they were before bound to repair as a foot bridge to a carriage bridge, they shall be liable *pro ratâ.* (*R.* v. *West Riding of Yorkshire*, 2 *East*, 353, n., *ante*, 452.)

By the Inhabitants.]—The persons to be charged by this act are comprehended under the word inhabitants; which word, being the largest word of the kind, is needful to be explained.

First, although a man be dwelling in a house in a foreign county, city, or town corporate, yet if he hath lands in his own possession and manurance in the county, city, or town corporate, where the decayed bridge is, he is an inhabitant, both where his person dwelleth, and where he hath lands in his own possession.

Secondly, if a man dwelleth in a foreign shire, city, or town corporate, and keepeth a house and servants in another shire, city, or town corporate, he is an inhabitant in each shire, city, or town corporate within this statute.

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Thirdly, *ex vi termini*, every person that dwelleth in any shire, city, or town corporate, though he hath but a personal residence, yet he is said in law to be an inhabitant, or a dweller there, as servants or the like; but this statute extendeth not to them, but to such householders who may be distrained for non-payment; and it would be infinite and impossible to tax every inhabitant being no householder.

Fourthly, every corporation and body politic residing in any county, city, or town corporate, or having lands or tenements in any county, city, or town corporate, which they keep in their own hands and occupation, are said to be inhabitants there within the purview of this statute.

Fifthly, an infant that hath house or lands by descent or purchase, is liable to the public charge; and so is the husband of a feme covert. (2 *Inst.* 702.) See further as to who are inhabitants, *post*, "*Constables.*"

IV. Concerning the 300 Feet at the Ends of Bridges.

Bridges built before the 20th March, 1836. County bound to keep in repair 300 feet of the highway at each end.

Bridges built before the 20th March, 1836.]—Stat. 22 Hen. VIII. c. 5, s. 9, after reciting, "Forasmuch that albeit bridges decayed were amended and repaired according to the tenor of this act, yet nevertheless, if speedy remedy for the amendment of the ways next adjoining to every of the ends of such bridges should not be had and made, the king's subjects should take little or none avail or commodity in many parts of this realm by the making of the bridges: in consideration whereof," it is enacted, "that such part and portion of the highways in every part of this realm, as well within franchise as without, as lie next adjoining to the ends of any bridges within this realm, distant from any of the said ends by the space of three hundred foot, be made, repaired, and amended as often as need shall require; and that the justices of the peace in every shire of this realm, franchise, city, or borough, or four of them at the least, whereof one to be of the quorum, within the limits of their commissions and authorities, shall have power and authority to inquire, hear, and determine in the king's general sessions of peace, all manner of annoyances of and in such highways, so being and lying next adjoining to any ends of bridges within this realm, distant from any one of the ends of such bridges three hundred foot, and to do in every thing and things concerning the making, repairing, and amending of such highways, and every of them, in as large and ample manner, as they might and may do, to and for the making, repairing, and amending of bridges, by virtue and authority of this present act"

Common law liability to repair the roads at ends of bridges.

The county is, by the common law, bound *primâ facie* to repair the road at the ends of every bridge, which bridge it is bound to repair; the above statute of 22 Hen. VIII. has fixed the length at 300 feet. (*Per* Lord *Eldon*, C., *R.* v. *West Riding of Yorkshire*, 5 *Taunt.* 284; and see *R.* v. *West Riding of Yorkshire*, 4 *B. & Ald.* 623.) The reason why the county is thus bound to repair this addition to the bridge is, that it is considered as intimately connected with the bridge itself; and it is difficult to ascertain the precise limits of the bridge from the continuation of arches on each side of the river. (*R.* v. *West Riding of Yorkshire*, 7 *East*, 588.)

The inhabitants of a county in which a new bridge was built (before 20th March, 1836,) within 300 feet of an old bridge in another county, were held liable to repair such new bridge. (*R.* v. *Devonshire*, 14 *East*, 477.) The county of Devon is divided from the county of Dorset by the river Yarty, over which there is a bridge maintained by Dorset, the inhabitants of which, in course, under stat. 22 Hen. VIII. c. 5, maintained the road for 300 feet on the Devonshire side from the bridge as part of such bridge. At the distance of 150 feet from the bridge on the same side, the road about thirty years ago led through a ford occasioned by a small stream which runs into the Yarty; but about that time, in order to avoid the inconvenience of the ford, a smaller bridge was built over it by an individual, which having been generally used by the public ever since, was considered as having been adopted by the county. The smaller bridge having fallen into decay, and requiring repair, the inhabitants of Devon were called upon to repair it;

which they objected to on the ground that being within 300 feet of the former bridge over the Yarty, which was repairable by Dorset, the inhabitants of Devon were no more bound to repair the smaller bridge than they were the road for that distance before that bridge was built, though lying within the limits of their county. Whereupon this indictment was preferred against them for the non-repair of the smaller bridge, and a verdict passed for the crown. And upon a motion for a new trial Lord *Ellenborough*, C. J., said, "Each is a substantive bridge in a different county, and the new bridge cannot be considered as an appendage to the other. The statute of Hen. VIII. attaches equally on the inhabitants of each county in respect of its own bridge. It makes no difference that the new bridge was first built by an individual, if it were afterwards adopted by the public as of great public utility. While it continued a road, it was repairable as part of the old bridge; but now that there is a substantive bridge built on the Devonshire side, it is repairable as a bridge by the inhabitants of the county in which it is situate, according to the statute."

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And see *R.* v. *Inhabitants of Gloucestershire* (1 *C. & M.* 506), which was the case of an indictment under the above act, and in which it was considered by *Cresswell*, J. "That it was not material to the liability of the county whether the bridge was originally necessary for the convenience of the public or not."

When others than county liable.

It may be taken as a general rule that where any district, corporation, public body, or private individual, by prescription or tenure, is liable to repair a bridge, it is an intendment of law, in the absence of any evidence to the contrary, that the liability extends to three hundred feet of the approaches at each end of the bridge. (*Reg.* v. *Lincoln, Mayor, &c.*, 2 *Nev. & Per.* 273; 8 *Ad. & Ell.* 65, S. C.) And such presumption is not rebutted by proof that the party has been known to repair only the fabric of the bridge, and that the only repairs known to have been done to the highway have been performed by commissioners under a turnpike road act. (*Ib.*)

A bridge originally built by subscription, in lieu of a foot bridge, having become a public benefit, is chargeable on the county; the highway, within the limits of 300 feet at each end, is bound by the same rule of law with respect to it as the bridge itself, and the charge of the repairs of such highway, within such limit, belongs *primâ facie* to the party charged with the repair of the bridge itself; and if the inhabitants of a county be indicted for the non-repair thereof, they cannot exonerate themselves except by pleading specially that some other is bound by prescription or tenure to repair the same. (*West Riding of Yorkshire* v. *R.*, 2 *Dow*, 1; 5 *Taunt.* 284; 7 *East*, 583; 3 *Smith*, 437, S. C.)

If the bridge be on a turnpike road, and the county make default in repairing the 300 feet at the end of a bridge built before the 20th March, 1836, perhaps the road trustees might be made liable to the repair. (See *Bussey* v. *Storey*, 1 *Nev. & M.* 639; 4 *B. & Adol.* 98, S. C.)

Where the road by which a bridge was approached passed between meadows which were occasionally flooded by a river, and for convenient access to the bridge a raised causeway had been made, having arches or culverts at intervals for the passage of the flood water, which were equally necessary to the safety of the main bridge and the causeway: it was held that the inhabitants of the county were not bound to repair such arches, being at the distance of more than 300 feet from the end of the main bridge. (*R.* v. *Oxfordshire*, 1 *B. & Adol.* 289.)

Bridges built after 20th March, 1836. County not liable to repair roads leading to.

Bridges built after 20th March, 1836.]—With respect to bridges to be built after the 20th March, 1836, the 5 & 6 Will. IV. c. 50, s. 21, (the General Highway Act,) enacts, "that if any bridge shall hereafter be built, which bridge shall be liable by law to be repaired by and at the expense of any county or part of any county, then and in such case all highways leading to, passing over, and next adjoining to such bridge shall be from time to time repaired by the parish, person, or body politic or corporate, or trustees of a turnpike road, who were by law before the erection of the said bridge bound to repair the said highways: provided nevertheless, that nothing herein con-

Raised causeways, &c.

4. *Concerning the Ends of Bridges.*

tained shall extend or be construed to extend to exonerate or discharge any county or any part of any county from repairing or keeping in repair the walls, banks, or fences of the raised causeways and raised approaches to any such bridge, or the land arches thereof."

V. Manner, &c. of Repairs, Widening, Diverting, &c.

Manner of repairing.

Those who are bound to repair public bridges must make them of such height and strength as shall be answerable to the course of the water, whether it continues in the old channel or makes a new one. (1 *Hawk.* c. 77, s. 1.)

Entering lands.

Persons bound to repair county bridges may, by the common law if necessary, enter on any adjoining lands for such repairs, or lay thereon the requisite materials. (1 *Hawk.* c. 77, s 1.)

Widening.

Those who are bound to repair bridges are not necessarily bound by the common law to *widen* them, at least the county are not so bound. (*R.* v. *Devonshire*, 4 *B. & Cres.* 670; 2 *Nev. & M.* 212, S. C.; *Cumberland* v. *Rex*, 3 *B. & Pul.* 354.) And no persons are compellable to *build*, or contribute to the *building* of any *new bridge*, without an act of parliament; nor can the inhabitants of a county, by their own authority, merely *change* a bridge or highway from one place to another. (2 *Inst.* 700.) But the statutes 14 Geo. II. c. 33, s. 1, (*a*) and 43 Geo. III. c. 59, s. 2, allow the quarter sessions to compel the county to widen or change old bridges, or build new ones.

Building a new.

Changing.

Sessions may alter situation of county bridges,

The following is the enactment of the 43 Geo. III. c. 59, s. 2, which incorporates and supplies many defects in the enactment of the 14 Geo. II. c. 33, s. 1: It enacts, "that where any bridge or bridges, or roads at the ends thereof, repaired at the expense of any county, shall be narrow and incommodious, it shall and may be lawful to and for the said justices, at any of their general quarter sessions, to order and direct such bridge or bridges, and roads, to be widened, improved, and made commodious for the public; and that where any bridge or bridges, repaired at the expense of any county, shall be so much in decay as to render the taking the same wholly down necessary or expedient, it shall and may be lawful to and for the said justices, at any of their said general quarter sessions, to order and direct the same to be rebuilt, either on the old site or situation, or on any new one more convenient to the public, contiguous to or within 200 yards of the former one, as to such justices shall seem meet; and if, for the purpose of altering the situation, or of widening or enlarging any such bridge or bridges, road or roads as aforesaid, it shall be necessary to purchase any land or ground, [or by stat. 54 Geo. III. c. 90, 'any building or buildings, or other erections,'] it shall and may be lawful for such county surveyor or surveyors, by and under the direction of such justices at their general quarter sessions as aforesaid, to set out and ascertain the same, not exceeding in the whole one acre at any one such bridge as aforesaid, and to contract and agree with the owner or owners of such land, and persons interested therein, for the purchase thereof, either by a sum in gross or by an annual rent, at the option of such owner or owners; and if the said surveyor or surveyors cannot agree with the said owner or owners for the purchase thereof, or the recompence to be made for the same, or by reason of such owner or owners not being to be found shall be prevented from treating, then and in every such case the said justices in their general quarter sessions shall impannel a jury, and assess the compensation and satisfaction for such land, and for the trespass and damage to be done by the execution of the

or widen,

or rebuild same.

May purchase lands, buildings, &c.

Not exceeding an acre.

On disagreement with owner a jury to assess compensation,

(*a*) It was said by *Buller, J.*, in *R.* v. *Justices of Glamorganshire*, 5 *T. R.* 279, "As to the power of justices to change roads, by changing the local situation of a bridge, there certainly are old cases against it, and they were properly decided: because previous to statute 14 Geo. II. c. 33, the sessions had no power to change the situation of bridges; but that act impliedly gives them that power, for it enables them to purchase lands adjoining any county bridge, *for the more commodious enlarging and convenient rebuilding the same.* This, therefore, impliedly gives them the power of altering the position of the bridge to suit the convenience of the public."

powers of this act, in the same manner as they are authorised and empowered to do by the said above-mentioned act of the thirteenth year of the reign of his present majesty, in relation to highways; and all and every the clauses, powers, provisions, exemptions, penalties, matters and things in the said act contained, as well with respect to impannelling juries, examining and swearing witnesses, payment of expenses, enabling bodies politic, corporate, and collegiate, and other incapacitated persons, to sell and convey, and all other the powers and provisions of the said act, shall be, and the same are hereby extended and applied to the works by this act authorised to be done and performed, as far as the same are applicable, as fully and effectually, to all intents and purposes, as if the same were herein particularly repeated and re-enacted; provided that no money shall be applied to the amendment or alteration of any such bridge or bridges, until presentment shall have been made of the insufficiency, inconveniency, or want of reparation of such bridge or bridges, in pursuance of some or one of the statutes made and now in force concerning public bridges." (See the other sections of this act, *post*, 458.)

5. *Manner, &c. of Repairs, &c.*

43 Geo. 3, c. 50.

as under highway acts.

Presentment to be first made.

By the 4 & 5 Vict. c. 49 (*post*, 467,) justices at sessions are empowered to raise money on the credit of the county rates for altering, widening, repairing, improving, or re-building county bridges.

Sessions may borrow money on county rates for the purpose of widening, &c. bridges.

By 54 Geo. III. c. 90, s. 2, all the powers and provisions of the 43 Geo. III. c. 59, (except as to bridges hereafter to be erected,) are extended "as well to bridges and the roads at the ends thereof repaired by the inhabitants of hundreds and other general divisions in the nature of hundreds, as to bridges and the roads at the ends thereof repaired by the inhabitants of counties."

Bridges in hundreds, &c.

R. v. *Justices of Dorsetshire and others*, 15 *East*, 594. The justices of Dorset having, under stat. 43 Geo. III. c. 59, contracted for the building of a new bridge in a different site in lieu of the old one, which was ruinous; and having directed the old bridge to be taken down before the new one was passable, for the benefit of the old materials to be used by the contractor in finishing the new bridge; the Court of Queen's Bench refused a *writ of prohibition* to them to restrain them from pulling down the old before the new bridge was passable; though there were strong affidavits of the inconvenience and loss to be sustained by the neighbourhood in being obliged to use a roundabout way in the interval; referring the complaints to the ordinary remedy by indictment, if the pulling down the old bridge under these circumstances were a nuisance; and seeing no occasion to interfere by applying a prompt remedy of a novel kind in modern practice. *Bayley*, J., there asked, "If the justices had not changed the site of the bridge, would they not have a right to use the materials of the old bridge in building the new one? Then can they be obliged to incur the additional expense of providing all new materials for the new bridge, because they have exercised the discretion given to them in changing it to another site?

Pulling down old bridge before new one built.(*a*)

In *R.* v. *Severn Railway Company*, 2 *B. & Ald.* 646, a *mandamus* was granted to enforce the reinstating a rail-road that had been illegally taken up.

Reinstating it.

VI. Surveyors, Materials, &c. for Repairs, &c.

By stat. 22 Hen. VIII. c. 5, s. 4, the justices of peace within the shires or ridings wherein such decayed bridges be out of cities and towns corporate; and if it be within cities or towns corporate, then the justices of peace within every such city, &c. or four of them at the least, (one of them being of the quorum,) within the limits of their commissions and authorities, shall have power to name and appoint two surveyors with salaries to see the bridges amended.

Appointing surveyors who are

And this business of surveying the bridges, for the more convenience, is usually annexed by the justices to the office of the high constable; for which they have by this clause power to allow them salaries.

usually the high constables.

(*a*) As to stopping up old highways before setting out the new one, see *post*, "*Highways*," Vol. III.

6. *Surveyors, Materials, &c.*

43 Geo 3, c. 59.

By 43 Geo. III. c. 59, s. 1, (called Lord Gower's act,) surveyors of county bridges in England were empowered to get materials for the repair of county bridges and roads at the ends thereof, and to remove obstructions, in the same manner as surveyors of highways under stat. 13 Geo. III. c. 78. But the latter act is expressly repealed by the 5 & 6 Will. IV. c. 50, and to maintain the effect of the enactment in the 43 Geo. III. c. 59, s. 1, the 5 & 6 Will. IV. c. 50, s. 22, re-enacts in nearly the same terms as follows: "that the several powers and authorities hereby vested in the surveyor of highways, as well for the getting of materials, as the preventing and removing of all nuisances and annoyances, shall be and the same are hereby vested in the surveyor of county bridges, and the roads at the ends thereof repairable therewith; and the several penalties, forfeitures, matters, and things in this act contained relating to highways shall be and the same are hereby extended and applied, as far as the same are applicable, to such bridges, and the roads at the ends thereof as aforesaid, the said surveyor or surveyors of county bridges making satisfaction and compensation for all trespass and damage done in the execution of the powers of this act in such and the same manner as the surveyors of highways are required to make under the provisions of this act." (See the various clauses of the 5 & 6 Will. IV. c. 50, as to these powers, *post*, "*Highways in General*," Vol. III.)

Powers for getting materials and preventing nuisances as to, contained in the General Highway Act, to extend to county bridges and roads at the ends thereof.

Sect. 2. see it, *ante*, 456.

Tools and materials, &c. vested in surveyor.

Sect. 3. "And the right and property of all tools, implements, timber, bricks, stones, gravel, and other materials, purchased, gotten or had, or to be purchased, gotten or had by or by the order of justices in counties, or the surveyor of county bridges for the time being, or in any respect belonging to such counties, shall be and the same are hereby vested in such surveyor for the time being; in whom, upon any action or indictment being commenced or prosecuted, such property may be laid."

Actions for damages to bridges, or for property of county, to be in name of surveyor.

Sect. 4. "The inhabitants of counties shall and may sue for any damages done to bridges and other works maintained and repaired at the expense of such counties respectively, and for the recovering of any property belonging to such counties, in the name of their surveyor, and also shall and may be sued in the name of such surveyor; and no action or prosecution to be brought or commenced by or against the inhabitants of counties, by virtue of this act, in the name of the said surveyor, shall abate or be discontinued by the death or removal of such surveyor, or by the act of the surveyor, without the consent of the justices at their general quarter sessions assembled, but the surveyor for the time being shall be deemed the plaintiff or defendant in such actions, as the case may be. provided always, that every such surveyor in whose name any action or suit shall be commenced, prosecuted, or defended in pursuance of this act, shall always be reimbursed and paid out of the monies in the hands of the treasurer of the public stock of such county respectively, all such costs and charges as he shall be put unto or become chargeable with by reason of his being so made plaintiff or defendant therein; and also all the costs and charges of prosecuting any indictment or indictments, or other proceedings, against any person or persons whomsoever."

Surveyor indemnified.

Bridge to be erected to surveyor's satisfaction.

By sect. 5, the county are not bound to repair a new bridge unless erected in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor. (See the enactment, *ante*, 450.)

Orders respecting bridges in Yorkshire to be made by sessions held first week after Easter.

Sect. 6. "All orders and proceedings made and had within the county of York, relative to county bridges, shall in future be made and had by the justices of the respective ridings assembled at the annual and general quarter sessions of the peace holden the first whole week after Easter, and at no other sessions whatever within such ridings, except at such adjournment as shall be made at the above annual and general quarter sessions so holden as aforesaid, for the express purpose of carrying such orders made as aforesaid into effect; provided nevertheless, that it shall and may be lawful for any two justices of the said ridings respectively, in cases of emergency, to give such orders for making temporary bridges, or such temporary repairs as shall be necessary for the temporary accommodation of the public."

Sect. 7. "Nothing herein contained shall extend to any bridges or roads which any person or persons, bodies politic or corporate, is, are, or shall be liable to maintain or repair by reason of tenure or by prescription, or to alter or affect the right to repair such bridges or roads."

6. *Surveyors, Materials, &c.*

Act not to extend to bridges repaired by reason of tenure, &c.

Stat. 54 Geo. III. c. 90, s. 2, recites, "And whereas it is expedient that the provisions of the said act, except as after mentioned, should be extended to bridges repaired by the inhabitants of hundreds and other general divisions of counties;" and enacts, "that the said act and all the powers and provisions of stat. 43 Geo. III. c. 59, (except as to bridges hereafter to be erected,) are extended 'as well to bridges and the roads at the ends thereof repaired by the inhabitants of *hundreds, and other general divisions in the nature of hundreds*, as to bridges and the roads at the ends thereof repaired by the inhabitants of counties.'"

These provisions extended to bridges in hundreds, &c.

By stat. 55 Geo. III. c. 143, s. 1, (*a*) after reciting the provisions of 43 Geo. III. c. 59, s. 1, and 54 Geo. III. c. 90, above noticed, and that "it is expedient that surveyors of county bridges and other persons, being under contract for the rebuilding or repairing such bridges, or bridges repaired by the inhabitants of hundreds and other general divisions of counties in the nature of hundreds, should have a more extended power for procuring materials than is at present vested in such surveyors of county bridges, by the operation of the said first recited act, 'so far as relates to the procuring of stone for such purposes from quarries;' it is enacted, "that it shall and may be lawful to and for every surveyor of such bridges in each and every county within that part of the United Kingdom called England, appointed or to be appointed by the justices at any general quarter sessions of the peace to be holden for such county; and also to and for the bridge master or all and every persons or person who may at the passing of this act, or from and after the passing thereof, be under contract for the rebuilding or repairing of any public bridge, built or repaired at the expense of the inhabitants of any such county, hundred, or general division as aforesaid; and such surveyor and surveyors and also such other person or persons, are hereby authorised and empowered, with the consent and by the order of two justices of the peace, acting for the county in which such bridge is intended to be rebuilt or repaired, first had and obtained for that purpose, to search for, work, dig, get and carry away any stone, in, from or out of any quarry or quarries whatsoever, within the county or counties to which such bridge may belong; other than and except such quarries as may be situated within a garden, yard, avenue to a house, lawn, park, paddock, or inclosed plantation, or as may now or hereafter have ornamental timber trees growing thereon, without the license or consent of the owner or owners of such quarry or quarries, as such surveyor or other person or persons shall judge necessary for the rebuilding or repairing of such bridges respectively, provided such quarry or quarries shall have been worked within the last three years preceding the time when such bridge shall be about to be rebuilt or repaired; the said surveyor or other person or persons making such satisfaction and recompence for the value of such stone, and also for the damage to be done to such quarry or quarries by the getting and carrying away the same, as shall be agreed upon between him or them and the owner, occupier, or other person interested in such quarry or quarries respectively; and in case they cannot agree, or such owner or occupier or other person interested shall refuse to treat, then and in every such case the justices of the peace at their general or quarter sessions, or any two or more of them appointed for that purpose, fourteen days' notice having been given to the owner or his agent of the intention to require a jury, shall cause the value of such stones and amount of such damage to be inquired into and ascertained by a jury of indifferent men of the county, riding, division, city, town, liberty, or precinct wherein the same shall be situated; and to that end shall summon and call before such jury and examine upon oath (which oath

Power to obtain materials from quarries.

Surveyors and persons employed under contracts, empowered to take stones for repair of county bridges.

Consent and order of two justices necessary.

Quarries in gardens, &c. not to be used without consent of owners.

Satisfaction to be made for stone, and damage done.

On refusal to treat, sessions to cause value of stones and amount of damage to be ascertained by a jury.

Witnesses before jury may be examined on oath.

(*a*) This enactment does not seem affected by the 5 & 6 Will. IV. c. 50, s. 21, *ante*, 455, for the 13 Geo. III. c. 78, s. 81, contained similar powers to those contained in s. 54 of the 5 & 6 Will. IV.

6. *Surveyors, Materials, &c.*

any two or more of such justices of the peace is and are hereby empowered to administer) any person or persons whomsoever; and such justices of the peace, or any two of them, shall, by ordering a view or otherwise, use all ways and means for the information of themselves and of such jury in the premises; and when such jury shall have inquired of and ascertained the value of such stones and amount of such damage, the said justices of the peace shall thereupon order that the sum or sums, which shall so appear to be the value of such stones and amonnt of such damage shall be paid; which verdict or inquisition and order shall be filed of record by the clerk of the peace, or other officer having the custody of the records of the said county, riding, divison, city, town, liberty, or precinct, and shall be final and conclusive to all intents and purposes whatsoever, against all parties and persons whomsoever claiming or to claim in possession, remainder, reversion, or otherwise, their heirs and successors, as well absent as present, infants, lunatics, idiots, and persons under coverture or any other disability whatsoever, corporations, guardians, committees, husbands, trustees, and attornies, or any other person or persons whomsoever."

View.

Payment of verdict.

Verdict of jury to be filed with clerk of peace.

Verdict final.

Sect. 2. "And for the summoning and returning such juries, it is further enacted, that such justices of the peace, or any two of them, may issue their warrant or warrants to the sheriff or bailiff of any particular county, riding, division, city, town, liberty, or precinct, within the limits of which the quarry or quarries shall be situated, requiring him to impannel, summon and return an indifferent jury of twenty-four persons qualified to serve on juries to appear before the said justices, or any two of them, at such time and places as in such warrant or warrants shall be appointed; and such sheriff or bailiff is and are hereby required to impannel, summon and return such number of persons accordingly; and out of the persons so impannelled, summoned and returned, or out of such of them as shall appear upon such summons, the justices of the peace, or any two of them, shall, and they are hereby empowered and required to draw by ballot, and to swear or cause to be sworn, twelve men, who shall be the jury for the purposes aforesaid; and in default of a sufficient number of jurymen so returned, the said sheriff or bailiff shall take such other honest and indifferent men of the bystanders, or that can speedily be procured to attend that service, to make up the number of twelve; and all persons concerned shall have their lawful challenges against any of the said jurymen when they come to be sworn; and the said justices of the peace, or any two of them, shall have power from time to time to impose a fine or fines on such sheriff or bailiff, or his deputy or deputies, making default thereof in the premises, and on any of the persons who shall be summoned and returned on such jury, and who shall not appear, or, appearing, shall refuse to be sworn on the said jury, or, being sworn, shall refuse to give or shall not give a verdict, or shall in any other manner wilfully neglect his or their duty therein, and also on any person who, being summoned and required to give evidence before the said jury, shall refuse or neglect to appear, or, appearing, shall refuse to be sworn or to give evidence, so that no such fine be more than ten pounds, nor less than twenty shillings on any one person for one offence."

Justices may require sheriffs or bailiffs to return juries.

Jury.

Jury refusing to appear or be sworn.

Witnesses refusing to give evidence.

Sect. 3. "In case any jury shall give in and deliver a verdict for more money, as the value of such stones and amount of such damage, than what shall have been offered for the purchase thereof by such surveyor or other person or persons as aforesaid, the costs and expenses of summoning and maintaining the jury and witnesses shall be borne and paid out of the rates to be collected within such county respectively; but if such jury shall give in and deliver a verdict for no more, or for less money, than the money which shall have been so offered by such surveyor or other person or persons as aforesaid, then the costs and expenses of summoning and maintaining the said jury and witnesses shall be borne and paid by the person or persons with whom such controversy or dispute touching the value of such stones and amount of such damage shall arise, and shall be levied by the warrant of one of the said justices by distress and sale of the goods and chattels of the person or persons made liable to the payment thereof."

Expenses of jury, how defrayed.

Sect. 4. "If any person or persons shall or may think himself, herself, or themselves aggrieved by any thing done or to be done in pursuance of this act, such person or persons may, within the space of three calendar months next after the cause of complaint shall have arisen, appeal to the justices of the peace at any general quarter sessions of the peace to be holden for the limit wherein the cause of complaint shall arise; every such appellant first giving or causing to be given fourteen days' notice (*a*) at least in writing, of his or her intention to bring such appeal, and of the cause or matter thereof, to the person or persons against whom such complaint shall be made, and within three days next after such notice entering into a recognizance before some justice of the peace acting for the county wherein the cause of complaint shall arise, with two sufficient sureties conditioned to try such appeal, and to abide by the order of and pay such costs as shall be awarded by the justices at such session aforesaid; and the said justices at such session, upon due proof of such notice being given as aforesaid, and of the entering into such recognizance, shall hear and finally determine the cause and matter of every such appeal in a summary way, and make such award to the party appealing or appealed against, as the said justices shall think proper; and the determination of such justices so assembled shall be binding and conclusive to all intents and purposes."

6. Surveyors, Materials, &c.

Appeal. (*a*)

Notice of.

Recognizance.

Justices to determine matter of appeal.

By stat. 3 Geo. IV. c. 126, s. 32, (*post*, "*Highways, Turnpike*," Vol. III.) materials for the repairs of bridges carried along a turnpike road are exempted from toll (See *Osmond* v. *Wuddicombe*, 2 *B. & Ald.* 49, title "*Highways, Turnpike.*")

Tolls of materials for repairs.

VII. Assessments and Contracts for Repairs, &c.; Expenses of, &c.

Assessments for Repairing, &c.]—The mode of taxing and collecting the monies necessary for the repairs of bridges, and the highways at the ends thereof, was regulated in the first instance by 22 Hen. VIII. c. 5, and afterwards by the 1 Anne, stat. 1, c. 18, and the 12 Geo. II. c. 29, s. 1.

Assessments, &c.

By the 22 Hen. VIII. c. 5, s. 4, "in every such case (*ante*, 457) where it cannot be known and proved what persons, lands, tenements and bodies politic owen to make and repair such bridges, that for speedy reformation and amending of such bridges, the justices of peace within the shires or ridings wherein such decayed bridges been out of cities and towns corporate, and if it be within cities or towns corporate, then the justices of peace within every such city or towns corporate, or four of the said justices at the least, whereof one to be of the *quorum*, shall have power and authority within the limits of their several commissions and authorities, to call before them the constables of every town and parish being within the shire, riding, city, or town corporate, as well within liberty as without, wherein such bridges or any parcels thereof shall happen to be, or else two of the most honest inhabitants within every such town or parish in the said shire, riding, city, or town corporate, by the discretion of the said justices of peace, or four of them at the least, whereof one to be of the *quorum*, and at and upon the appearance of such constables or inhabitants the said justices of peace or four of them, whereof one to be of the *quorum*, with the assent of the said constables or inhabitants, shall have power and authority to tax and set every inhabitant in any such city, town or parish within the limits of their commissions and authorities, to such reasonable aid and sum of money as they shall think by their discretions convenient and sufficient for the repairing, re-edifying and amendment of such bridges, and after such taxation made, the said justices shall cause the names and sums of every particular person so by them taxed to be written in a roll indented,

Justices may call together the constables, &c.;

and with their assent may tax the inhabitants;

(*a*) As to appeals in general, and the requisite notice and recognizance, see *ante*, "*Appeal.*"

7. *Assessments, &c.*

22 Hen. 8, c. 5, s. 4. may make two collectors of every hundred.

Distress, &c.

May make two surveyors;

who shall repair the bridge, &c.

Collectors and surveyors shall account to the justices,

or may be committed.

The five ports excepted.

Allowance made to surveyors and collectors.

and shall also have power and authority to make two collectors of every hundred, for collection of all such sums of money by them set and taxed, which collectors, receiving the one part of the said roll indented, under the seals of the said justices, shall have power and authority to collect and receive all the particular sums of money therein contained, and to distrain every such inhabitant as shall be taxed and refuse payment thereof in his lands, goods and chattels, and to sell such distress, and of the sale thereof retain and perceive all the money taxed, and the residue (if the distress be better) to deliver to the owner thereof, and that the same justices or four of them, within the limits of their commissions and authorities, shall also have power and authority to name and appoint two surveyors, which shall see every such decayed bridge repaired and amended from time to time, as often as need shall require, to whose hands the said collectors shall pay the said sums of money taxed and by them received; and that the collectors, and surveyors and every of them, and their executors and administrators of them and every of them, from time to time shall make a true declaration and account to the justices of peace of the shire, riding, city, or town corporate wherein they shall be appointed collectors or surveyors, or to four of the same justices, whereof one to be of the *quorum*, of the receipts, payments and expenses of the said sums of money; and if they or any of them refuse that to do, then the same justices of peace or four of them, from time to time, by their discretions, shall have power and authority to make process against the said collectors and surveyors, and every of them, their executors and administrators, and the executors and administrators of every of them, by attachments under their seals, returnable at the general sessions of the peace, and, if they appear, then to compel them to account as is aforesaid, or else if they or any of them refuse that to do, then to commit such of them as shall refuse to wards, there to remain without bail or mainprize till the said declaration and account are truly made."

Sect. 6. "Provided always, that this act or any thing therein contained be not prejudicial to the liberties of the five ports or members of the same; and for reformation of annoyances of bridges within the said ports and members."

Sect. 8. "The justices of peace or four of them shall have full power and authority to allow such reasonable costs and charges to the said surveyors and collectors as by their discretions shall be thought convenient."

22 Hen. 8, c. 5, concerning the amending of bridges further continued.

By the 1 Anne, st. 1, c. 18, after reciting, "Whereas by an act of parliament in the two-and twentieth year of the reign of King Henry the Eighth, intituled "*An Act concerning Repairing and Amending of Bridges in the Highways*," it is amongst other things therein enacted, that in every case where it cannot be known and proved that persons, lands, tenements and bodies politic ought to make and repair such bridges, that for speedy reformation and amending of such bridges the justices of the peace within their several counties, shires, ridings, divisions, cities and towns corporate, or any four of them, whereof one to be of the *quorum*, shall within the limits of their several commissions call before them the constables of every town and parish, or else two of the most honest inhabitants of every town and parish, and with the assent of the said constables or inhabitants, shall tax and set every inhabitant in such city, town and parish to such reasonable aid and sums of money as they shall think by their discretions convenient, for the repairing of such bridges, and after such taxation made shall cause the names and sums of every particular person so by them taxed to be written in a roll indented, one part whereof is to be delivered, under the hands and seals of the said justices, to two collectors appointed by the said justices for every hundred, who are thereby empowered to collect the same, which method and manner of taxing and collecting the said money for repair of decayed bridges and the highways thereunto adjoining, having by long experience been found very troublesome, burthensome and chargeable to the several counties, cities, towns corporate, ridings, and divisions: and whereas in many places within this kingdom more money than is necessary for the repair of such bridges hath been taxed and collected, or the money, which hath been so taxed and collected hath been misemployed, and not laid out in the repair of such bridges as was intended;

for remedy of all which mischiefs and inconveniences for the future, it is enacted, that all and every the clauses, matters and things in the said act of the two-and twentieth year of the reign of the said King Henry the Eighth not hereby altered shall be and continue in full force and virtue, to all intents, constructions, and purposes whatsoever, relating to the repairing of decayed bridges and the highways thereunto adjoining."

7. *Assessments, &c.*

1 Ann. st. 1, c. 18.

Sect. 2. "For the more easy taxing and collecting of the money for the repair of decayed bridges, and that the same may be duly applied to the purposes for which it is intended, the justices of the peace within the several limits of their commissions, shall at their general or quarter sessions of the peace, from and after the first day of May which shall be in the year of our Lord 1702, have full power and authority, upon due presentment to them made, that any bridge within their respective commissions or authorities is out of repair, and which by them hath usually or ought to have been repaired and maintained, to assess upon every town, parish or place within their respective commissions, in proportions upon respective town and parish as they usually have been assessed, towards the repair of bridges; which money so assessed as aforesaid shall be levied and collected by the respective constables of each parish, township, hamlet or vill, or by such other person and persons, and in such manner as the said justices by their order at such sessions shall in that behalf direct and appoint, and the money thereby raised shall (by such constables or other persons so as aforesaid by them collected) be paid over by them to the high constables of every hundred in any such county, city, riding, or division, in six days after they shall have received the same, and the high constables shall and are hereby required, in ten days after their receipt, to pay the same into the hands of such person and persons as the said justices by their order at such sessions shall direct and appoint to be treasurers and receivers of the same, and the money thereby raised shall be employed and accounted for according to the orders and directions of the said justices for and towards the amending of such decayed bridges and the highways at the end of the said bridges, from time to time as need shall require; and the said assessments shall be levied by distress and sale of the goods of every person so assessed not paying the same within ten days after demand, rendering the overplus of the value of the goods so distrained to the owner and owners thereof, the necessary charges of making and selling such distress being first deducted."

For collecting money for repair of decayed bridges justices of peace may assess every town, &c. in proportion.

Assessment, how to be levied, &c.

Treasurer to be appointed, and monies how employed.

On nonpayment, to be levied by distress.

Sect. 3. "And to the end that the money which is hereby intended to be assessed and levied may be duly collected, paid and applied to the several purposes for which it is intended, it is enacted, that every high constable, churchwarden, overseer of the poor or petty constable, or other person that shall neglect to assess, collect or pay the money hereby intended to be raised as is hereinbefore directed, shall for every such offence forfeit the sum of forty shillings, and every treasurer that shall pay any money but by order of such justices of the peace at such sessions (which order the said justices are hereby required and commanded to make only for the building, repairing or amending such bridges and the highways at the end of such bridges as aforesaid) shall for every such offence forfeit the sum of five pounds."

Penalty on constable.

Sect. 6. "The said justices of the peace at such general quarter sessions as aforesaid shall have full power and authority to allow such persons concerned in the execution of this present act any sum not exceeding threepence in the pound."

Justices to allow 3d. in the pound, &c.

Sect. 7. "If any action or suit shall be hereafter commenced or prosecuted against any person or persons by this act authorised to put the same in execution, every person or persons so sued may plead the general issue, and give this act, or the said recited act made in the two-and-twentieth year of the reign of King Henry the Eighth, and the special matter in evidence; and if the plaintiff shall become nonsuit or forbear further prosecution, or suffer discontinuance, or if a verdict pass against him or her, the said defendant and defendants shall recover his and their double costs, for which he and they shall have the like remedy as in cases where costs by law are given to defendants." But now by the 5 & 6 Vict. c. 97, s. 2, the defendant shall have

General issue.

Double costs.

7. *Assessments, &c.*

such costs taxed to him as will fully indemnify him. (See "*Justices,*" Vol. III.)

Persons and things exempted.

Sect. 8. "Provided always, that this act nor any thing therein contained shall excuse or discharge any particular persons, estates or places from repairing any bridge which they have heretofore usually repaired."

Penalties, how to be levied.

Sect. 9. "All the penalties and forfeitures incurred by this act shall be applied towards the repairing the said bridges and highways at the ends of the same."

Expenses payable out of county rates.

By 12 Geo. II. c. 29, s. 1, the charges of *repairing and amending* bridges and highways at the ends of bridges, shall be paid out of the general county rate.

Sessions may contract for repairs.

By sect. 14, "That from and after the first day of June, one thousand seven hundred and thirty-nine, when any public bridges, ramparts, banks or cops, or other works, are to be repaired at the expense of any county, city, riding, hundred, division, liberty or town corporate, it shall and may be lawful to and for the justices of the peace at their general or quarter sessions respectively, or the greater part of them then and there assembled, if they think proper and convenient, after presentment (*a*) to be made as aforesaid of the want of reparation of such bridges, ramparts, banks or cops, to contract and agree with any person or persons for rebuilding, repairing and amending of such bridges, ramparts, banks or cops, as shall be within their respective counties, cities, ridings, hundreds, divisions, liberties or towns corporate, and all other works which are to be repaired and done by assessment on the respective counties, cities, ridings, hundreds, divisions, liberties or towns corporate, for any term or terms of years, not exceeding seven years, at a certain annual sum, payment or allowance for the same; such contractor or contractors giving sufficient security for the due performance thereof, to the respective clerk of the peace for the time being, or the town clerk, high bailiff, or chief officer of any county, town corporate or liberty; and that such justices at their respective general or quarter sessions shall give public notice of their intention of contracting with any person or persons for rebuilding, repairing, and amending the bridges, ramparts, banks or cops, and other works aforesaid; and that such contracts shall be made at the most reasonable price or prices which shall be proposed by such contractors respectively; and that all contracts when agreed to, and all orders relating thereto, shall be entered in a book, to be kept by the respective clerk of the peace for the time being, or the town clerk, high bailiff or chief officer of any city, town corporate or liberty for that purpose; who is and are hereby required to keep them amongst the records of such county, city, town corporate or liberty, to be from time to time inspected at all seasonable times by any of the said justices within the limits of their commissions; and by any person or persons employed or to be employed by any parish, township or place, contributing to the purposes of this act, without fee or reward."

Contractor to give security.

Notice for contracts.

Contract to be a fair price

Contracts to be entered in book kept by clerk of peace.

Reciting 12 Geo 2, c. 29, &c.

By 52 Geo. III. c. 110, s. 1, reciting, that by stat. 12 Geo. 2, c. 29, "No part of the money to be raised and collected in pursuance of this act shall be applied to the repair of any bridges, gaols, prisons, or houses of correction, until presentments be made by the respective grand juries at the assize, great sessions, general gaol delivery, or general or quarter sessions of the peace, held for any county, riding, division, city, town corporate, or liberty, of the insufficiency, inconveniency, or want of reparation of their bridges, gaols, prisons, or houses of correction; and it is further enacted, that from and after the 1st day of June, 1739, when any public bridges, ramparts, banks or cops, or other works, are to be repaired at the expense of any county, city, riding, hundred, division, liberty or town corporate, it shall and may be lawful to and for the justices of the peace at their general or quarter sessions respectively, or the greater part of them then and there assembled, if they think proper and convenient, after presentment to be made

County bridges repaired under contract may be repaired without presentment.

(*a*) But now this presentment is unnecessary, 52 Geo. III. c. 110, s. 1, *infra*.

7. *Assessments, &c.*

52 Geo. 3, c. 110.

as aforesaid of the want of reparation of such bridges, ramparts, banks or cops, to contract and agree with any person or persons for rebuilding, repairing, and amending of such bridges, ramparts, banks or cops, as shall be within their respective counties, cities, ridings, hundreds, divisions, liberties, or towns corporate, and all other works which are to be repaired and done by assessment on the respective counties, cities, ridings, hundreds, divisions, liberties, or towns corporate, for any term or terms of years not exceeding seven years, at a certain annual sum, payment or allowance for the same, such contractor or contractors giving sufficient security for the due performance to the respective clerk of the peace for the time being, or the town clerk, high bailiff or chief officer of any city, town corporate, or liberty; and that such justices at their respective general or quarter sessions shall give public notice of their intention of contracting with any person or persons for rebuilding, repairing, and amending the bridges, ramparts, banks or cops, and other works aforesaid, and that such contracts shall be made at the most reasonable price or prices which shall be proposed by such contractors respectively; and that all contracts when agreed to, and all orders relating thereto, shall be entered in a book to be kept by the respective clerk of the peace for the time being, or the town clerk, high bailiff, or chief officer of any city, town corporate or liberty, for that purpose, who is and are hereby required to keep them amongst the records of such county, city, town corporate or liberty, to be from time to time inspected at all seasonable times by any of the said justices within the limits of their commissions, and by any person or persons employed or to be employed by any parish, township, or place, contributing to the purposes of this act, without fee or reward: and whereas great expense in the repairs of county bridges, ramparts, banks, cops, and other works appertaining to the same, and of the roads over the same, and of so much of the roads at the ends thereof as by law is to be repaired at the expense of any county, riding, hundred, division, liberty or town corporate, and great inconvenience to the public may be often in a great measure prevented by the timely and immediate repair of any inconsiderable damage, injury, defect, or sudden want of repair or amendment of the same, without the delay which must generally arise from the necessity imposed by the aforesaid act, of a presentment by the grand jury at the assize, great sessions, or general or quarter sessions of the peace held for any county, city, riding, division, town corporate or liberty, of the want of reparation of the same; by means of which delay the aforesaid want of repair is often very much increased, to the great expense of the county and great inconvenience of the public: and whereas it is also expedient that the justices of the peace of any county, city, riding, division, town corporate or liberty, at their general quarter sessions respectively, before any presentment shall have been made as aforesaid, as directed by the aforesaid act, of the want of repair of such roads, should be enabled without any such presentment to contract and agree with certain persons hereinafter mentioned, for the repairing and amending of the same; and also for keeping the same in repair when so repaired and amended;" it is enacted, "that from and after the 1st day of July, 1812, it shall and may be lawful for the justices of the peace of any county, city, riding, division, town corporate or liberty, at their general quarter sessions or great sessions respectively, to be holden in the week next after the clause of Easter, or the greater part of them then and there assembled, to appoint annually two or more justices of the peace acting in and for any division of justices in such county, city, riding, division, town corporate or liberty, in or near which any such county bridge, or any bridge which is in part a county bridge, ramparts, banks, cops or other works appertaining to the same, or any part or parts thereof, or the roads over the same, or so much of the roads at the ends thereof as by law is to be repaired at the expense of any county, city, riding, division, town corporate or liberty shall be situate, to superintend the same, and whenever it shall appear on their own inspection to be necessary for the purpose of preventing the further decay and injury of the same, to order any immediate repairs or amendments to

Sessions may appoint annually two justices near to superintend roads and bridges.

7. *Assessments, &c.*

52 Geo. 3, c. 110.

Who may order repairs.

And they may expend 20*l.* (*b*)

How long the two justices to remain in office.

be done to the same or to any part thereof; but it shall and may be lawful for any two such justices so to be appointed as aforesaid, and any two such justices are hereby empowered by a written order, (*a*) signed by their hands respectively, to order such immediate repairs to be done by such person or persons as to them shall seem fit and proper: provided, that in no case the sum to be expended by them in such repairs shall exceed the sum of twenty pounds; (*b*) and further, that such appointments of such justices as aforesaid shall remain in force until one week after the following Easter sessions respectively; and that in case of the death of, or removal of, or refusal to act by any such justice or justices so appointed as aforesaid, the said Court of general quarter sessions or great sessions may at any other of the four quarterly sessions appoint any other justice or justices to act for the remainder of the then current year, in the place of any such justice or justices so dying, removing, or refusing to act as aforesaid."

Quarter sessions to order payment for repairs.

Not exceeding 10*l.*

A certificate to be signed by two of the said justices.

Sect. 2. "It shall and may be lawful for the justices of the peace of any county, city, riding, division, town corporate or liberty, at the general quarter sessions or great sessions which shall next happen after such repairs so ordered to be made by such justices so appointed as aforesaid shall be completed, or the greater part of them then and there asembled, to order the payment of such sum or sums of money, not exceeding ten pounds, (*b*) as shall be sufficient to pay for such repairs, to be made out of the county rate, to such person or persons who shall have so repaired the same by such order of such justices as aforesaid, although no presentment shall have been made by any grand jury at the assize, great sessions, or general quarter sessions of the peace of any county, city, riding, division, town corporate or liberty in which such repairs shall have been done, of the want of such reparation, as by the said act of the twelfth year of his late Majesty King George the Second, above recited, was directed: provided nevertheless, that before such payment be ordered to be made as aforesaid, a certificate (*c*) be returned to such justices of the peace so assembled at such last mentioned sessions, signed by two at the least of such justices so appointed as aforesaid, who shall have so ordered such repairs as aforesaid, stating the nature of such repairs, and the defects, damage or injuries, which they had so ordered to be repaired, and their reason for so ordering such immediate repairs as aforesaid: provided also, that such justices of the peace, so assembled as last aforesaid, be satisfied by the parties concerned, that the charges made by them for such repairs are reasonable and just."

Justices may contract for repairs.

Sect. 3. "From and after the 1st day of July, 1812, it shall and may be lawful for the justices of the peace of any county, city, riding, division, town corporate or liberty, at their general quarter sessions respectively, or the greater part of them then and there assembled, if they shall think proper and convenient, to contract and agree with the commissioner or commissioners, trustee or trustees, of any turnpike road within the said county, city, riding, division, town corporate or liberty, or with their surveyor or clerk, or with both their surveyor and clerk, or with the surveyor or surveyors of the highway of any parish, place or tything within the said county, city, riding, division, town corporate or liberty respectively, or with any other person or persons, for the maintaining and keeping in repair roads over any county bridges, and so much of the roads at the ending thereof as by law is to be repaired at the expense of any such county, city, riding, division, town corporate or liberty, or any part of the same, for any term not exceeding seven years, nor less than one, although no presentment shall have been made as directed by the said recited act of the twelfth year of his late Majesty King George the Second, of the insufficiency, inconveniency, decay or want of repair of the same; subject however to all the rules, restrictions, regulations, directions and conditions, required by the above recited act in case where the same shall have been presented or directed by that act."

(*a*) See form (No. 1), *post*, 477.

(*b*) See now the 55 Geo. III. c. 143, s. 5, *post*, 467.

(*c*) See form (No. 2), *post*, 478.

7. *Assessments, &c.*

By stat. 55 Geo. III. c. 143, s. 5, reciting, that "It is expedient that the powers contained in an act passed in the forty-third year of his present Majesty, intituled, '*An Act for remedying certain defects in the laws relative to the building and repairing of county bridges, and other works maintained at the expense of the inhabitants of counties in England*,' for authorising the justices of the peace of any county, city, riding, division, town corporate or liberty, at their general quarter session of the peace, to contract for maintaining and keeping in repair roads over county bridges, and so much of the roads at the ending thereof as by law is to be repaired at the expense of counties, although no presentment shall have been made of the want of repair, as directed by an act passed in the twelfth year of his late Majesty King George the Second, intituled '*An Act for the more easy assessing, collecting and levying of county rates*,' should be extended to the bridges as well as to the roads at the end thereof;" it is enacted, "That from and after the day of passing this act, it shall and may be lawful to and for the justices of the peace of any county, city, riding, division, town corporate or liberty, at their general quarter sessions respectively, to contract and agree, or to authorise any other person or persons to contract and agree, with any person or persons, for the maintaining and keeping in repair any county or hundred bridge, and the road over such county or hundred bridge, and so much of the roads at the ends thereof as are by law liable to be repaired at the expense of any such county, hundred, city, riding, division, town corporate or liberty, or any part of the same; and the said justices are hereby empowered to order such sum or sums of money as may be contracted for and agreed to be paid for the repairing, amending and supporting such bridges, and the roads over the same, or the ends thereof, to be paid (in cases where the county is liable to the repair thereof) by the treasurer of the county out of the county rate, or (in cases where the hundred is liable to the repair of the same) by the bridgemaster (or other public officer charged with the repair of bridges) of the hundred by which such bridge is liable to be repaired, for any term not exceeding seven years nor less than one, although no presentment of the insufficiency, decay or want of repair of the same shall have been made, and although no public notice shall have been given by the said justices, at their respective general or quarter session, of their intention to contract for the repair of such bridges, or the roads at the ends thereof, as respectively directed by the said act of the twelfth year of his late Majesty King George the Second: provided nevertheless, that before any such contract shall be made, the said justices shall cause notices to be given in some public paper circulated in such county, city, riding, hundred, division, town corporate or liberty, of their intention to contract."

55 Geo. 3, c. 143.

Further regulations enabling justices to contract for repairs.

Sessions may contract for repairs, &c. to any extent.

May order sum contracted for to be paid by county treasurer out of county rate.

Without presentment.

What notice to be given.

By this statute it will be seen that justices may now without indictment or presentment order *repairs* to any county or hundred bridges to any extent. (See 1 *B. & Ald.* 317.)

By the 4 & 5 Vict. c. 49, intituled "*An Act to provide for repairing, improving and rebuilding County Bridges*," (21st June, 1841,) reciting that "The expense of maintaining, altering, widening, repairing, improving and rebuilding county bridges and approaches thereto, is in some instances considerable, and it is expedient that the money required for that purpose should, in certain cases, be borrowed on security of the county rate; it was therefore enacted, that when it shall appear to the justices assembled at any general or quarter sessions of the peace to be holden at any time after the passing of this act in any county, riding or division in England or Wales, that the amount of any estimate approved by the said justices for the upholding, maintaining, supporting, altering, widening, repairing, improving or rebuilding of any county bridge or bridges, or the approaches thereto, or the land arches connected therewith, which any county is legally bound to repair or maintain, shall exceed one-fourth of the amount of the ordinary annual assessment for the rate of any county, riding or division, (such ordinary assessment to be taken on an average of such rate for the last seven years preceding,) it shall be lawful for the justices in quarter sessions assembled from time to time to

4 & 5 Vict. c. 49.

Justices at sessions may borrow money for repairing county bridges on the credit of the county rate.

7. *Assessments, &c.*

4 & 5 Vict. c. 40.

borrow and take up on mortgage of such rate, by instrument in the form contained in the schedule to this act annexed marked (A.), (see this form, *post*,) or to the like effect, any sum of money not exceeding the amount of such estimate, in sums not less than fifty pounds each, at interest, as to the said justices shall appear necessary and expedient for the purposes aforesaid, and to secure every such sum of money so borrowed upon the credit of the said rate; and it shall and may be lawful for the justices so assembled and they are hereby authorised to treat and agree with any person for the loan of any such sums of money, and by their order to confirm every such agreement; and every such agreement, signed by the chairman and two or more other justices present at the time of making such order, shall be and the same is hereby declared to be effectual for securing every sum of money so advanced, with interest thereon, to the person or persons advancing the same, on such terms as in and by such agreements shall be stipulated; and copies or extracts of all such agreements shall be kept by the clerk of the peace; and it shall and may be lawful for every person who shall be entitled to the money thereby secured, and such person is hereby empowered, by endorsing his name on the back of such security, to transfer the same, and his right to the principal money and interest thereby secured, unto any other person; and every such assignee may in like manner transfer the same again, and so *toties quoties*; and the person to whom such security, or any such assignment thereof, shall be made, and his executors, administrators and assigns, shall be creditors upon the said rate, in an equal degree one with another, and shall not have any preference with respect to the priority of any monies so advanced."

Justices may agree with persons for loans.

Copies of agreements to be kept by the clerk of the peace.

Justices may charge the county rate with interest on the money borrowed, and such further sum as shall insure the repayment thereof in fourteen years.

Sect. 2. "That it shall and may be lawful for the said justices and they are hereby authorised and required to charge the rate to be raised upon such county, riding, or division, not only with the interest of the money so borrowed, but also with the payment of such further sum as shall insure the payment of the whole of the sum borrowed within fourteen years from the time of borrowing the same; and such sums shall be assessed on the county, riding or division, in such manner as county rates are directed to be assessed under the laws in force for that purpose, and shall be paid and applied, under the direction of the justices, in discharge of the interest and of so many of the principal sums on the said securities as such money will extend to discharge in each year, until the whole of the money for which such securities shall be made, and the interest thereof, shall be fully paid and discharged; and the justices shall and they are hereby required to fix one or more day or days in each year on which such payment shall be made, and shall make orders for assessments in due time, so as to provide for the regular payment thereof; and such justices shall also and they are hereby required to appoint a proper person to keep an exact and regular account of all the receipts and payments under the authority of this act, in a book or books, separate and apart from all other accounts, and the same to adjust and settle in such manner that it may easily be seen what interest is growing due, and what principal money has been discharged, and what remains due, and the books or book so adjusted and settled to deliver into Court at any general or quarter sessions to be held for such county, riding or division; and the justices shall also and they are hereby required at every such sessions carefully to inspect all such accounts, and to make orders for carrying the purposes of this act into execution, in such manner as to them shall seem meet; and the justices so assembled in sessions as aforesaid shall direct in what order such securities shall be discharged, by drawing lots or otherwise, as they shall think fit, taking care to discharge, in the first place, all such securities as shall bear the highest rate of interest."

Books to be kept of receipts and payments.

Notice to be given of borrowing money on mortgage of the county rate.

Sect. 3. "Provided always, that the justices shall not make any order for the borrowing money upon mortgage of the rate for any of the purposes aforesaid, unless a notice in writing of the intention to make the application, signed by two at least of the justices usually acting in and for the division within which the bridge in question is situated, shall have been given to the clerk of the peace four weeks previous to the holding of the sessions at which such application is intended to be made, and shall also have been

published in the newspaper or newspapers in which notice of holding the quarter sessions is usually published, together with such last-mentioned notice.

7. *Assessments, &c.*

Powers of 6 Geo. 4, c. 40, applied to this act (*a*).

Sect. 4. "That an act passed in the sixth year of the reign of his Majesty King George the Fourth, intituled *An Act to enable Justices of the Peace in England, in certain Cases, to borrow Money on Mortgage of the Rate of the County, Riding, or Place for which such Justices shall be then acting*, and the several clauses, powers and provisions in the said recited act contained relating to the paying off of any debt or debts, and the borrowing of any money for such purpose, shall and may be applied in the paying off any money borrowed under the provisions or for the purposes of this act, as fully and effectually as if such clauses, powers, and provisions were repeated and re-enacted in this act."

SCHEDULE TO WHICH THE 4 & 5 VICT. c. 49, *ante*, 467, REFERS.

Form of mortgage of county rates.

"*WE, A.B. one of her Majesty's justices of the peace, and chairman of the Court of quarter sessions of the peace holden at on the day of for the county, &c. of* [as the case may be], *C.D. and E.F. Esquires, two other of her Majesty's justices of the peace acting for the said county, &c. and assembled in the said Court, in pursuance of the powers to us given by an act passed in the fourth year of the reign of her Majesty Queen Victoria, intituled, &c.* [insert the title of this act] *do hereby in open Court mortgage and charge all the rates to be raised within the said county, &c.* [as the case may be] *under the description of county rates, by the laws now in being, with the payment of the sum of which G. H. of hath proposed and agreed to lend, and hath now actually advanced and paid, towards defraying the expenses of upholding, maintaining, supporting, altering, widening, repairing, improving,* or *rebuilding* [as the case may be] *a certain county bridge at* or *certain county bridges at and* [as the case may be] *in the said county, and the approaches thereto* [as the case may be] *in the said county, &c. and we do hereby assign the same unto the said G. H., his executors, administrators and assigns, for securing the payment of the sum of and interest for the same after the rate of per centum per annum, and do order the treasurer for the said county, &c. or other person* [as the case may be] *to pay the interest of the said sum of half-yearly as the same shall become due, until the principal shall be discharged, pursuant to the directions of the said act.*"

Power of sessions to reimburse fees of clerk of peace.

The sessions are not authorised to order the payment by the bridgemaster to the clerk of the peace of a per-centage on all money to be raised for the repair of bridges in a particular district in lieu of all his fees for indictments, presentments, &c. for bridges within it, although such per-centage was claimed as an ancient fee, and had been paid without dispute for a long period of time. (*R.* v. *Houldgrave*, 1 *B. & Ald.* 312.) *Et Lord Ellenborough*, C. J. "I accede fully to the doctrine laid down by *Lord Kenyon* in the case of *R.* v. *Essex*, 4 *T. R.* 591, that wherever a duty is imposed on a county, and where costs incidentally and necessarily arise in questioning the propriety of acts done to enforce that duty, the magistrates who have the superintendence over the county purse have necessarily a right to defray such expenses out of the county stock. It is therefore quite clear, that in this case the magistrates had a jurisdiction over the subject-matter. They had a full right to order these expenses to be defrayed out of the county stock; but the question is, whether they had a right to make that order in these terms. It is not necessary for us to say whether the order is bad in point of form, as being on the bridgemaster and directing him to pay this money absolutely, and not out of such funds as may at the time be in his hands, for I think it cannot be supported on another ground. The magistrates had no authority to make an accumulated compensation of this nature to the clerk of the peace; their duty was at the end of each year to ascertain how much business had been done by him and what sum was due for it; but here they have, instead of taking the items of his bill division, substituted a sort of average computation. They have in this order directed the bridge-

(*a*) See this act, title "*Gaols*," Vol. III.

7. *Assessments, &c.*

master to pay an ancient and accustomed fee of 1s. in the pound on all the money raised in lieu of all the fees due to him upon all business relating to the indictments and presentments for not repairing bridges and roads in this hundred. Now how can that be for a moment considered as an award by them to him of a fair compensation for his trouble? It does not depend on his trouble, and is not more or less in proportion to it; then this Court, seeing that the magistrates have here adopted an improper and illegal rule for computing the amount of this compensation, can do no otherwise than quash this order, which is founded on that computation."

Contracts for repairs of bridges not repairable by county.

By the General Turnpike Act, 3 Geo. IV. c. 126, s. 107, 108, for the better amendment of bridges which are not repairable by the county, counties are empowered to contract and compound for the repair of such bridges. See the act, *post*, "*Highways, Turnpike*," Vol. III.

Contracts, &c. for widening, diverting, or building new bridges.

Widening, Diverting, or Building New Bridges.]—By the provisions contained in the 14 Geo. II. c. 33, s. 1; 43 Geo. III. c. 59, s. 2, and 54 Geo. III. c. 90, s. 1, the quarter sessions may contract for the purchase of lands, buildings, and other erections, for the purpose of widening, diverting, or building new bridges. See the enactments, *ante*, 456, 457.

VIII. Modes of Prosecution for Non-Repairs.

Mode of prosecution.

In general, the modes of prosecution for the non-repair of or nuisances to bridges are the same as those for the non-repair of and nuisances to highways, and the reader is referred to title "*Highways in General*," Vol. III. for any further information not to be found under this title. The modes are either—by criminal information—by presentment—or by indictment.

Action for.

Generally speaking an action will not lie against the county by an individual, for a county bridge being out of repair, on the ground that no action will lie for a public injury; (*Russell* v. *Men of Devon*, 2 *T. R.* 667;) but in the case of special damage, it will sometimes lie. (See title "*Highways in General*," Vol. III; "*Nuisance*," Vol. V.)

1. By Criminal Information.

1 By criminal information.

In cases of very aggravated neglect to repair, or where there appears little chance of obtaining justice by preferring an indictment, the Court of Queen's Bench will grant a criminal information against the party liable to repair. (*R.* v. ——, 1 *Stra.* 180; see "*Information*," Vol. III.) But this course of proceeding is very rarely resorted to, the more usual one being by presentment or indictment. (2 *Inst.* 701.)

2. By Presentment.

2. By presentment in Queen's Bench.

The presentment of a public bridge for non-repairs, &c. may at common law be before the Queen's Bench or at the assizes. (2 *Inst.* 701.)

At court leet.

Decays of bridges are also presentable in the leet or torn. (2 *Inst.* 701.)

22 H. 8, c. 2, s. 1.

By stat. 22 Hen. VIII. c. 5, s. 1, "Be it enacted by the king our sovereign lord, and the lords spiritual and temporal, and the commons, in this present parliament assembled, and by authority of the same, that the justices of peace in every shire of this realm, franchise, city, or borough, or four of them at the least, whereof one to be of the quorum, shall have power and authority to inquire, hear, and determine in the king's general sessions of peace, of all manner of annoyances of bridges broken in the highways, to the damage of the king's liege people, and to make such process and pains upon every presentment afore them for the reformation of the same, against such as owen to be charged for the making or amending of such bridges, as the king's justices of this bench use commonly to do, or as it shall seem by their

discretions to be necessary and convenient for the speedy amendment of such bridges."

8. *Prosecution for Non-Repairs, &c.*

Four of them at the least.]—If the bridge be within a franchise which hath not four justices and a sessions of its own, the justices of the county shall inquire; but if the franchise be a county of itself, and hath not four justices, one of them being of the quorum, it is not within this statute, but is left to the remedy which it had at common law. (2 *Inst.* 702.)

Construction of 22 Hen. 8, c. 5, s. 1.

And to make Process.]—Sect. 5. "And where any bridge or bridges lien in one shire or riding, and such persons inhabitants, bodies politic, lands or tenements, which owen to be charged to the making and amending of such bridges, lien and abiden in another shire or riding, or where such bridges been within any city or town corporate, and the persons inhabitants, bodies politic, lands or tenements, that owen to make or repair any such bridges, lien and been out of the said cities and towns corporate; be it enacted, that in every such case the justices of peace of the shire, city or town corporate, within the which such decayed bridges, or any part thereof shall happen to be, shall have power to inquire, hear, and determine all such annoyances, being within the limits of their commissions or authorities; and if the annoyance be presented, then to make process into every shire within this realm, against such as owen to make or amend any such bridges so presented before them to be decayed, to the annoyance and let of the passage of the king's subjects, and to do further in every behalf in every such case, as they might do by authority of this act, in case that the persons or bodies politic, lands or tenements, which owen to be charged to the amending or making of such bridges, or any part thereof, were in the same shire, riding, city or town corporate, where such annoyance shall happen to be. And that all sheriffs, and bailiffs of liberties and franchises, shall truly serve and execute such process, as shall come to their hands from the said justices of peace afore whom any presentment shall be had for any such annoyance, according to the tenor and effect of the said process to them directed, without favour, affection, or correction, upon pain to make such fine as shall be set upon them or any of them by the discretion of the said justices."

Process for.

This statute of 22 Hen. VIII. is confirmed by the 1 Anne, stat. 1, c. 18, except so far as the proceedings are altered by the last provision.

1 Anne, st. 1, c. 18.

This act of Anne empowers justices on presentment before them to lay such a sum on every parish towards the repair as each has been accustomed to collect; it directs the proceedings to originate in the jurisdiction where the defect exists, and provides that no *certiorari* shall be allowed to remove them. But this last proviso extends only to bridges which the county is bound to repair, and where a district or individual is charged, or the duty comes in question, the 5 Will. & Mary, c. 11, allows the removal. (*R.* v. *Inhabitants of Hanworth*, 2 *Stra.* 900; and see further, *Inhabitants of Cumberland* v. *The King*, 3 *B. & P.* 354, *post*, 475.)

Certiorari.

The court of quarter sessions cannot impose more than one fine for the non-repair of a bridge; however insufficient that fine may be, the only remedy is by a second indictment. This was held in the case of *R.* v. *Machynlleth, &c.* 4 *B. & Ald.* 469. In that case an order of sessions of the county of Montgomery was removed by *certiorari* into the Court of King's Bench The order was as follows: "It is ordered, that the fine heretofore imposed by the Court on the inhabitants of the township of Machynlleth and the parish of Pennegoes, for not repairing Pontfelingerrig bridge, be, and the same is hereby increased by the sum of 200*l.*" On the motion for quashing this order, it appeared from the affidavits that the defendants had been presented at the January sessions, 1818, for the non-repair of the bridge in question, to which presentment they at the same sessions submitted, and a fine of 300*l* was imposed and afterwards levied upon them. At Michaelmas sessions, 1820, the fine not having been sufficient, the order in question was made, imposing a second fine of 200*l.* The Court were of opinion, that the power of the sessions was at an end after the first fine, and that they had no jurisdiction to impose a second, and they quoted the case

Fine for non-repairs.

8. *Prosecution for Non-Repairs, &c.*

of *R.* v. *Old Malton, id.* 470, n. (*a*), as an authority directly in point, and the order of sessions was quashed.

By stat. 12 Geo. II. c. 29, s. 13, no money shall be applied to the repair of bridges until presentment be made by the grand jury at the assizes or sessions of their insufficiency, inconveniency, or want of reparation. Now, however, by stat. 55 Geo. III. c. 143, s. 5, *ante*, 467, county bridges repaired under contract may be repaired without presentment, &c.

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3. By Indictment, and herein of the Plea, Certiorari, Evidence, Trial, Judgment.

3. By indictment.

Indictment.]—Where a bridge is so out of repair as to be prejudicial to the public, it may be the subject of indictment.

We have already noticed, *ante*, 447 to 454, who are liable for the non-repair of county bridges.

Who may be made defendants.

Fine and contribution amongst several.

Any particular inhabitant of a county, or tenant of land charged to the repairs of a bridge, may be made defendant to an indictment for not repairing it, and be liable to pay the whole fine assessed by the Court for the default of repairs, and shall be put to his remedy at law for a contribution from those who are bound to bear a proportionable share in the charge; for the necessity of the case requires the greatest expedition in cases of this nature; for bridges being of absolute necessity are not to lie unrepaired till suits are determined. (1 *Hawk.* c. 77, s. 2.)

Venue.

The venue must be laid in the county where the bridge lies. (See *post*, 476.)

Form of indictment.

The indictment ought to state *what sort* of bridge it is, whether for carts or carriages, or for horses or footmen only. (*R.* v. *Sainthill*, 2 *Ld. Raym.* 1175; 1 *Salk.* 359.) Such statement must correspond with the proof. Where an indictment alleged that a bridge was a public carriage bridge, and also for the Queen's subjects passing and repassing on foot, and upon the evidence it appeared, that it had been used by passengers on horseback and on foot, and not with carriages, it was held, that the defendants could not be convicted of any part of the charge. (*R.* v. *Lancashire, per Bayley*, J., *Lancaster Sum. Ass.* 1820; *Stark. on Evid.* part iv. 316.)

The ancient form of an indictment as mentioned in 2 *Inst.* 701, is *Quod pons publicus et communis situs in altâ regiâ viâ super flumen seu cursum aquæ*, &c. In many indictments in modern times, the words *super flumen*, &c. are omitted; but in such indictments, they must be considered as virtually included in the true import of the word bridge; for otherwise such indictments would be vicious, there being many structures bearing the name of a bridge erected across a steep ravine, and in modern times over an ancient road crossed in a transverse direction by a new road, having no reference to water, and which unquestionably the county is not bound to repair. (*Per Tenterden*, C. J., in *R.* v. *Oxfordshire*, 10 *B. & Cres.* 301.)

As to the statement of the *termini*, see "*Highways in General*," Vol. III.

If the right to use the bridge be only at particular times, it must be so described. (*R.* v. *Marquis of Buckingham*, 4 *Camph.* 189. *Post*, "*Highways in General*," Vol. III.)

It must be stated that the bridge is public, and that it is in decay. (*Andr.* 285.)

A parish may be indicted for non-repair of a bridge without stating any other ground of liability than immemorial usage. (*R* v. *Inhabitants of Hendon*, 4 *B. & Adol.* 628.)

Where the indictment is against the inhabitants of any *particular town*, it is necessary to show that the bridge is within the *town*, and it is insufficient to charge that it is within the *parish*, unless the parish also be alleged to be within the town: moreover, as this is a charge against common right, a consideration must be shown for the liability of the inhabitants of the town; and it has been held, that no sufficient consideration is shown by alleging that the inhabitants of the town were liable by reason of the tenure of certain lands,

for as inhabitants they cannot hold lands. (*R.* v. *Machynlleth*, 2 *B. & Cres.* 166; 3 *D. & R.* 388, S. C.; and see *R.* v. *St. Giles, Cambridge*, 5 *M. & Sel.* 261.)

8. *Prosecution for Non-Repairs, &c.*

In an indictment against a *hundred* for not repairing by prescription, although the hundred may have varied at different times in its component parts, it may, nevertheless, be charged as a hundred immemorially. And the same with respect to a *corporation*, if it be alleged that the "*corporation*" have repaired, and the component parts of it be not specified by describing it "as the mayor, aldermen," &c. (*R.* v. *Oswestry*, 6 *M. & Sel.* 361.)

Where a party is bound to repair *ratione tenuræ*, that circumstance must be set forth on the record. Thus even against a lord of the manor it will not suffice to charge a prescription without these expressions. (*R.* v. *Bucknall*, 2 *Ld. Raym.* 792, 804; *ante*, 451.)

Where this duty is charged the indictment must show the place in which the lands are situate. (2 *Hale*, 181.) The very terms "by reason of his tenure" should then also be inserted, and the Courts will not allow the words "owner and proprietor" to be substituted in their room. (*R.* v. *Kerrison*, 1 *M. & Sel.* 439.) But in presentments by the grand jury there is no occasion to show who ought to repair, it is sufficient if the defect be shown and the bridge stated to be public. (*Andr.* 285) *Sed query.*

A corporation must be charged as being bound by prescription, unless it is chargeable merely by reason of the tenure of certain lands. (*Anon.* 13 *Rep.* 33; *ante*, 451.)

Plea to.

Plea.]—It hath been resolved that it is not sufficient for the defendants to an indictment for not repairing a bridge, to excuse themselves by showing either that they are not bound to repair the whole, or any part of the bridge, without showing what other person is bound to repair the same: and it is said that in such case the whole charge shall be laid upon such defendants by reason of their ill plea. (1 *Hawk.* c. 77, s. 4.)

In an indictment for not repairing a highway, a special verdict was found. The indictment alleged that a certain part of the highway, at the township of Quick, in the West Riding, &c , to wit, a certain part thereof lying next adjoining the west end of a certain public bridge there called Tamewater Bridge, and within the distance of 300 feet thereof, &c. was and yet is very ruinous, &c. And that the inhabitants of the West Riding of, &c. of right ought to repair, &c. Plea, not guilty. The evidence (as far as it is material to this point) was, that the township of Quick lay in the parish of Saddleworth, in the said riding, which parish had been immemorially divided into four districts called Mears, in one of which mears, called Shaw Mear, the highway in Quick (hereinbefore mentioned) lay; and that the 300 feet at the other end of the bridge lay in another mear; and that each mear had respectively repaired the said respective highways, &c. The main argument was upon the liability of the county to repair these *ends* of 300 feet each, in the same manner as they were liable to repair the bridge. This was decided in the affirmative. But in arguing it was said by Mr. *Holroyd*, who was counsel for the crown, and not contradicted by the Court, that no question could arise as to any special liability of the respective mears, because the general issue only was pleaded; and any question of that sort, he said, could only be raised by a special plea. He cited *R.* v. *City of Norwich*, 1 *Stra.* 180, 182. The counsel for the defendants argued against this, upon the principle of assuming that these *ends* were *highways*, and not parts of the bridge. This, however the Court overruled. (*R.* v. *W. R. Yorkshire*, 7 *East*, 588; 3 *Smith's Rep.* 467, S. C.)

It is suggested, however, that this doctrine must be understood only of indictments against the county, and not of indictments against *individuals*, or bodies corporate. (1 *Russ.* 356; 2 *Saund.* 159, n. 10.)

Though the county, under the plea of not guilty, can only prove that the bridge was not a public bridge, or that it was in good condition, they may give evidence that particular individuals have been accustomed to repair, not immediately for the purpose of throwing the liability on them, but to afford

8. *Prosecution for Non-Repairs, &c.*

ground for the jury to conclude that the bridge is not public. (*R.* v. ———, 2 *M. & Sel.* 262.)

It is said that where the defendants plead, whether necessarily or otherwise, that others ought to repair, and traverse the charge against themselves, the attorney-general may, in such case, take a traverse upon a traverse, by insisting that the defendants are bound to repair, and traversing the charge against the parties named in the plea: that on this last traverse issue must be taken, and that the attorney-general may afterwards surmise that the defendants are liable to repair, and that the whole matter shall be tried by an indifferent jury, &c. (1 *Hawk.* c. 77, s. 5.)

In a plea by the inhabitants of a county, that the inhabitants of a particular township have immemorially repaired the highway at the end of a county bridge, situate within the township, it is not necessary to allege any consideration for such prescription. (*R.* v. *W. R. Yorkshire*, 4 *B. & Ald.* 623.)

The plea must correspond exactly with the facts which come out in evidence. Therefore a plea by the inhabitants of the county, that certain townships had *immemorially* used to repair a bridge, is disproved by evidence that the townships had enlarged the bridge to a carriage bridge, which they had before been bound to repair as a foot bridge. (*R.* v. *W. R. Yorkshire*, 2 *East*, 353: and see *R.* v. *Surrey*, 2 *Campb.* 455; *R.* v. *Duchess of Buccleugh*, 1 *Salk.* 357; 6 *Mod.* 150, S. C.; *R.* v. *Cumberland*, 3 *B. & P.* 354. *Post*, "*Highways in General*," Vol. III.)

So where upon an indictment against a county, the defendants pleaded that J. S. was liable *ratione tenuræ*, and it appeared that J. S. had purchased part of an estate, the owner of which, both before and after the purchase, had repaired the bridge: it was held, that this was not sufficient evidence to support the plea. (*R.* v. *Oxfordshire*, 16 *East*, 223.) *Et per* Lord *Ellenborough*, C. J. "The defendants have not maintained their plea. It is pleaded that M., and all those whose estate he hath, have immemorially repaired. Now, there is no evidence that he and those who had the estate have repaired, for it appears that since he purchased the estate another person has repaired. It would have been more correct to have pleaded that 'he and those whose estate he hath with others have repaired,' instead of which, the burthen is cast on him impartibly, without giving him the benefit of a contribution from Lord *Cadogan*. But I should be sorry to conclude the county from bringing forward their case."

So where a county pleaded that by a certain act of parliament for amending the road, certain trustees were directed to *lay out the tolls* thereby granted in repairing the roads, and were empowered to make and repair bridges; that the bridge in question was erected by the trustees under and by virtue of that act; and that the trustees were liable and ought to repair: it was held, that the bridge being built for public purposes in a public highway, the common law liability to repair attached upon the inhabitants of the county as soon as it was built; and that the plea was clearly insufficient to exonerate them, as it did not aver that the *trustees had funds adequate to the repair of the bridge*: and even if that fact had been averred and proved, still the county would have been primarily liable, and must have taken their remedy against the trustees. (*R.* v. *Oxfordshire*, 6 *D. & R.* 231; 4 *B. & Cres.* 194; and see *R.* v. *Netherthong*, 2 *B. & Ald.* 179.)

Removal by certiorari.

CERTIORARI.]—By 1 Ann. st. 1, c. 18, s. 5, it is enacted, "That all matters concerning the repairing and amending of the bridges and highways herein-before mentioned, shall be determined in the county where they lie, and not elsewhere; and that no presentment or indictment for not repairing such bridges, or the highways at the end of such bridges, shall be removed by *certiorari* out of the said county into any other Court."

In the case of *R.* v. *Cumberland*, 6 *T. R.* 194, the chief question was, whether an indictment for not repairing a bridge could be removed by *certiorari* or not? To show that it could *not*, the defendants relied on the above clause; but the prosecutor contended that it was intended only to prevent *defendants* removing such presentments or indictments, and did not take away the *cer-*

tiorari from the *prosecutor*. Lord *Kenyon*, C. J. stated several cases in which informations and indictments for non-repair of bridges had been removed by writs of *certiorari* applied for by the prosecutors. And that therefore the Court were of opinion that the *certiorari* was properly issued. He also stated, that if it were otherwise it would be an anomalous case in the law of England, for that in these cases the defendants are the inhabitants of a county, and if the indictments cannot be removed by *certiorari*, they must be tried by the very persons who are parties to the cause.

8. *Prosecution for Non-Repair, &c.*

This case afterwards came by writ of error before the House of Lords, where the above judgment was affirmed. (*Inhabitants of Cumberland* v. *The King*, 3 *Bos. & Pull.* 354.)

A *certiorari* lies to remove an order made by the justices concerning the repair of a bridge, pursuant to a private act of parliament; and the justices ought to return the private act upon which their order is founded. (*Dalt.* 504.)

(*R.* v. *Hamworth*, 2 *Stra.* 900.) Upon motion to quash a *certiorari* to remove an indictment against the defendants at sessions, for not repairing a bridge, it was insisted, that by stat. 1 Ann. c. 18, the *certiorari* is taken away. To which it was answered, and resolved by the Court, that this act extendeth only to bridges where the *county* is charged to repair; and that where a private person or parish is charged, and the right will come in question, the act of the 5 & 6 Will. 4, c. 11, hath allowed the granting a *certiorari*; and therefore they refused to quash.

In such a case the *certiorari* must be moved for before judgment has been pronounced in the inferior Court. Therefore where, upon an indictment at the quarter sessions for not repairing a bridge, a verdict was found for the crown, and judgment pronounced accordingly, the Court of Queen's Bench would not allow a *certiorari* to issue to remove the indictment for the purpose of taking objections to it. *Per Curiam.* The defendants have thought proper to take the chance of succeeding at the sessions. They ought clearly to have applied for a *certiorari* before the trial, and it ought not to issue in this late stage of the proceedings. They can now avail themselves of objections to the indictment by writ of error only. (*R.* v. *Machynlleth*, 1 *B. & C.* 142; 3 *D. & R.* 388, S. C.)

Evidence.

EVIDENCE AND WITNESSES.]—The preceding observations as to who are liable to repair will for the most part show the requisite evidence for the prosecution or defence; and see further, "*Highways in general*," Vol. III.

It lies on the prosecutors to prove that the bridge is a public bridge repairable by the county. On an indictment for not repairing arches as part of a bridge, it would be strong evidence that they were part of the bridge, if they were erected at the same time as the main bridge, or if the inhabitants of the county had from time to time repaired 300 feet of the road beyond these arches, which (if they were part of the original bridge) they would have been liable to do. (See *per Bayley*, J., in *R.* v. *Oxfordshire*, 1 *B. & Adolp.* 299, note.)

Where the indictment charged a corporation with a prescriptive obligation to repair a bridge, and a charter of a corporation granted by Edw. VI. was given in evidence, from the terms of which it appeared to be doubtful whether the corporation had before existed immemorially, and whether lands had not been given for the repair of the bridges (*R.* v. *Stratford-upon-Avon*, 14 *East*, 348); but parol evidence was given that the corporation had in fact repaired the bridge as far back as living memory could go; it was held that parol evidence and the charter might be taken in aid of each other, and that the preponderance of evidence was, that this was a corporation by prescription, although words of incorporation were used in the incorporating part of the charter only; and that the corporation were still bound to repair by prescription and not by tenure. (*Id.*)

Evidence of inhabitants to be taken.

The 1 Ann. st. 1, c. 18, s. 13, recites, "'Whereas many private persons, or bodies politic or corporate, are of right obliged to repair such decayed bridges,

8. *Prosecution for Non-Repairs, &c.*

1 Ann. c. 18, s. 13.

and the highways thereunto adjoining, but because the inhabitants of the county, riding or division, in which such decayed bridge or highways lie, have not been allowed, upon informations or indictments brought against such person or persons, bodies politic or corporate, for not repairing such decayed bridges, and the highways thereunto adjoining, by the judges before whom such information or indictment is to be tried, to be legal witnesses;" and enacts, "that in all informations or indictments to be brought and tried in any of her Majesty's Courts of Record at Westminster, or at the assizes or quarter-sessions of the peace, the evidence of the inhabitants, being credible persons, or any of them, of the town, corporation, county, riding or division, in which such decayed bridge or highway lies, shall be taken and admitted in all such cases, in the courts aforesaid; any custom, rule, order or usage to the contrary notwithstanding." Previous to this statute such witnesses were, in some instances, held to be competent on the ground of necessity. (*R.* v. *Carpenter*, 2 *Show.* 47; *R.* v. *The Inhabitants of Kirdford*, 2 *East*, 561.)

Trial.

Jurors.

TRIAL. JURORS.]—By 1 Ann. st. 1, c. 18, s. 5, *ante*, 474, all matters concerning the repairing and amending of bridges and the highways thereunto adjoining shall be determined in the county where they lie and not elsewhere.

It seemeth that no inhabitant of a county ought to be a *juror* for the trial of an issue, whether the county be bound to such repairs or not; and therefore the jury must come from some adjacent county. (1 *Hawk.* c. 77, s. 6.)

What justices may try.

And it seemeth that the same objection may lie as to the *justices*, where they are (as it may probably happen) all interested: in which case it seemeth that the trial shall be in the next county; for where an impartial trial cannot be had in the proper county, it shall be tried as near to the same as may be; as in the case of *R.* v. *Norwich*, concerning a county bridge, the trial was in Suffolk. (2 *Burr.* 859, 860.) But now, by a special statute, *viz.* 1 Ann. st. 1, c. 18, *supra*, an inhabitant of the county in such case may be a witness.

Where the bridge lies within the county of a city or town corporate, and the point in dispute is whether the inhabitants of the city or the county at large ought to repair, on a suggestion of these facts on the record, and that consequently no impartial investigation can take place in either of these jurisdictions, the *venire* will be awarded into the county adjacent to the larger division. (*R.* v. *Inhabitants of the City of Norwich*, 1 *Stra.* 177.)

Judgment.

JUDGMENT.]—The judgment of the Court upon a conviction will generally be regulated by those principles which govern the judgment on conviction for not repairing highways; and for which see "*Highways in general*;" "*Fine*," Vol. III.

It seems that in some cases where the evidence is greatly in favour of the non-liability of the defendants to repair, the Court of Queen's Bench will, upon motion, direct a rule to be drawn up for staying the judgment, upon payment of the costs of prosecution; the county in the meantime proceeding to indict the parties whom they contend to be liable. (*R.* v. *Oxford*, 16 *East*, 223.) The Court, however, will not stay judgment generally, but only till further order; and, if the trial of another indictment be not proceeded in with all despatch, judgment will be given. (*R.* v. *Southampton*, 2 *Chit.* 215.)

Fines, &c. to be paid to the treasurer.

By 1 Ann. stat. 1, c. 18, s. 4, after reciting that "Whereas upon presentments and indictments for not repairing such bridges, and the highways at the end of such bridges, the fines imposed and set upon such presentments and indictments, and other fines and issues for not repairing, building and amending such bridges, and the highways at the end of such bridges, are returned into the Court of Exchequer, or other Courts;" it is enacted that no fine, issue, penalty or forfeiture, shall hereafter be returned into the Court of Exchequer, or other Court, but shall be levied and paid into the hands of the treasurer or treasurers, so as aforesaid appointed by the said justices, to be accounted for by the said treasurer, and to be applied by the said justices towards the building, repairing or amending such bridges, and the highways at the end of such bridges, and to no other end or purpose whatsoever."

We have already seen that the court of quarter sessions cannot impose more than one fine for the non-repair, however insufficient that fine may be, and the only remedy, if the defendant still neglect to repair. (*R.* v. *Machynlleth*, 4 *B. & Ald.* 469; *ante*, 471.) 8. *Prosecution for Non-Repairs, &c.*

IX. Injuries, &c., to Public Bridges.

It is a misdemeanor at common law maliciously to destroy or materially to damage any public bridge, it being a nuisance to all the Queen's subjects. (2 *East, P. C.* 108.) At common law.

The General Turnpike Acts, 3 Geo. IV. c. 126, s. 121, and 4 Geo. IV. c. 59, s. 72, (*post*, "*Highways, Turnpike*," Vol. III.,) enact, that if any person shall wilfully pull down or damage, or cause any damage or injury to be done to any bridge, arch, wall or other building or erection set up by the trustees, &c. of any turnpike road on such road, &c. he shall be subject to the penalty of 40*s* over and above the damage done, to be recovered as therein pointed out. Under Turnpike Act.

By the 5 & 6 Will. IV. c. 50, s. 22, "The several powers and authorities hereby vested in the surveyor of highways, as well for the getting of materials, as the preventing and removing of all nuisances and annoyances, shall be and the same are hereby vested in the surveyor of county bridges, and the roads at the ends thereof repairable therewith; and the several penalties, forfeitures, matters and things in this act contained relating to highways shall be and the same are hereby extended and applied, as far as the same are applicable, to such bridges and the roads at the ends thereof as aforesaid; the said surveyor or surveyors of county bridges making satisfaction and compensation for all trespass and damage done in the execution of the powers of this act, in such and the same manner as the surveyors of highways are required to make under the provisions of this act." Powers of Highway Act for preventing nuisances to extend to county bridges and approaches to.

By 7 & 8 Geo. IV. c. 30, s. 13, "If any person shall unlawfully and maliciously pull down, or in anywise destroy any public bridge, or do any injury with intent, and so as thereby to render such bridge or any part thereof dangerous or impassable, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice or thrice publicly or privately whipped, (if the court shall so think fit,) in addition to such imprisonment." See the general clauses of this act, *post*, "*Malicious Injuries to Property*," Vol. V. Destroying, &c. bridges, felony. Punishment.

To the punishment of imprisonment, besides whipping, may be added hard labour for the whole or any part of the imprisonment, and with or without solitary confinement, (7 & 8 Geo. IV. c. 30, s. 27,) such confinement not exceeding one month at any one time, nor three months in any one year. (7 Will. IV. & 1 Vict. c. 90, s. 5.)

The offence is not triable at any quarter sessions. (5 & 6 Vict. c. 38, s. 1.) Not triable at sessions.

By the 43 Geo. III. c. 59, s. 4, actions for damages done to bridges, &c. and for the recovering of any property belonging to counties, may be brought in the name of the surveyor, &c. *ante*, 458. Actions for injuries to.

X. Forms.

County of , *to wit.* } *TO* , *of the parish of* , *in the said county. We* *and* , *two of her Majesty's justices of the peace in and for the said county, duly appointed, in pursuance of the statute in that case made and provided, to superintend the county bridges, ramparts, banks, cops, and other works appertaining to the same, and the roads over the same, and so much of the roads at the ends thereof as by law is to be repaired at the expense of the said county, within the division or hundred of* , *in the said county, having on this day inspected the* (1.) Order of two justices to repair a county bridge, under 52 Geo. 3, c. 110, s. 1.(*a*)

(*a*) *Ante*, 465. The act gives this form.

10. *Forms.*

county bridge , situate in the parish of in the said county, and within the said division or hundred; and it appearing to us, on our own inspection thereof, to be necessary for the purpose of preventing the further decay and injury of the same, to order the immediate repairs and amendments to be done to the same, as in the schedule of particulars by you prepared and signed, and hereto annexed: Now therefore we, the said justices, do hereby order and direct you immediately to repair and amend the said county bridge, according to the said schedule of particulars by you prepared and signed and hereto annexed, provided that the sum to be expended in such repairs shall not exceed the sum of . Given under our hands this day of , 18 .

(2.) Certificate to be returned to the sessions, pursuant to 52 Geo. 3, c. 110, s. 2,(a)

County of , to wit. } TO the justices of the peace at the general quarter sessions, to be holden at , in the said county, the day of , 18 . We and , two of her Majesty's justices of the peace in and for the said county, duly appointed, in pursuance of the statute in that case made and provided, to superintend the county bridges, ramparts, banks, cops, and other works appertaining to the same, and the roads over the same, and so much of the roads at the ends thereof as by law is to be repaired at the expense of the said county, within the division or hundred of , in the said county, do hereby certify to the said court of quarter sessions, that on the day of last we did inspect the county bridge situate in the parish of , in the said county, and within the division aforesaid; and it having appeared to us, on our own inspection thereof, that , and that it was necessary, for the purpose of preventing the further decay and injury of the same, to order the immediate repairs and amendments to be done to the same as follows, viz. *; therefore we, the said justices, did, on the said day of , make our order in writing, signed with our respective hands, and did thereby order and direct of the parish of in the said county of , immediately to make the said repairs and amendments, provided that the sum to be expended in such repairs should not exceed the sum of pounds. And we, the said justices, do hereby further certify, that the said repairs so directed to be made as aforesaid, have been made accordingly by the said , and that the reasonable price and charges payable to the said for the same amounts to the sum of , as per account hereto annexed and verified on the oath of . Given under our hands this day of , in the year of our Lord 18 .*

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(3) Indictment against a county for suffering a public bridge to be out of repair.

——(*to wit.*) *The jurors for our Lady the Queen upon their oath present, that on the day of , in the year of the reign of our Lady the now Queen Victoria, there was and from thence hitherto hath been and still is* [do not state it was immemorially public] *a certain common and public bridge, commonly called bridge, situate and being in the parish of , in the county of , in the common Queen's highway leading from the* [*market town of* ,] *in the county aforesaid, towards and unto the* [*market town of* , *in the same county, being a common highway for all the liege subjects of our said Lady the Queen on foot and with their horses, cattle, coaches, carts, and other carriages,* [according to the fact,] *to go, return, pass, repass, ride, and labour upon and over every year, at all times of the year,* [see *ante*, 472,] *at their free will and pleasure; and that the same during all the time aforesaid of right ought to have been used, and still of right ought to be used by all the said liege subjects for the purposes in that behalf aforesaid, and that the said common and public bridge on the day and year aforesaid, and continually from thence until the day of the taking of this inquisition, at the parish of aforesaid, in the county aforesaid, was and yet is ruinous, broken, dangerous, and in great decay, for want of needful and necessary upholding, maintaining, amending, and repairing the same, so that the liege subjects of our said Lady the Queen, in, upon, and over the said bridge, on foot, and with horses, coaches, carts, and carriages, could not during the time aforesaid, and cannot pass and repass, ride, and labour, without great danger of their lives and loss of their goods, as they before ought and were accustomed to do; and still of right ought to do; to the great damage and common nuisance of all the liege subjects of our said Lady the Queen upon and over the said bridge on foot, and with their horses, coaches, carts, and other carriages about their necessary affairs and business, going, returning, passing, riding, and labouring; and against the peace of our said Lady the Queen, her crown and dignity: and that the inhabitants of the county of aforesaid, of right have been, and still of right are bound to repair and amend the said common bridge when and so often as it shall be necessary.*

(a) *Ante*, 466. The act gives this form.

10. *Forms.*

(4.) Presentment at a quarter sessions of a bridge which the county ought to repair, being out of repair, *ante*, 470.

[Commence as usual, *post*, "*Presentment*," Vol. V.] *that at a general quarter sessions of the peace of our Lady the Queen, holden at for the said county, on, &c. before E. F. G. H., &c. Esquires, and others justices of our said Lady the Queen assigned to keep the peace of our said Lady the Queen, in and for the said county, and also to hear and determine divers felonies, trespasses, and misdemeanors, committed within the said county, it is presented by the oath of A. B., &c.* [the names of the grand jurors,] *good and lawful men of the said county, then and there sworn and charged to inquire for our said Lady the Queen and the body of the said county as followeth, that is to say, aforesaid; the jurors present for our sovereign lady the Queen upon their oath, that a certain bridge over the river , commonly called Bridge, lying and being in the several parishes of and , in the said county of , in the Queen's common highway there, leading from* [*the market town of* ,] *in the county of , to* [*the market town of* ,] *in the county of , for and during twenty years last and upwards, being a common Queen's highway for all the liege subjects of our said Lady the Queen, with their horses, carts, and carriages, to go, pass, ride, and travel, at their freewill and pleasure, on, &c. was and continually from thenceforth hitherto hath been and still is in great decay, broken down, and ruinous, so that the liege subjects of our said Lady the Queen, upon and over the said bridge with their horses, carts, and carriages, could not and cannot go, pass, ride, and travel, without great danger, to the grievous damage and nuisance of all the liege subjects of our said Lady the Queen, upon and over the said bridge, going, passing, riding, and travelling, against the peace of our said Lady the Queen, her crown and dignity; and that the inhabitants of the county of aforesaid, the common bridge aforesaid (so as aforesaid being in decay) ought to repair and amend when and so often as it shall be necessary.*

(5.) Indictment against an individual for not repairing a bridge which he ought to do *ratione tenuræ*, *ante*, 473.

[Proceed as in form, *supra*, (No. 3,) to the words *crown and dignity*, and then conclude as follows]: *And that C. D. late of* [*gentleman*] *by reason of his tenure of certain lands, situate, lying, and being in the parish of , in the said county of , during all the time aforesaid was and still is bound to repair and amend the said common bridge as often and whenever it hath been and shall be necessary.*

(6.) Indictment for not repairing a highway within distance of 300 feet from a bridge built before 20th March 1836, *ante*, 454.

—— *to wit. THE jurors for our Lady the Queen upon their oath present, that from time immemorial there was and yet is a common and ancient Queen's highway leading from* [*the market town*] *of , in the* [*west riding of the*] *county of towards and unto* [*the market town of* ,] *in the county* [*palatine*] *of , in, through, and over the* [*township*] *of , in the* [*west riding of*] *the county of aforesaid, used for all the liege subjects of the Queen for themselves with carriages, &c. to pass, &c.* [as *ante*, 478.] *And that a certain part of the said highway at the said* [*township*] *of , in the* [*west riding*] *aforesaid, to wit, a certain part thereof lying next adjoining the* [*west*] *end of a certain public bridge there, called Bridge, and within the distance of* 300 *feet thereof, beginning at the west end of the said public bridge and extending from thence* [*westwards*] *containing in length* [45] *feet, and in breadth* [*seven*] *yards, and a certain other part thereof lying next adjoining to the* [*east*] *end of the said bridge, and within the distance of* 300 *feet thereof, beginning at the east end of the said bridge, and extending from thence eastwards, containing in length* 150 *feet and in breadth seven yards, on the day of , in the year of the reign of our Lady the now Queen Victoria, at the parish of , in the county of , was and yet is very ruinous and in decay for want of repair, &c.* [as *ante*, 478,] *so that the subjects of the Queen cannot safely pass; to the common nuisance, &c.* [as *ante*, 527], *against the peace of our said Lady the Queen, her crown and dignity, and against the form of the statute in such case made and provided. And that the inhabitants of the west riding of the said county of the said common highway so as aforesaid being in decay, of right ought to repair and amend when and so often as it shall be necessary.*

(7.) Commitment under 7 & 8 Geo. 4, c. 30, s. 13, for destroying a bridge, *ante*, 477.

[Commencement as usual, as *ante*, p. 9, (No. 1.)] *on the day of* A. D. *, at the parish of , in the said county, a certain public bridge there situate, unlawfully, maliciously, and feloniously did pull down and destroy: against the form of the statute in such case made and provided. And you the said keeper, &c.* [as usual, as *ante*, 9, to the end.]

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10. *Forms.*

(8) Indictment for a like offence, *ante*, 477.

—— *to wit. THE jurors for our Lady the Queen upon their oath present, that C. D. late of the parish of , in the county of , labourer, on the day of , in the year of the reign of our Lady the now Queen Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, a certain public bridge there situate, commonly called Bridge, then and there unlawfully, maliciously, and feloniously did pull down and destroy; against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.* [If any doubt as to the name or situation of the bridge add another count or more.]

(9.) Commitment on like act for doing injury to a bridge to render it dangerous, &c. *ante*, 477.

[Commencement as usual, as *ante* 9, (No. 1.)] *on the day of* A. D. *at the parish of , in the said county, unlawfully, maliciously, and feloniously did, &c.* [state the injury done, see the act, *ante*, 477,], *with intent thereby the said bridge* [such bridge or any part thereof] *to render dangerous and impassable; and that the said C. D. thereby did render the same dangerous and impassable; against the form of the statute in such case made and provided. And you the said keeper, &c.* [as usual, as *ante*, p. 9, to the end.]

(10.) Indictment for a like offence, *ante*, 477.

—— *to wit. THE jurors for our Lady the Queen upon their oath present, that C. D. late of the parish of , in the county of , labourer, on the day of , in the year of the reign of our Lady the now Queen Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully, maliciously, and feloniously did, &c.* [state the injury done], *with intent thereby then and there the said bridge to render dangerous and impassable; and that the said C. D. then and there did thereby render the same dangerous and impassable; against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.*

British Plate Glass Company, see "*Malicious Injuries to Property*," Vol. V.

Broker, see "*Annuity*," *ante*; "*Extortion*," Vol. II.; "*Larceny*," Vol. III.

Brothel, see "*Disorderly House*," Vol. II.; "*Lewdness*," Vol. III.

Buggery, see "*Sodomy*," Vol. V.

Building Act.

THIS act is the 14 Geo. III. c. lxxviii., relating to London and its precincts, the provisions, however, being extremely long and local, are not here inserted. It is partially amended by the 1 & 2 Vict. c. 75.

In the case of *Rix and another*, 4 *D. & R.* 332; 2 *D. & R. M. C.* 249, S. C. where justices omitted to set out in the record of a conviction on the act the evidence adduced on the hearing of the information as nearly as possible in the words used by each of the witnesses, in pursuance of the 3 Geo. IV. c. 23, a *mandamus* was granted to compel them to set it out.

See, as to what may be an addition of a building within the act, *R.* v. *Gregory*, 2 *Nev. & Man.* 478; 5 *B. & Adol.* 555. See also *R.* v. *Hungerford Market Company*, 2 *Nev. & Man.* 340; *Wells* v. *Ody*, 2 *C. M. & R.* 128, 184; 7 *C. & P.* 22, S. C.; *Wells* v. *Ody*, 1 *M. & W.* 452; *Thacker* v. *Wilson*, 3 *Ad. & El.* 142; 2 *N. & M.* 659, S. C.

Building Benefit Societies, see "*Friendly Societies*," Vol. III.

Bull Baiting.

As to the ill treatment of cattle in general, see "*Cattle and Animals*." *post*.

The 121st section of the General Turnpike Act, 3 Geo. IV. c. 126, imposes a penalty on persons bull baiting near turnpike roads. (See the enactment *post*, "*Highways, Turnpike*," Vol. III. See also "*Police*," Vol. V.)

Bullion, see "*Coin*," *post*.

Burglary.

Offences against the house of another, which fall short of burglary, belong to title "*Larceny*," and are to be found under that title, Vol. III.

I. *What constitutes the Offence of Burglary*, 481.
1. *As to the Breaking*, 482.
2. —— *the Entry*, 484.
3. —— *the Dwelling-house*, 485.
4. —— *the Ownership of it*, 488.
5. —— *the Time*, 493.
6. —— *the Intention*, 493.
II. *Burglary by breaking out of a House*, 494.
III. *Burglary, and Assaulting with intent to Murder, &c.* 495.
IV. *Indictment, &c. for*, 495.
V. *Trial and Verdict*, 497.
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VIII. *Offence of having Housebreaking Tools in possession*, 498.
IX. *Forms*, 498.

I. What constitutes the Offence of Burglary.

The word *burglar* seemeth to have been brought unto us out of *Germany*, by the *Saxons*, and to be derived of the German *burg*, a house, and *larron* a thief, probably from the Latin, *latro, latronis*. Derivation.

Burglary *is a felony at common law, in breaking and entering a dwelling-house of another, in the night, with intent to commit some felony within the same, whether the felonious intent be executed or not.* (*Hale's Sum.* 49; and see 2 *Russ.* 900; 4 *Bla. Com.* 227.) Definition of offence at common law.

As to burglary by breaking out of a house, see *post*, 494. Burglary by breaking out of a house.

As to burglary and attempt to murder, see *post*, 495. Burglary and attempt to murder.

As to housebreaking and stealing in a dwelling-house, or in shops, &c., see "*Larceny*," Vol. III. Housebreaking and stealing in.

1. *What is a Burglary.*

I. As to the Breaking.

Must be a *breaking.*

What is one.

To constitute a burglary, there must be an actual or constructive breaking, into the house. Every entrance into the house by a trespasser is not a breaking in this case. As if the door of a mansion house stand open, and the thief enter, this is not breaking. So, if the window of the house be open, and a thief with a hook or other engine draweth out some of the goods of the owner, this is no burglary, because there is no actual breaking of the house. But if the thief breaketh the glass of a window, and with a hook or other engine draweth out some of the goods of the owner, this is burglary, for there was an actual breaking of the house. (3 *Inst.* 64; 1 *Hale*, 551.) Where a window was a little open, and not sufficiently so to admit a person, and the prisoner pushed it wide open and got in, this was held to be no sufficient breaking. (*R.* v. *Smith*, *Car. C. L.* 293; *R. & M.* 178, S. C.) If there be an aperture in a cellar window to admit light, through which a thief enters in the night, this is not burglary. (*R.* v. *Lewis*, 2 *Car. & P.* 628; *R.* v. *Spriggs*, 1 *Moo. & R.* 357.)

Violence is not necessary.

There is no need of any demolition of the walls, or any manual violence, to constitute a breaking. Lord *Hale* says, "These acts amount to an actual breaking, *viz.* opening the casement or breaking the glass window, picking open the lock of a door, or putting back the lock, or the leaf of a window, or unlatching the door that is only latched." (1 *Hale*, 552; and see *Pugh* v. *Griffiths*, 7 *A. & El.* 836; *R.* v. *Widan*, 7 *C. & P.* 432; *R.* v. *Wheldon*, 8 *C. & P.* 247; *R.* v. *Hyams*, 7 *C & P.* 441.) Where a glass window was broken, and the window opened with the hand, but the shutters in the inside were not broken; this was ruled to be burglary, by *Ward*, C. B., *Powis* and *Tracy*, justices, and the Recorder; but they thought this the extremity of the law; and on a subsequent conference, *Holt*, C. J., and *Powel*, C. J., doubting and inclining to another opinion, no judgment was given. (2 *East's P. C.* 487. See *R.* v. *Bailey and Spencer*, *post*, 485, 486.) Where an entry was effected by taking the glass out of a door, it was holden to be a burglary. (*R.* v. *John Smith*, *Russ. & R.* 417.)

Entering by chimney.

If a thief enter by the chimney, it is a breaking; for that is as much closed as the nature of things will permit. (1 *Hawk.* c. 38, s. 4; 4 *Bla. Com.* 226.) And it would be a burglarious breaking to constitute burglary, though the party does not enter any of the rooms of the house. Thus in *R.* v. *Brice*, (*R. & R.* 450,) the prisoner got in at a chimney, and lowered himself a considerable way down, just above the mantel piece of a room on the ground floor. *Holroyd* and *Burrough*, justices, thought this was not a breaking and entering of the dwelling-house, on the ground that he was not in the dwelling-house till he was below the chimney-piece. The rest of the judges, however, held otherwise; for that the chimney was part of the dwelling-house, that the getting in at the top was a breaking of the dwelling-house, and that the lowering himself was an entry therein.

Must be a fastening.

Where the prisoner effected an entry, by pulling down the upper sash of a window, which had not been fastened, but merely kept in its place by the pulley weight: the judges held this to be a sufficient breaking to constitute burglary, even although it also appeared that an outside shutter, by which the window was usually secured, was not closed or fastened at the time. (*R.* v. *Haines and Harrison*, *R. & R.* 451; and see *R.* v. *Hyams*, 7 *C. & P.* 441.) Where an entry was effected, first into an outer cellar, by lifting up a heavy iron grating that led into it, and then into the house by a window: and it appeared that the window, which opened by hinges, had been fastened by means of two nails as wedges, but could notwithstanding easily be opened by pushing; the judges held that opening the window, so secured, was a breaking sufficient to constitute burglary. (*R.* v. *Hall*, *R. & R.* 355.) So where a party thrust his arm through the broken pane of a window, and in so doing broke some more of the pane, and removed the fastenings of the window and opened it. (*R.* v. *Robinson*, *R. & M.* 327. And see *R.* v. *Bird*, 9 *C. & P.* 44.)

1. *What is a Burglary.*

But if a window thus opening on hinges, or a door, be not fastened at all, opening them would not be a breaking, within the definition of burglary. Even where the heavy flat door of a cellar, which would keep closed by its own weight, and would require some degree of force to raise it, was opened; it had bolts by which it might have been fastened on the inside, but it did not appear that it was so fastened at the time: the judges were divided in opinion whether the opening of this door was such a breaking of the house as constituted burglary. (*R.* v. *Cullan*, *R. & R.* 157.) It was holden in *Brown's case* (2 *East's P. C.* 487) that it was. It seems the only difference between these two cases is, that in *Brown's case* there were no interior fastenings, but in *Cullan's* there were, though not used. In a later case it has been held by *Bolland*, B., that the lifting up of a trap door covering a cellar, which was merely kept in its place by its own weight, and which had no fastenings, because it being a new trap door, they had not been put on, is not a sufficient breaking to constitute a burglary. (*R.* v. *Lawrence*, 4 *C. & P.* 231. See *R.* v. *Russell*, *R. & M.* 377; *R.* v. *Smith*, *supra.*)

Where thing shut with its own weight.

Where the offender, with intent to commit a felony, obtains admission by some artifice or trick for the purpose of effecting it, he will be guilty of burglary, for this is a *constructive* breaking. Thus where thieves, having an intent to rob, raised the hue and cry, and brought the constable, to whom the owner opened the door; and when they came in they bound the constable and robbed the owner; this was held a burglary. So if admission be gained under pretence of business; or if one take lodgings with a like felonious intent, and afterwards rob the landlord; or get possession of a dwelling-house by false affidavits without any colour of title, and then rifle the house; such entrance being gained by fraud, it will be burglarious. (2 *East's P. C.* 485.) So in *A. Hawkin's case*, *O. B.* 1704, (2 *East's P. C.* 485,) she was indicted for burglary; upon evidence it appeared that she was acquainted with the house, and knew that the family were in the country; and meeting with the boy who kept the key, she prevailed upon him to go with her to the house, by the promise of a pot of ale; the boy accordingly went with her, opened the door, and let her in, whereupon she sent the boy for the pot of ale, robbed the house, and went off; and this being *in the night time*, it was adjudged that the prisoner was clearly guilty of burglary. (And see *Doe* v. *Carter*, 8 *T. R.* 302.) If a servant conspire with a robber, and let him into the house by night, this is burglary in both; (1 *Hale*, 553; 1 *Hawk.* c. 38, s. 14; *R.* v. *Cornwall*, 2 *Str.* 881;) for the servant is doing an unlawful act; and the opportunity afforded him of doing it with greater ease rather aggravates than extenuates the guilt. But if a servant, pretending to agree with a robber, open the door and let him in for the purpose of detecting and apprehending him, this is no burglary, for the door is lawfully open. (*Reg.* v. *Johnson*, 1 *Car. & Mar.* 218.)

Entering by fraud a constructive breaking.

A breaking may be also constructive, as where in consequence of violence commenced or threatened, in order to obtain entrance, the owner, either from apprehension of the force, or with a view more effectually to repel it, opens the door through which the robbers enter. But where no fraud or conspiracy is made use of, or violence commenced or threatened, in order to obtain an entrance, there must be an actual breach of some part of the house, though it need not be accompanied with any violence as to the manner of executing it. (2 *East's P. C.* 486.)

So entering by threats.

Some part of the house must be broken. Where the prisoner opened the area gate with a skeleton key, and from the area passed into the kitchen, through a door which did not appear to have been shut at the time; the judges held that opening the area gate was not a breaking of the dwelling-house, as there was no free passage, in the time of sleep, from the area into the house. (*R.* v. *Davis*, *R. & R.* 322.) So, breaking a door, which formed part of the outward fence of the curtilage of a dwelling-house, and which opened, not into any building, but into a yard only, was holden not to be a breaking of the dwelling-house; the premises consisted of a dwelling-house, warehouses, and stables, surrounding a yard; there was an immediate entrance to the dwelling-house from the street, and a gate and gateway, under one of

Must be into part of a house.

1. *What is a Burglary.*

the warehouses, leading into the yard; the prisoner entered the premises by breaking this gate: the judges held that this was not burglary: that breaking this gate, which was part of the outward fence of the curtilage, and not opening into any of the buildings, was not a breaking of any part of the dwelling-house. (*R.* v. *Bennett*, *R. & R.* 289.) A shutter-box partly projected from a house, and adjoined the side of the shop window, which side was protected by wooden panelling, lined with iron: held, that the breaking and entering the shutter-box did not constitute burglary. (*R.* v. *Paine*, 7 *Car. & P.* 135.) As to what is a dwelling-house, see *post*, 485, and *post*, "*House*," Vol. III.

Breaking inner rooms, &c.

A burglary may be committed by a breaking on the inside: for though a thief enter a dwelling-house in the night-time through the outer door being left open, or by an open window, yet, if when within the house, he turn the key or unlatch a chamber door, with intent to commit felony, this is burglary. (*R.* v. *Johnson*, 2 *East's P. C.* 488.) And this may be done by a servant, who sleeps in an adjacent room, unlatching his master's door, and entering his apartment with intent to kill him; (1 *Hale*, 544; 2 *East's P. C.* 488;) or to commit a rape on his mistress; (*Gray's case*, 1 *Stra.* 481.) But Lord *Hale* doubts whether a guest at an inn is guilty of burglary by rising in the night, opening his own door, and stealing goods from other rooms. (1 *Hale*, 554.) And it seems certain that breaking open a chest or trunk is not in itself burglarious; (*Fost.* 108, 109; 2 *East's P. C.* 488;) and, according to the better opinion, the same principle applies to cupboards, presses, and other fixtures, which, though attached to the freehold, are intended only the better to supply the place of moveable depositories. (*Fost.* 109) And Mr. J. *Foster* there says, "in questions between the heir or devisee, and the executor (see 2 *Vern.* 508; 1 *P. Wms.* 94;) those fixtures may with propriety enough be considered as annexed to and parts of the freehold. The law will presume that it was the intention of the owner, *under whose bounty the executor claimeth*, that they should be so considered; to the end that the house might remain to those who, by operation of law, or by his bequest, should become entitled to it, in the same plight he put it or should leave it, entire and undefaced. But in capital cases I am of opinion that such fixtures, which merely supply the place of chests and other ordinary utensils of household, should be considered in no other light than as mere moveables, partaking of the nature of those utensils, and adapted to the same use." See 1 *Hale*, 555; 2 *East's P. C.* 489; see also the valuable work on Fixtures by Messrs. Amos and Ferard.

Breaking out of a house.

It was formerly doubted whether the breaking might not be subsequent to the entry; as if the prisoner being in the house, without violence, should break it, in order to escape with his booty; (1 *Hale*, 554;) but this difficulty was removed by 12 Ann. c. 7, and now by the 7 & 8 Geo. IV. c. 29, s. 11, which see, *post*, 494.

Unlocking and opening a hall door of a house and running away, is a sufficient breaking out of the house. (*R.* v. *Lawrence*, 4 *C. & P.* 231; see *R.* v. *Compton*, 7 *C. & P.* 139, *post*, 495.)

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2. As to the Entry.

There must be an entry.

It is essential that there should be an *entry* as well as a *breaking*. (1 *Hale*, 555.)

What amounts to.

It is deemed an entry when the thief breaketh the house, and his body, or any part thereof, as his foot or his arm, is within any part of the house; or when he putteth a gun into a window which he hath broken, (though the hand be not in,) or into a hole of the house which he hath made, with intent to murder or kill; this is an entry and breaking of the house; but if he doth barely break the house, without any such entry at all, this is no burglary. (3 *Inst.* 64; 2 *East's P. C.* 490.)

Thieves came by night to rob a house; the owner went out and struck one of them; another made a pass with a sword at persons he saw in the

entry, and in so doing his hand was over the threshold. This was adjudged burglary by great advice. (2 *East's P. C.* 490.)

1. *What is a Burglary.*

In the case of George Gibbons, Old Bailey, June, 1752 (*Fost.* 107; 2 *East's P. C.* 490;) who was indicted for burglary in the dwelling-house of John Allan, it appeared in evidence that the prisoner in the night time cut a hole in the window shutters of the prosecutor's shop, which was part of his dwelling-house, and putting his hand through the hole took out watches and other things, which hung in the shop within his reach; but no entry was proved, otherwise than by putting his hand through the hole. This was held to be burglary, and the prisoner was convicted.

Introducing the hand through a pane of glass, broken by the prisoner, between the outer window and an inner shutter, for the purpose of undoing the window latch, is a sufficient entry. (*R.* v. *Bailey*, *R. & R.* 341.) So would the mere introduction of the offender's finger. (*R.* v. *Davis*, *R. & R.* 499; and see 1 *Hale*, 533.)

So, an entry down a chimney is a sufficient entry into the house, for the chimney is part of the house. (*R.* v. *Brice*, *R. & R.* 450, *ante*, 482.)

But an entry through a hole in the roof, left for the purpose of admitting light, is not a sufficient entry to constitute burglary; for a chimney is a necessary opening, and needs protection; whereas, if a man choose to leave a hole in the wall or roof of his house instead of a fastened window, he must take the consequences. (*R.* v. *Spriggs*, 1 *Moo. & Rob.* 357.)

It is even said that discharging a loaded gun into a house is a sufficient entry. (1 *Hawk.* c. 38, s. 11; 1 *Hale*, 555; 4 *Camp.* 220; *Pickering* v. *Rudd*, 1 *Stark.* 48.)

If the instrument with which the house is broken happen to enter the house, but without any intention upon the part of the burglar to effect his felonious intent (as, for instance, to draw out the goods) with it, this will not be a sufficient entry to constitute a burglary. (*R.* v. *Hughes & al*, 1 *Leach*, 496; see *R.* v. *Roberts*, 2 *East's P. C.* 487.)

The prisoner raised a window which was not bolted, and he thrust a crowbar under the bottom of the shutter (which was about half a foot within the window) so as to make an indent on the inside of the shutter, but from the length of the bar his hand was not inside the house. This was held not to be a sufficient entry to constitute burglary. (*R.* v. *Rust and Ford*, *R. & M.* 184; *Car. C. L.* 293, S. C. by the name of *R.* v. *Roberts*.)

Where the house was broken, but not entered, and the owner for fear threw out his money, it was holden to be no burglary; though clearly robbery, if taken in the presence of the owner. (2 *East's P. C.* 490.)

Where thieves bored a hole through the door with a centre-bit, and part of the chips were found in the inside of the house, by which it was apparent that the end of the centre-bit had penetrated into the house, yet as the instrument had not been introduced for the purpose of taking the property or committing any other felony, it was decided that this was not sufficient to constitute burglary. (*R.* v. *Hughes*, 2 *East's P. C.* 491.)

If divers come in the night to do a burglary, and one of them break and enter, the rest of them standing to watch at a distance, this is burglary in all. (3 *Inst.* 64.)

The entry need not be at the same time as the breaking, provided both be in the night: therefore, if thieves break a hole in the house one night, with intent to enter another night, and commit felony, which they execute accordingly, it is burglary. (1 *Hale*, 551.)

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3. As to the Dwelling-house and Residence.

The burglary must be in a dwelling-house.

The breaking and entering, to constitute a burglary, must be into the dwelling-house of another, that is to say, a house which the occupier or his family usually *reside*, or in other words dwell and lie in.

Church.

It has been said that a church may be the subject of burglary (3 *Inst.* 64; 1 *Hale*, 556); but this seems questionable (see 1 *Hawk.* c. 38, s. 17); the act,

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7 & 8 Geo. IV. c. 29, s. 11, merely mentions "*dwelling-house.*" There is an express provision as to breaking and entering into and *stealing* chattels in a church, 7 & 8 Geo. IV. c. 29, s. 10, *post*, "*Larceny*," Vol. III.

Person must reside in it.

A house under repair, or a building intended for and constructed as a dwelling-house, in which no one lives, though the owner's property is deposited there, is not a place in which burglary can be committed; for it cannot be deemed his dwelling-house, until he has taken possession and began to inhabit it; (1 *Leach*, 185; *Fuller's case*, 2 *East's P. C.* 498; 1 *Leach*, 196, n.; *Elsmore* v. *St. Briavells*, 2 *M. & R.* 514; 8 *B. & Cress.* 461, S. C.;) nor will it make any difference if one of the workmen engaged in the repairs sleep there in order to protect it; (1 *Leach*, 186, *in notis*;) nor though the house is ready for the reception of the owner, and he has sent his property into it preparatory to his own removal, will it become for this purpose his mansion. (*R.* v. *Hallard*, 2 *East's P. C.* 498; *R.* v. *Thompson*, *Id.*; 2 *Leach*, 771.) So if the landlord of a house purchase the furniture of his out-going tenant, and procure a servant to sleep there in order to guard it, but without any intention of making it his own residence, a breaking into the house will not amount to burglary. (*R.* v. *Davis*, 2 *Leach*, 876; *R.* v. *Smith*, 2 *East's P. C.* 497; *R.* v. *Fuller*, *Id.* 498; 1 *Leach*, 196, n.) The mere casual use of a tenement will not suffice. (1 *Hale*, 557.) Where neither the owner nor any of his family have slept in the house, it is not his dwelling-house, so as to make the breaking into it burglary, though he had used it for his meals and all the purposes of his business. (*R.* v. *Martin*, *R. & R.* 108.) If a man die in his leasehold house, and his executors put servants in it, and keep them there at board wages, burglary may be committed in breaking it, and it may be laid to be the executor's property. (2 *East's P. C.* 499.)

What actual residence necessary or not.

It is not absolutely necessary to make it burglary that any person should be actually within the house at the time the offence is committed. For if the owner leaves it *animo revertendi*, though no person resides there in his absence, it will still be his mansion. (1 *Hawk.* c. 37, s. 11.) As if a man has a house in town and another in the country, and goes to the latter in the summer, the nocturnal breaking into either, with a felonious design, will be burglarious; (*Fost.* 77; 2 *East's P. C.* 496, *Nutbrown's case*;) so if he goes a journey. (*R.* v. *Murray*, 2 *East's P. C.* 496.) And though a man leaves his house and never means to live in it again, yet if he uses part of it as a shop, and lets his servant and his family live and sleep in another part of it, for fear the place should be robbed, and lets the rest to lodgers, the habitation by his servant and family will be a habitation by him, and the shop may still be considered as part of his dwelling-house. (*R.* v. *Gibbons*, *R. & R.* 442.) But where the prosecutor, an upholsterer, left the house in which he had resided with his family, without any intent of returning to live in it, and took a dwelling-house elsewhere, but still retained the former house as a warehouse and workshop; two women, employed by him as work-women in his business, and not as domestic servants, slept there to take care of the house, but did not have their meals there, or use the house for any other purpose than sleeping in it as a security to the house; the judges held that this was not properly described as the dwelling-house of the prosecutor. (*R.* v. *Flannagan*, *R. & R.* 187.)

Residence by a servant.

The occupation of a *servant* in that capacity, and not as tenant, is in many cases the occupation of the master, and will be a sufficient residence to render it the dwelling-house of the master. (*R.* v. *Stock*, *R. & R* 185, *post*, 490; *R.* v. *Wilson*, *R. & R.* 115.) Where the prisoner was indicted for burglary in the dwelling-house of J. B. J. B. worked for one W. who did carpenter's work for a public company, and put J. B. into the house in question, which belonged to the company, to take care of it, and some mills adjoining. J. B. received no more wages after than before he went to live in the house. It was held not rightly laid. (*R.* v. *Rawlings*, 7 *Car. & P.* 150.) If a servant live in a house of his master's at a yearly rent, the house cannot be described as the master's house, though it is on the premises where the master's business is carried on, and although the servant has it because of his service. The servant is in such a case the tenant of the master, who might have distrained

for rent, and could not arbitrarily have removed him, and consequently, the occupation of the servant cannot be deemed the occupation of the master. (*R.* v. *Jervis & al. R. & M.* 7; and see further, *post*, 489; "*Larceny*," Vol. III.)

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Every permanent building, in which a party may *dwell and lie*, is deemed a dwelling-house, and burglary may be committed in it. A set of chambers in an inn of court or college is deemed a distinct dwelling-house for this purpose. (1 *Hale*, 556; 1 *Hawk.* c. 38, s. 11.) So even a loft over a stable, used for the abode of a coachman, which he rents for his own use and that of his family, is a place which may be burglariously broken. (*R.* v. *Turner*, 1 *Leach*, 305.) So also burglary may be committed in a lodging-room; (1 *Leach*, 89;) or in a garret used for a workshop, and rented together with an apartment for sleeping, and if the landlord does not sleep under the same roof, the place may be laid as the mansion of the lodger. (1 *Leach*, 237; see further *post*, 491, 492.) But burglary cannot be committed in a tent or booth in a market or fair, even although the owner lodge in it; (1 *Hawk.* c. 38, s. 35; 1 *Hale*, 557;) because it is a temporary, not a permanent, edifice. But if it be a permanent building, though used only for the purposes of a fair, it is a dwelling-house. (*R.* v. *Smith*, 1 *M. & Rob.* 256.)

What a sufficient house.

A set of chambers in inn of court, &c.

The term "mansion-house," in its common sense, not only includes the dwelling-house but also all outhouses, as barn, stable, cow-house, dairy-house, if they be parcel of the mansion, though they be not under the same roof or joining contiguous to it. (1 *Hale*, 558, 559.)

Outhouses, &c.

And all outhouses, within the same curtilage, with the dwelling-house, occupied and immediately connected and communicating with it, may be the subject of burglary, and the burglary, in such cases, may be alleged to have been in the dwelling-house. Formerly this was the case with respect to all buildings within the curtilage. But by stat. 7 & 8 Geo. IV. c. 29, s. 13, "no building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for the purpose of burglary, or for any of the purposes aforesaid, *unless there shall be a communication* between such building and dwelling-house, *either immediate* or *by means of a covered and inclosed passage leading from the one to the other*." This provision made an important alteration in the law as it previously stood, for no communication as that pointed out by the act was absolutely necessary at common law to constitute burglary, see cases, *infra*, note(*a*). Where the prosecutor's house consisted of two rooms for living in,

7 & 8 Geo. 4, c. 29, s. 13.

(*a*) The following decisions will show how the law stood previously to the above act of 7 & 8 Geo. IV. c. 29. Their insertion is deemed useful, especially in deciding questions arising as to what is a house to constitute the offence of arson; as to which, see *post*, "*Burning*."

This offence was deemed to be committed by breaking open a shop built close to a dwelling-house, although no one slept in it, and it had no internal communication with the principal mansion. (*R.* v. ——, 1 *Leach*, 357.) And a building used with a dwelling-house and opening into an inclosed yard belonging thereto was deemed parcel of the dwelling-house, though it also opened into an adjoining street, and although it had no internal communication with the dwelling-house. (*R.* v. *Lithgo*, *R. & R.* 357.) And where the prosecutor's house was at the corner of a street, and adjoining thereto was a workshop, beyond which a stable and coach-house adjoined, all were used with the house, and had doors opening into a yard belonging to the house, which yard was surrounded by adjoining buildings, &c. making altogether an inclosed yard; the workshop had no internal communication with the house, and it had a door opening into the street; its roof was higher than that of the dwelling-house; the street door of the workshop was broken open in the night and the offender being indicted for burglary and convicted, the judges held this workshop was parcel of the dwelling, and that the conviction was right. (*R.* v. *Chalking*, *R. & R.* 334.) So where the prisoner broke into a goose-house opening into the prosecutor's yard, into which his house also opened, and the yard was surrounded partly by other builings of the homestead and partly by a wall, some of the buildings had doors opening backward, and there was a gate in one part of the wall opening upon a road; this goose-house was held to be part of the dwelling-house. (*R.* v. *Clayburn and another*, *R. & R.* 360.)

But where a centre building was al-

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another room used as a cellar, and a wash-house on the ground-floor, and of three bed-rooms up stairs, one of them over the wash-house, and the bed-room over the house-place communicated with that over the wash-house, but there was no internal communication between the wash-house and any of the rooms of the house, but the whole was under the same roof; and the defendant broke into the wash-house, and was breaking through the partition wall between the wash-house and the house-place; it was holden that the defendant was properly convicted of burglary, in breaking the house. (*R.* v. *Burrows*, *R. & M.* 274.) To be within the meaning of this statute, the building must be occupied with the house in the same right; and, therefore, where a house let to and occupied by A. adjoined and communicated with a building let to and occupied by A. and B., it was holden that the building could not be considered a part of the dwelling-house of A. (*R.* v. *Jenkins*, *R. & R.* 244.) If there be any doubt as to the nature of the building broken and entered, a count may be inserted for breaking and entering a building within the curtilage. (See "*Larceny*," Vol. III. and *Jervis's Arch. C. L.* 9 ed. 306.)

Divided house.

A dwelling-house may be so divided as to form two or more dwelling-houses within the meaning of the word in the definition of burglary. See the authorities, *post*, 492.

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4. As to the Ownership in the House.

Who the owner of the house.

It is necessary to ascertain to whom the mansion belongs, and to state that with accuracy in the indictment. If the rule, observes Mr. East, (2 *East's P. C.* 499, 500,) by which to ascertain this ownership may be compressed with sufficient discrimination into a small compass, I should say generally, that where the legal title to the whole mansion remains in the same person; there, if he inhabit it either by himself, his family, or servants, or even by

General rule.

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lotted to a variety of trades and there were two wings annexed to it, both of which were used as dwelling-houses and were occupied by different persons, but had no internal communication with the building, though the roofs of all were connected, and the entrances of all were out of the same common enclosure, the case was considered otherwise, and it was holden not a dwelling-house, for the purpose being evidently a distinct tenement, and occupied jointly, while the adjoining houses were the respective abodes of individuals. (*Egginton's case*, 2 *East's P. C.* 424; 2 *B. & P.* 508; 2 *Leach*, 913, S. C.)

It was holden that burglary might take place in respect of a building eight or nine yards distant from a dwelling-house, and with only a paling between them; (1 *Hale*, 558;) and an outhouse in the yard of a dwelling-house was considered parcel of the dwelling-house if the yard was inclosed, though the occupier had another dwelling-house opening into the yard, and he let such dwelling-house with certain easements in the yard. (*Ry. & Mo. C. C.* 13; and see *Brown's case*, 2 *East's P. C.* 493.) But it was even then laid down, that if the outhouse was at a considerable distance, as if it stood a bowshot from it, so as not to be reasonably esteemed parcel of the principal dwelling, nor within the curtilage, it would not answer to this description. (1 *Hale*, 144.) And in more recent times it has been decided, that an outhouse several feet from the mansion, and unconnected by any common inclosure, is not a place in which burglary can be committed. (*Garland's case*, 2 *East's P. C.* 493; 1 *Leach*, 144.) And a building separated from a dwelling-house by a public road, however narrow, was held not to be a parcel of the dwelling-house, if there was no common fence or roof to connect them, though it were held by the same tenure, and though some of the offices necessary to the dwelling-house adjoined it, and though there was an awning extending from it to the dwelling-house. But if it be made a sleeping-place for any of the servants of the dwelling-house, it may be deemed a distinct dwelling-house. (*R.* v. *Westwood*, *R. & R.* 495.)

A door which only forms part of the outward fence of the curtilage, and opens into no building, but into the yard only, was not such a part of the dwelling-house as that the breaking thereof would constitute burglary. (*R.* v. *Bennett*, *R. & R.* 289.)

An area gate, opening into the area only, was not deemed part of the dwelling-house, so as to make the breaking thereof burglary, if there was any door or fastening to prevent persons in the area from entering the house, although such door or fastening might not be secured at the time. (*R.* v. *Ouns*, *R. & R.* 322.)

his guests, the indictment must lay the offence to be committed against *his* mansion. And so it is if he let out apartments to inmates who have a separate interest therein, if they have the same outer door or entrance into the mansion in common with himself. But if distinct families be in the exclusive occupation of the house, and have their ordinary residence or domicile there, without any interference on the part of the proper owner, or if they be only in possession of parts of the house as inmates to the owner, and have a distinct and separate entrance, then the offence of breaking, &c. their separate apartments must be laid to be done against the mansion-house of such occupiers respectively.

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Nice questions frequently arise as to whether a party dwells in and occupies a house in his own right, or as the servant of another. A workman was employed at 15*s.* a-week wages, and a cottage free of rent and taxes, for himself and his family to dwell in: upon an indictment for burglary, the judge at the trial held, that as the workman occupied this cottage for his own benefit, and not for the use or benefit of his master, it was well described as the dwelling-house of the workman; and upon a reference to the judges, they were of the same opinion. (*R.* v. *Joblin, R. & R.* 525; and see *R.* v. *Smythe*, 5 *Car. & P.* 202; *R.* v. *Jarvis, R. & M.* 7, *infra.*) Where a toll-gate-house, erected by the trustees of a turnpike as and for the dwelling-house of the person who might be employed to collect the tolls at a particular gate, was broken and entered in the night time; and upon an indictment for the burglary, it appeared that the trustees had let the tolls to Ward, and Ward had employed Ellis (at weekly wages, with the privilege of living in the toll-house in question) to collect them, and that Ellis dwelt in the house for that purpose: the indictment having described this as the dwelling-house of Ellis, the judges held the description to be correct, for Ellis had the exclusive possession; it was unconnected with any premises of Ward's, and Ward did not appear to have any interest whatever in it. (*R.* v. *Camfield, R. & M.* 42.) And where a servant lived rent-free in a house belonging to his master, and his master paid the taxes, and his master's business was carried on in the house; but the servant and his family were the only persons who slept in the house; and that part of the house in which his master's business was carried on, was at all times open to those parts in which the servant lived; upon an indictment for breaking and entering that part of the house in which the master's business was carried on, it was held, that it might be described as the servant's house; but it was not decided that it might not also be described as the house of the master. (*R.* v. *Witt, R. & M.* 248.)

Occupation by servant.

If a servant live in the house of his master at a yearly rent, the house cannot be described as the master's house though it be on the premises where the master's business is carried on, and although the servant has it because of his service. (*R.* v. *Jervis, R. & M.* 7; and see *R.* v. *Smythe*, 5 *C. & P.* 202.)

G. Brown was indicted for burglary in the dwelling-house of M. Graydon, and stealing thereout oats. A second count stated it to be in the dwelling-house of T. Trumball. Graydon, a farmer, had a dwelling-house in which he lived, a stable, cowhouse, cottage, and barn, all in one range of buildings in the order mentioned, and under one roof; but they were not inclosed by any wall or court yard, nor was there any communication from one to the other within. Trumball's family resided in the cottage by agreement with Graydon, when he went into his service; but Trumball paid no rent; only an abatement was made in his wages on account of his family residing in the cottage. Some corn having been missed out of the barn, Trumball and another person put a bed in the barn, and went and slept there, and a few nights after they had so done, the prisoner unlocked the barn door, and took away a quantity of oats. After conviction, judgment was respited upon a doubt whether it could be considered as the dwelling-house either of Graydon or Trumball. Upon a reference it was agreed, (Mich. T. 1787,) by all the judges, that the sleeping in the barn made no difference. But they held, (*Buller*, J., doubting,) that this was no more than a license to Trumball and servant to lodge in the cottage, and not a letting it to him; and that the

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barn, as well as the rest of the buildings, being under the same roof, continued parts of the mansion-house of Graydon. And many of the judges inclined to think that if there had been a demise of the cottage to Trumball, the barn would still have continued part of Graydon's dwelling-house in point of law. (*G. Brown's case*, 2 *East's P. C.* 501.) So in another case, where the servant of three partners in trade had weekly wages, and particular rooms assigned to him, as lodging for himself and his family, over the bank and brewery office of his employers, with which his lodging communicated by a trap door and a ladder, it was holden by the twelve judges, that a burglary committed in the banking room was well laid as in the dwelling-house of the three partners. (*R.* v. *Stockton and others*, 2 *Taunt.* 339; 2 *Leach*, 1015; *Russ. & Ry.* 185, S. C. nom. *R.* v. *Stock.*)

Where the prisoner was indicted for burglary in the dwelling-house of J. B. J. B. worked for one W. who did carpenter's work for a public company, and put J. B. into the house in question, which belonged to the company, to take care of it, and some mills adjoining. J. B. received no more wages after than before he went to live in the house. It was held not rightly laid. (*R.* v. *Rawlins*, 7 *C. & P.* 150.)

A gardener lived in a house of his master, quite separate from the dwelling-house of his master, and the gardener had the entire control of the house he lived in, and kept the key; it was held, that, on an indictment for burglary, the gardener's house might be laid either as his or his master's. (*R.* v. *Rees*, 7 *C. & P.* 568.)

Married women.

If a house be tenanted by a married woman, it must in all cases be deemed the house of her husband, and not of her, even although she live separate from her husband. (*Farr's case*, *Kel.* 43; 2 *East's P. C.* 504; and see *Boggett* v. *Frier*, 1 *East*, 301; *R.* v. *Smythe*, 5 *Car. & P.* 202.) Where a married woman lived apart from her husband, upon an income arising from property vested in trustees for her separate use, the judges held that a house which she had lived in was properly described as her husband's dwelling-house, though she paid the rent out of her separate property, and the husband had never been in it. (*R.* v. *French*, *Russ. & Ry.* 491.) Upon an indictment for burglary in the dwelling-house of George Gillings, it appeared that Gillings owned and had built the house in question, but had never lived in it; that suspecting his wife of infidelity with one Webdale, they agreed to separate, and he told her she might live in the house in question, and gave her a bed and bedding, &c. for the purpose; she afterwards lived and cohabited with Webdale in the house, with the knowledge of her husband; Webdale paid the expenses of housekeeping, but never paid any rent for the house to Gillings; the judges held, that the house was properly described as the dwelling-house of the husband. (*R.* v. *Wilford*, *Russ. & Ry.* 517.)

A prisoner was indicted for breaking into the house of Elizabeth A. and stealing her goods. There was a second count, laying the property of the goods in the Queen. It was shown by proof of the record, that the husband of Elizabeth A. had been convicted of felony; and it was also proved, that he was still in prison under the sentence, and that the articles stolen were his before his conviction, and had remained in the house from the time of his apprehension, and that the wife continued in possession of the house and goods till they were stolen by the prisoner. It was held that the prisoner might be properly convicted of larceny on the second count, which laid the property of the goods in the queen, although there had been no office found; and that he could not be convicted of housebreaking, as that part of the indictment which laid the goods and the house to be those of Elizabeth A. could not be supported. (*Reg.* v. *Whitehead*, 9 *C. & P.* 429.)

Insolvent debtor.

A house in part of which a man lives, and other parts of which he lets to lodgers, may be considered and described as his house, though he has taken the benefit of the Insolvent Debtor's Act, and executed an assignment including the house, if the assignee has not taken possession; at least, no objection can be made if in other counts it be stated as the house of the assignee, and in others of the lodger in whose room the offence was committed. (*R.* v. *Ball*, *R. & M. C. C.* 30.)

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In the case of persons employed by the crown or public companies, the same rule prevails as in other cases. If burglary be committed in the invalid office at Chelsea, in Somerset House, in Whitehall, in any of the public offices or royal palaces, the mansion must be laid as the Queen's. (1 *Leach*, 324, and *in notis*; *R.* v. *Williams*, 1 *Hale*, 522.)

Public offices, palaces, &c.

The same principle applies to corporations; for if a burglary be laid to be in the dwelling-house of one of the officers belonging to the African Company, it will be bad, although a corporation cannot be resident. (*Kel.* 37; 1 *Leach*, 324, *in notis*; 2 *East's P. C.* 501.) But it has been holden that if the agent of a trading company resides in the house of his employers in town, it may properly be laid as his dwelling. (*R.* v. *Margette*, 2 *Leach*, 930.) So a city hall may be described as the residence of the clerk to the company to whom it belongs (*id. in notis.*) The ground for these two last decisions is stated to be that the punishment of burglary was intended to protect the actual occupant from the terror of disturbance during the hours of darkness and repose, but it would be absurd to suppose that that terror which is of the essence of the crime could from a breaking and entry in one place produce an effect in another. (2 *Leach*, 931.) J. Picket was indicted for burglary in the dwelling-house of the East India Company, which is inhabited by their servants; and he was convicted and executed. O. B. April, 1765. (2 *East's P. C.* 501.) C. Maynard was indicted for burglary in the mansion-house of the master, fellows, and scholars of Bennet College, in Cambridge. It appeared that he broke into the buttery of the college, and there stole some money; and it was agreed by all the judges, upon a reference to them, that it was burglary. (*C. Maynard's case*, 2 *East's P. C.* 501.)

Corporations, and public bodies.

If by an actual severance all internal communication be cut off, the partitions become distinct houses, so that if one house is divided to accommodate the families of two partners, though the rent and taxes of the whole are paid out of the common fund, each part will be regarded as a mansion. (*R.* v. *Jones*, 1 *Leach*, 537; 2 *East's P. C.* 504; *Tracy* v. *Talbot*, *Salk.* 532.) But a house, the joint property of partners in trade in which their business is carried on, may be described as the dwelling-house of all the partners, though only one of the partners resides in it. (*R.* v. *Athea*, *R. & M.* 329.)

Where house divided.

If the chamber of a guest at an inn be forced open and his goods stolen, the burglary must be laid in the dwelling-house of the landlord. (1 *Hale*, 557; *R.* v. *Prosser*, 2 *East's P. C.* 502; 2 *MS. Sum.* 249.) And the same in all other cases where the occupier has the use merely and no interest in the apartments he occupies. (See 1 *Hawk.* c. 38, s. 26.)

Inn.

Where inmates have several rooms in a house of which they keep the keys, and inhabit them severally with their families, yet if they enter at one outer door with the owner, these rooms cannot be said to be the dwelling-houses of the inmates, but the indictment ought to be for breaking the house of the owner. But if the owner inhabit no part of the house, or even if he occupy a shop or a cellar in it, but do not sleep therein, the apartments of such inmates shall be considered as their respective dwelling-houses. (*Carrell's case*, 1 *Leach*, 237; *Trapshaw's case*, 1 *Leach*, 427; and see 1 *Hawk.* c. 38, s. 26.)

Inmates.

If the owner, who lets out apartments in his house to other persons, sleep under the same roof, and have but one outer door common to him and his lodgers, such lodgers are only inmates, and all their apartments are parcel of the one dwelling-house of the owner. (*Kel.* 84.) But if the owner do not lodge in the same house, or if he and the lodgers enter by different outer doors, the apartments so let out are the mansion for the time being of each lodger respectively, even though the rooms are let by the year. (2 *East's P. C.* 505, *post*, 493.) Where a servant of the prosecutor dwelt in a part of the house, and the rest (excepting the shop) was let off to lodgers: the judges held that the shop, which was in the prosecutor's occupation, was properly described as the dwelling-house of the prosecutor. (*R.* v. *Gibbons*, *Russ. & Ry.* 442, *ante*, 486. Where the prosecutor, having a dwelling-house with a shop adjoining to it, with separate entrances from the street, but the shop having a back door into a passage in the house, let the shop to his son, who used it as a place of business only, and did not reside there; a burglary

Owner letting off part, and residing in residue.

1. *What is a Burglary.*

Owner letting off part, but not residing in residue.

having been committed in the shop, the judges held that it was properly described in the indictment as the dwelling-house of the father. (*R.* v. *Sefton, R. & Ry.* 202.)

If the owner let off a part, but do not dwell in the part he reserves for himself, then the part let off is deemed in law the dwelling-house of the party who dwells in it, whether it communicates internally with the other part or not; but the part he has reserved for himself is not the subject of burglary: it is not his dwelling-house, for he does not dwell in it; nor can it be deemed the dwelling-house of the tenant, for it forms no part of his lodging. (1 *Leach*, 89, 237, 437.) Where a coachman rented the loft over a coachhouse and stables, and he and his family resided in it, a burglary committed in it was holden to be well laid to have been committed in the dwelling-house of the coachman. (*R.* v. *Turner*, 1 *Leach*, 305.) The governor of the workhouse at Birmingham, under a contract for seven years with the guardians and overseers of the poor of that place, occupied and dwelt in the governor's house, with the exception of one room, which the guardians and overseers reserved for themselves as an office, and three other rooms as store-rooms; the clerk of the guardians and overseers kept one key of the office, the governor another, for the purpose of securing the effects in case of fire, and the room was cleaned and taken care of by the governor's servant: this office being broken and entered in the night time, ten of the judges held that it could not be described as the dwelling-house of the governor. (*R.* v. *Wilson, R. & Ry.* 115.) So where the owner of a dwelling-house, warehouse, and counting-house, within the same curtilage, let the dwelling-house to his warehouseman at a yearly rent: the counting-house and warehouse being broken and entered in the night time, the judges held that this was not burglary; that the counting-house and warehouse could not be described as the dwelling-house of the master; because the dwelling-house was occupied by the warehouseman as tenant, and not as servant; nor could they be described as the dwelling-house of the tenant, for they formed no part of his holding. (*R.* v. *Jarvis, R. & M.* 7. See *R.* v. *Smythe*, 5 *Car. & P.* 202.)

Owner letting whole of house to different tenants.

If the owner let the whole of a dwelling-house, retaining no part of it for his or his family's dwelling, the part each tenant occupies and dwells in is deemed in law to be the dwelling-house of such tenant, whether the parts holden by the respective tenants communicate with each other internally or not. Thus where the owner of a house divided the shop into two by a partition, each having a door opening into the street, and let one of them and some rooms in the house to Choice, and the other with the remainder of the house to Ryan; at the end of each shop was a door, opening into a common passage, that led to one common staircase; Choice paid 100*l.* a-year and the taxes for the whole house, for his part; Ryan 80*l.* a-year for his; each had his separate family, separate kitchen, &c.; but the rooms occupied by each opened on the common staircase above-mentioned: upon an indictment for burglary, it appeared that the prisoner entered at the window of the common staircase, unlocked the door of Ryan's shop, and entered it; and the judges held that the place was rightly described in the indictment as the dwelling-house of Ryan. (*R.* v. *Bailey, R. & M.* 23.) One Richards let her dwelling-house to her son Josiah, and a warehouse, communicating internally with the dwelling-house, to Josiah and his younger brother, at a separate rent; Josiah lived in the dwelling-house, and constantly used the communication between that and the warehouse; both brothers carried on their joint business in the warehouse: the warehouse being broken and entered in the night time, the judges held that it could not be deemed a part of the dwelling-house, as the dwelling-house was holden under a demise to Josiah alone, and he alone dwelt in it, and the warehouse was holden under a distinct demise to himself and his brother. (*R.* v. *Jenkins, R. & R.* 244.) Where a lodger occupied a sleeping-room on the first floor, and a workshop in the attic, and the rest of the house was occupied by other lodgers, a burglary in the workshop was holden by the judges to be well laid to have been committed in the dwelling-house of the lodger who rented it. (*R.* v. *Carrell*, 1 *Leach*, 237.)

A man cannot be indicted for burglary in his own house. Therefore if the owner of a house break and enter into the room of his lodger and steal his goods, he can only be convicted of the larceny. (*Kel.* 84; 2 *East's P. C.* 502, 506.)

1. *What is a Burglary.*

Burglary in offender's own house.

5. As to the Time of committing the Offence.

The breaking and entry must be in the night time. (4 *Bla. Com.* 224.) As to what shall be reckoned night, and what day, for this purpose the 7 Will. IV. & 1 Vict. c. 86, s. 4, enacts, "That so far as the same is essential to the offence of burglary, the night shall be considered and is hereby declared to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the next succeeding day (*a*)."

The offence must be in the night time.

The breaking and entering must both be committed in the night time; if the breaking be in the day and the entering in the night, or the breaking in the night and the entering in the day, it is no burglary. (1 *Hale*, 551.) But the breaking may be in one night, and the entering in another. (1 *Hale*, 551; *R.* v. *Jordan*, 7 *C. & P.* 432.) The breaking, however, must be with intent to enter, and the entry with intent to commit a felony. Where the prisoner took the glass out of a door on Friday night, with intent thereby to enter the house, and afterwards on the Sunday night, and before the glass was replaced, he entered by the aperture he had thus made; the judges held, that the breaking being originally with intent to enter, and the breaking and the entering being both in the night time, the offence amounted to burglary, notwithstanding the time that had elapsed between the breaking and the entry. (*R.* v. *Smith*, *R. & R.* 417.)

What shall be deemed night.

Both the breaking and entry must be in the night.

6. As to the Intention.

There can be no burglary but where the indictment both expressly alleges, and the verdict also finds an intention to commit some felony: for if it appear that the offender meant only to commit a trespass, as to beat the party, or the like, he is not guilty of burglary. (1 *Hawk.* c. 38, s. 18; 3 *Inst.* 65; 1 *Hale*, 561.) In the case of *R.* v. *Knight and Roffey*, the prisoners were indicted for a burglary in the dwelling-house of Mary Snelling, the indictment stating the intent to be to steal the goods of Leonard Hawkins. It appeared from the evidence that Hawkins, who was an excise officer, had seized some bags of tea in a shop, entered in the name of Smith, as being there without a legal permit, and had removed them to Mary Snelling's, where he lodged. The prisoners and many other persons broke open Mary Snelling's house in the night, with intent to take his tea. Smith did not appear to have been in company with them; but it was shown that they supposed the tea to belong to Smith; and that the act was committed either in company with him, or by his procurement. The jury being directed to find as a fact with what intent the prisoners broke and entered the house, found that they intended to

The burglary must be with a felonious intent.

(*a*) Anciently the day was accounted to begin only at sun-rising, and to end immediately upon sunset: but the better opinion at the time of passing the above enactment seems to be, that if there be day light, or *crepusculum*, (twilight,) enough begun or left to discern a man's face withal, it was no burglary. (3 *Inst.* 63; 1 *Hale*, 350; 2 *East's P. C.* 509.) But this did not extend to moon-light, for then many midnight burglaries would go unpunished; and besides the malignity of the offence does not so properly arise from its being done in the dark, as at the dead of night, when all the creation, except beasts of prey, are at rest, when sleep has disarmed the owner, and rendered his castle defenceless. (4 *Bla. Com.* 224.) The ancient law appears to be the most reasonable. In the summer there is but a very short time when there is not day-light sufficient to discover the countenance of the offender; and it is well known that a very considerable portion of the offences of this nature are committed during that light. Besides, the same reason why moon-light is not sufficient to protect the burglar would apply to twilight.

1. *What is a Burglary.*

take the goods on the behalf of Smith; and upon the point being reserved, the twelve judges were of opinion that the indictment was not supported, as however outrageous the conduct of the prisoners was in so endeavouring to get back Smith's goods, still there was no intention to steal. But if the indictment had been for breaking the house with intent feloniously to rescue goods seized, &c., which is felony by stat. 19 Geo. II. c. 34, some of the judges thought that it would have been burglary. But even in that case it was agreed, that evidence must be given on the part of the prosecutor to show that the goods were uncustomed, in order to throw the proof upon the prisoners that the duty was paid; but being found in oil cases, or in great quantities in an unentered place, would have been sufficient for that purpose. (2 *East's C. P.* 510.) It seems the better opinion, that an intention to commit a rape, or other such crime, which is made felony by statute, and was a trespass only at common law, will make a man guilty of burglary, as much as if such offence were a felony at common law; because wherever a statute makes any offence felony, it incidentally gives it all the properties of felony at common law. (1 *Hawk.* c. 38, s. 18.)

Immaterial whether intent be executed.

It is immaterial whether the felonious intent be executed or not: thus they are burglars who, with a felonious intent, break any house or church in the night, although they take nothing away. And herein this offence differs from robbery, which requires that something be taken, though it be not material of what value. J. Dobbs was indicted for burglary, in breaking and entering the stable of J. Bayley, part of his dwelling-house, in the night, with a felonious intent to kill and destroy a gelding of one A. B. there being. It appeared that the gelding was to have run for 40 guineas, and that the prisoner cut the sinews of his fore-leg to prevent his running, in consequence of which he died. *Parker*, C. J. ordered him to be acquitted; for his intention was not to commit the felony by killing and destroying the gelding, but a trespass only to prevent his running, and, therefore, no burglary. But the prisoner was again indicted for killing the gelding, and capitally convicted. (*Dobb's case*, 2 *East's P. C.* 513; *see* 1 *Hale*, 561.) If the breaking and entering be at different times, both must appear to have been done with the same felonious intent. (*R.* v. *Smith*, *R. & R.* 417.) The felonious intent with which the prisoner broke and entered the house cannot be proved by positive testimony; it can be proved only by the admission of the party, or by circumstances from which the jury may presume it. Where it appears that the prisoner actually committed a felony after he entered the house, this is satisfactory evidence, and almost conclusive, that the intent with which he broke and entered the house was to commit that felony. Indeed the very fact of a man's breaking and entering a dwelling-house in the night time is strong presumptive evidence that he did so with intent to steal; and the jury will be warranted in finding him guilty, unless the contrary be proved. (*Arch. Peel's Acts*, 40.) And where a man was found in the night time in the chimney of a shop, just above the mantel-piece, and before he had entered the shop; the jury found him guilty of burglary with intent to steal upon this evidence merely, and the judges confirmed the conviction. (*R.* v. *Brice*, *R. & R.* 450; *ante*, 482.)

As to what is a variance in the statement of the intent, see *post*, 496.

II. Burglary by breaking out of a House.

Breaking out of house.

By the 7 & 8 Geo. IV. c. 29, s. 11, "if any person shall enter the dwelling-house of another with intent to commit felony, or being in such dwelling-house shall commit any felony, and shall in either case *break out* of the said dwelling-house in the night time, such person shall be deemed guilty of burglary." As to the punishment, see *post*, 497.

This offence is not triable at any quarter sessions, 5 & 6 Vict. c. 38, s. 1.

In *R.* v. *Lawrence*, 4 C. & *P.* 281, *Bolland*, B., held, that escaping from a house by lifting a heavy flap door which had no fastening, but was kept down by its own weight, was not a sufficient breaking out of a house.

It is not the less a burglary, because the defendant was *lawfully* in the house, as a lodger, or a guest at an inn. (*Reg.* v. *Wheeldon*, 8 *C. & P.* 447.)

2. *Burglary by breaking out of a House.*

An indictment for breaking *out* of a house stated that the prisoner "did break *to* get out," and in another that he "did break *and* get out:" it was held not sufficient since the stat. 7 & 8 Geo. IV. c. 29, s. 11, which uses the words "break out." (*R.* v. *Compton*, 7 *Car. & P.* 139.)

III. Burglary and Assaulting with intent to Murder, &c.

By the 7 Will. IV. and 1 Vict. c. 86, s. 2, "Whosoever shall burglariously break and enter into any dwelling-house, and shall assault with intent to murder any person being therein, or shall stab, cut, wound, beat, or strike any such person, shall be guilty of felony, and being convicted thereof, shall suffer death." By sect. 6 of this statute, principals in the second degree and accessories before the fact are punishable in the same way.

Burglary and attempt to murder.

Accessories.

This offence is not triable at any quarter sessions, 5 & 6 Vict. c. 38, s. 1.

Not triable at sessions.

The defendant may be found guilty of the burglary only, if the assault with intent to murder be not proved; or he may be found guilty of an assault only; (7 Will. IV. & 1 Vict. c. 85, s. 11, *ante*, p. 285;) or, if a larceny also be charged, he may be found guilty of the larceny only. (See *Jervis's Arch. C. L. 9 ed.* 315.)

Defendant may be found guilty of one of the offences.

The indictment for this offence must charge both the burglary and the striking, and the proof must correspond with the indictment. Where A was indicted for burglary in the house of S. W. and striking D. *James*, the burglary was proved as laid, but the person struck was D. *Jones*, it was held, that the prisoner must be acquitted of the capital charge and convicted of the burglary only. (*Reg.* v. *Parfitt*, 8 *C. & P.* 288.)

Form of indictment.

It is not necessary to state the instrument, or means by which the injury was inflicted. (*R.* v. *Briggs*, 1 *Mood. C. C.* 318.)

IV. Indictment for Burglary.

The indictment must describe the facts necessary to constitute the offence of burglary, viz. the breaking and entering a dwelling-house of another in the night-time, and with some felonious intent.

Description of offence.

The words *broke and entered* must both be inserted, both of them being essential to constitute the offence. (1 *Hale*, 550.) The word *burglariously* is necessary, (4 *Co.* 39, 40;) as also the word *feloniously*, as in other felonies; and it must be stated that the offence was committed in a mansion or dwelling-house; and if it be stated to have been in a "house" merely, the proceedings will be defective (1 *Hale*, 550.) When the place is an outhouse which adjoins the mansion, it must either be laid in the dwelling-house generally, or in a stable, &c part of the dwelling-house, either of which methods may be adopted. (1 *Leach*, 144; 2 *East's P. C.* 512, 513.)

Breaking and entering.

Dwelling house.

Care must be taken that the local description of the house be according to the fact, as a variance would be fatal. If it be not expressly stated where the dwelling-house is situated, it shall be taken to be situated at the place named in the indictment by way of special venue. (See *R.* v. *Napper*, *R. & M.* 44.) And if two parishes having been named, the house is stated to be "at the parish aforesaid," the last parish shall be intended. (*R.* v. *Richards*, 1 *M. & Rob* 177.) Where it appeared that the dwelling house was in the parish of A. and an outhouse connected and occupied with it in the parish of B, and a burglary was committed in the outhouse, one of the questions reserved for the opinion of the judges was, whether the dwelling-house was properly described in the indictment, as being in the parish of B.; but the judges gave no opinion upon this point, having decided the case upon another ground. (*R* v. *William Bennett and another*, *R. & R.* 289.)

Local description of.

The name of the owner of the house must be stated with such certainty to

Ownership of house.

4. *Indictment for.*

a common intent, as is in general necessary in the description of the party who has sustained the injury. An error in such statement would be fatal. (2 *Leach*, 774; 2 *East's P. C.* 514.) See the cases and authorities as to who is to be deemed the owner, &c. *ante*, 488 to 493.) The owner may be described by an assumed name, by which he had been known for the preceding five years, and during that time had never been known by his original name. (*R.* v. *Norton*, *R. & R.* 510.) Where a person was indicted for burglary in the house of Sarah Lunns, and her name appeared to be London, he was acquitted of the capital part of the charge; (1 *Leach*, 253, *in notis*); and though it is said to be doubtful whether the leaving of a blank for the surname would not be vicious; (1 *Hale*, 558; *Cole's case*, *Moore*, 466); there can be but little doubt that at the present day such an omission would be material. (3 *Chit. C. L.* 1113.) As to the mode of describing the ownership in companies, &c. see "*Indictment*," Vol. III. If there be any doubt whether the house broken and entered belongs to A., B., or C., to obviate the difficulty, counts alleging it to be the dwelling-house of A., B., and C., respectively should be inserted.

Time.

It must be stated that the offence was committed in the night-time; and it is not only necessary to state a day and year, but also an *hour* about which the offence was committed; in order that it may appear to the Court to be at a time when there could be no daylight remaining. If this be wanting, the defendant can only be convicted of a simple larceny. At the Lancaster Lent Assizes, 1771, (*R.* v. *Waddington*, 2 *East's P. C.* 513,) there was an indictment for burglary, alleging the fact to have been committed in the night, but not expressing about what hour it was done; Mr. J. *Gould* held the indictment insufficient as for a burglary, and directed the prisoner to be found guilty of a simple felony only. He said, that according to the old doctrine, a burglary might be committed at any time between sun-setting and sun-rising; but that the rule now established is, that it cannot be committed during the *crepusculum*; that therefore it is necessary to specify the *hour*, in order that the fact may appear upon the face of the indictment to be done between the twilight of the evening and that of the morning. But it is not necessary that the evidence should correspond with the allegation either as to the day or hour, so that it shows the offence to have been committed in the time of darkness. (2 *Hale*, 179.) Both breaking and entering must be charged to have taken place in the night, or there is no charge of burglary. (1 *Hale*, 549.) The hour should, though after twelve o'clock at night, be stated to be in the night of the preceding day.

Felonious intent.

The felonious intent must be stated, and this correctly so; for if it be stated that the defendant intended to commit one species of felony, and it is proved that he intended another, the indictment will be bad. (1 *Hale*, 561; *R.* v. *Dobbs*, 2 *East's P. C.* 513; *R.* v. *Dingley*, 2 *Leach*, 840; 2 *East's P. C.* 510, 514.)

Ownership of goods.

Where the intent laid was to steal the goods of J. W., and it appeared in evidence that no goods of any person of the name of J. W. were in the house, but that the name of J. W. had been inserted in the indictment by mistake; the judges held the variance to be fatal, and the defendant was accordingly acquitted. (*R.* v. *Jenks*, 2 *East's P. C.* 514; 2 *Leach*, 774.) Where A. was charged with breaking into the house of K., and stealing the goods of M.; it was proved by M. that K., his brother-in-law, had taken the house, and that M., (who lived on his property), carried on the trade of a silversmith for the benefit of K. and his family, having himself neither a share in the profits nor a salary. M. stated that he had authority to sell any part of the stock, and might take money from the till, but that he should tell K. of it; and that he sometimes bought goods for the shop, and sometimes K. did it: it was held, that M. was a bailee, and that the goods in the shop might properly be laid as his property. (*Reg.* v. *Bird*, 9 *Car. & P.* 44.)

If an actual larceny is averred, and it is proved that the theft was not complete, the defendants must be acquitted. (2 *Leach*, 708; *R.* v. *Furnival*, *R. & R.* 445; 2 *East's P. C.* 514.) Nor can a previous stealing in the same house be connected with a subsequent breaking, so as to support this charge. (*Id.*) On the other hand, if a felony has been actually committed, an aver-

ment of the intent to commit it will suffice. (1 *Hale*, 560.) Where there is a doubt as to what specific felony was intended, the intention should be laid differently in separate counts. (2 *East's P. C.* 515.) 4. *Indictment for.*

The burglariously breaking and entering a dwelling-house, with intent to commit a rape, is not a crime which includes an assault; and therefore, in an indictment for such a burglary, the prisoner cannot be convicted of any assault under the 11th sect. of the stat. 1 Vict. c. 85. (*Reg.* v. *Watkins*, 1 *Car. & M.* 264; see *ante*, "*Assault.*")

If bank notes, or other valuable securities, be stolen, conclude "against the form of the statute," &c.; for although this is not necessary as to the burglary, yet if that part of the charge fail, such a conclusion would be deemed to be necessary in order to convict for the larceny. (*R.* v. *Pearson*, 5 *C. & P.* 121.) Conclusion.

V. Trial.—Verdict.

This offence is not triable at any quarter sessions; 5 & 6 Victi. c. 38, s. 1. Not triable at sessions.

The indictment may be so laid as to comprise several offences, arising out of the same transactions, so that the prisoner may be found guilty of part and acquitted of the rest. As if the prisoner be charged with burglariously breaking and entering the dwelling-house, and stealing goods of the value of 40*s.*, he may be acquitted of breaking and entering in the night-time, &c. and yet found guilty of stealing in the dwelling-house. (*R.* v. *Withal and Overend*, 1 *Leach*, 88, and 2 *East's P. C.* 517; and *R.* v. *Hungerford*, *id.* See "*Indictment*," Vol. III.) Verdict where several offences charged.

Or upon such an indictment the prisoner may be acquitted of the capital charges, viz. of the burglary, and of stealing in the dwelling-house to the value of 40*s.*, and be convicted of the simple larceny. (1 *Hale*, 561.)

Upon an indictment for burglary and larceny against two, one may be found guilty of the burglary and the larceny, and the other of the larceny only. (*R.* v. *Butterworth*, *R. & R.* 520.) Against several defendants.

VI. Punishment for.

By the 7 Will. IV. & 1 Vict. c. 86, s. 3, it is enacted, "That whosoever shall be convicted of the crime of burglary shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than ten years, or to be imprisoned for any term not exceeding three years." To the punishment of imprisonment may be added hard labour with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. (*Id.* s. 7; see "*Larceny*," Vol. III.) Punishment for burglary.

For burglary and assaulting, with intent to murder, &c. the offender shall suffer death. (7 Will. IV. & 1 Vict c. 86, s. 2, *ante*, 495.) This sentence may be recorded; 4 Geo. IV. c. 29, s. 11. (See "*Judgment*," Vol. III.) Punishment for burglary and attempt to murder, &c.

VII. Reward for Apprehending, &c. a Burglar.

It may be observed, that it is provided by stat. 24 Hen. VIII. c. 36, that there shall be no forfeiture of lands or goods for killing any person that attempts to commit burglary. But besides this indulgence to a person killing such an offender in defence of his house, there are special advantages and rewards for apprehending him. (See 7 Geo. IV. c. 64, s. 28; "*Rewards*," Vol. V.) Indemnity and reward.

8. *Offence, &c.*

VIII. Offence of having House-breaking Instruments.

Persons having house-breaking implements.

Stat. 5 Geo. IV. c. 83, s. 4, for the purpose of preventing burglary and house-breaking, enacts, "That every person having in his or her custody or possession any picklock, key, crow, jack, bit, or other implement, with an intent feloniously to break and enter into any dwelling-house, warehouse, coach-house, stable, or out-building: or being armed with any gun, pistol, hanger, cutlass, bludgeon, or other offensive weapon; or having upon him or her any instrument with intent to commit any felonious act; every person being found in or upon any dwelling-house, warehouse, coach-house, stable, or outhouse, or in any inclosed yard, garden, or area, for any unlawful purpose, shall be deemed a rogue and vagabond within the true intent and meaning of this act; and it shall be lawful for any justice of the peace to commit such offender, (being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witnesses) to the house of correction, there to be kept to hard labour for any time not exceeding three calendar months; and every such picklock key, crow, jack, bit, and other implement; and every such gun, pistol, hanger, cutlass, bludgeon, or other offensive weapon; and every such instrument as aforesaid, shall, by the conviction of the offender, become forfeited to his majesty."

Punishment.

Implements, how disposed of.

In the case of *R.* v. *Brown*, 8 *T. R.* 26, (upon stat. 23 Geo. III. c. 88, now repealed by the above stat. 5 Geo. IV. c. 83, s. 1,) a warrant of commitment was holden defective, because it did not state that the defendant was apprehended with the implements of house-breaking upon him *at the time of such apprehension*. Lord *Kenyon*, C. J. said, that he yielded with great reluctance to the objection.

IX. Forms.

(1.) Warrant to apprehend a burglar where he actually stole goods.

County of } *To the Constable of*

FORASMUCH as A. I. of , in the county of , yeoman, hath this day made information and complaint upon oath before J. P. Esquire, one of her Majesty's justices of the peace for the said county, that yesterday in the night the dwelling house of him, the said A. I. at aforesaid, in the county aforesaid, was feloniously and burglariously broken open, and one silver tankard of the value of 5l. of the goods and chattels of him the said A. I. feloniously and burglariously stolen, taken, and carried away from thence; and that he hath just cause to suspect and doth suspect that A. O. late of , in the county of , labourer, the said felony and burglary did commit; these are therefore in her said Majesty's name to command you, that immediately upon sight hereof you do apprehend the said A. O. and bring him before me to answer the premises, and to be further dealt withal according to law. Herein fail you not. Given under my hand and seal the day of in the year of our Lord .

(2.) Commitment for like offence.

[Commencement as usual, as *ante*, p. 9]: *that the said C. D. on , about the hour of twelve in the night, at , in the county aforesaid, the dwelling-house of A. B. there situate, feloniously and burglariously did break and enter, with intent the goods and chattels of the said A. B. in the said dwelling-house then and there being, then and there feloniously and burglariously to steal, take and carry away, and then and there in the said dwelling-house, twelve silver spoons of the goods and chattels of the said A. B., then and there feloniously and burglariously did steal, take and carry away. And you the said keeper, &c.* [as usual, as *ante*, p. 9, to the end.]

(3.) Commitment for breaking out of a house.

[Commencement as usual, as *ante*, p. 9]: *that the said C. D. on , at the parish of , in the county of , being in the dwelling-house of A. B. there situate, twelve silver spoons of the goods and chattels of the said A. B., in the said dwelling-house then and there being found, then and there in the said dwelling-house feloniously did steal, take and carry away; and that the said C. D., so being in the said dwelling house as aforesaid, and having committed the felony aforesaid, on the day and year aforesaid, about the hour of twelve in the night of the same day,*

9. *Forms.*

at the parish aforesaid, in the county aforesaid, feloniously and burglariously did break out of the said dwelling house, against the form of the statute in that case made and provided. And you the said keeper, &c. [as usual, as *ante*, p. 9, to the end.]

(4.) Indictment for burglary, laying an intent to steal as well as actual theft.

—— *(to wit) THE jurors for our Lady the Queen upon their oath present, that C. D. late of the parish of , in the county of, labourer, on the day of , in the year of the reign of our Lady the now Queen Victoria, about the hour of one in the night of the same day, with force and arms, at the parish aforesaid, in the county aforesaid, the dwelling house of A. B. there situate, feloniously and burglariously did break and enter * with intent the goods and chattels of the said A. B.* [or *of one G. H.*] *in the said dwelling house then and there being, then and there feloniously and burglariously to steal, take and carry away, and then and there in the said dwelling house, with force and arms, one silver tea pot of the value of 5l.* [here state the articles stolen as in an indictment for larceny] *of the goods and chattels of the said A. B.* [or *G. H.*] *in the said dwelling house then and there being found, then and there feloniously and burglariously did steal, take and carry away, against the peace of our said Lady the Queen, her crown and dignity.* [If bank notes or other valuable security be stolen, conclude also, *against the form of the statute in that case made and provided.*] [If there be any doubt as to the ownership of the house or goods, add other counts accordingly. Also, as burglary is a breaking and entering of a dwelling house with intent to commit a felony, (and whether a felon at common law or by statute, is immaterial, 1 *Hawk.* c. 38, s. 38), if there be any doubt of the intent with which the offence was committed, it may be varied in different counts accordingly. See *Jervis's Arch. C. L. 9th edit.* 301.]

(5.) Indictment for burglary and assaulting, &c. with intent to murder.

[Same as in last precedent to the asterisk (*) and then proceed as follows:] *and then and there in the said dwelling house in and upon the said A. B. in the said dwelling house then and there living, feloniously did make an assault with intent him the said A. B. then and there feloniously, wilfully, and of his malice aforethought to kill and murder, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.*

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(6) The like against two persons for a burglary with intent to steal.

—— *to wit. THE jurors for our Lady the Queen upon their oath present, that C. D. late of the parish of , in the county of , labourer, on the day of , in the year of the reign of our Lady the now Queen Victoria, about the hour of twelve in the night of the same day, with force and arms at aforesaid, the dwelling house of A. B. there situate, feloniously and burglariously did break and enter, with intent the goods and chattels of the said A. B. in the said dwelling house then and there being found, then and there feloniously and burglariously to steal, take and carry away, against the peace of our said Lady the Queen, her crown and dignity.*

(7.) Indictment on 7 & 8 Geo. 4, c. 29, s. 11, for burglary in breaking out of a house, *ante*, 494.

—— *to wit. THE jurors for our Lady the Queen upon their oath present, that C. D. late of the parish of , in the county of , labourer, on the day of , in the year of the reign of our Lady the now Queen Victoria, about the hour of twelve in the night of the same day, at aforesaid, being in the dwelling house of A. B. there situate, twelve silver spoons of the value of six pounds, of the goods and chattels of the said A. B. in the said dwelling house then and there being, with force and arms, then and there in the said dwelling house feloniously did steal, take and carry away; and that the said C. D. being so as aforesaid in the said dwelling house, and having committed the felony aforesaid in manner and form aforesaid, he the said C. D. afterwards, to wit, on the same day and year aforesaid, about the hour of twelve in the night of the same day, with force and arms, at aforesaid, the said dwelling house of the said A. B. then and there feloniously and burglariously did break out of the same, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.*

Burial of Dead Bodies cast on Shore.

As to the stealing, selling and preventing the burial of dead bodies, see *ante*, "*Bodies*," p. 414.

As to the burial of a felo de se, see "*Homicide*," Vol. III.

As to burials in general, see *post*, "*Church*."

As to funerals being exempted from tolls, see "*Highways, Turnpike*," Vol. III.

48 Geo. 3, c. 75.

The stat. 48 Geo. III. c. 75, after reciting, that "whereas no provision hath yet been made by the laws now in force for providing suitable interment in churchyards or parochial burying grounds, for such dead human bodies as may be cast on shore from the sea by wreck or otherwise, in that part of the United Kingdom called England: and whereas it is expedient that provision should be made for the decent interment of such bodies," it is enacted, "that from and after the passing of this act, the churchwarden and churchwardens, overseer and overseers of the poor for the time being of the respective parishes throughout England, in which any dead human body or dead human bodies shall be found thrown in or cast on shore from the sea, by wreck or otherwise, shall, and he and they is and are hereby required, upon notice to him or them given that any such body or bodies are thrown in or cast on shore by the sea, and is or are lying within the bounds of the parish for which he or they shall be churchwarden or churchwardens, overseer or overseers of the poor, to cause the same to be forthwith removed to some convenient place, and with all convenient speed to cause such body or bodies to be decently interred in the churchyard or burial ground of such parish, so that the expenses attending on such burial do not exceed the sum which at that time is allowed in such parish for the burial of any person or persons buried at the expense of such parish: provided always, that in case any such body or bodies shall be thrown in or cast on shore from the sea in any extra-parochial place where there is no churchwarden or churchwardens, overseer or overseers of the poor, then and in every such case the constable or headborough of such place shall, on notice being given to him that such body or bodies is or are lying in such extra-parochial place, forthwith to cause such body or bodies to be removed to some convenient place, and with all convenient speed cause the same to be buried in such and the like manner as the churchwardens and overseers within England are hereby required to bury such body or bodies."

Where dead bodies cast on shore, churchwardens, &c. inter them in churchyard.

In extra parochial places.

Minister to perform funeral service, &c.

Sect. 2. "Every minister, parish clerk, and sexton of such respective parishes shall perform their several and respective duties in such and the like manner as is customary in other funerals, and shall admit of such body or bodies being interred in such churchyards or burial grounds without any improper loss of time, receiving for the same, by way of compensation, such and the like sums as in cases of burials made at the expense of such parishes."

Rewarding persons finding bodies, and giving notice to parish officers.

Sect. 3. "In case any person or persons shall find any such body or bodies cast on shore from the sea, by wreck or otherwise, and shall within six hours thereafter give notice thereof to some one of the churchwardens or overseers of the poor of the parish for the time being in which such body or bodies shall be found, or to the constable or headborough for the time being, in case such body or bodies shall be found in any extra-parochial place, or cause such notice to be left at his or their last or usual place or places of abode, then and in every such case such person or persons shall receive the sum of 5*s*. for his, her or their trouble, such sum to be forthwith paid to the person or persons first giving such notice only: but nevertheless that no greater sum than 5*s*. shall be paid for any one notice, although there may be a greater number of such bodies than one."

Penalty on not giving notice.

Sect. 4. "In case any person or persons shall find any such body or bodies cast on shore from the sea by wreck or otherwise, and shall not within

six hours thereafter give notice to some one of the churchwardens or overseers of the poor of the parish for the time being in which such body or bodies shall be found, or to the constable or headborough for the time being, in case such body or bodies shall be found in any extra-parochial place, or cause such notice to be left at his or their last or usual place or places of abode, then and in every such case such person or persons shall for every such offence forfeit and pay the sum of 5*l.*" 48 Geo. 3, c. 75.

Sect. 5. "All necessary and proper payments, costs, charges and expenses which shall be made or incurred in or about the execution of this act, shall be made and paid by the churchwarden or churchwardens, overseeer or overseers, constable or headborough for the time being of such respective parishes and places as aforesaid." Expenses to be paid by churchwardens, &c.

Sect. 6. "And for the purpose of reimbursing him or them all such payments, costs, charges and expenses," it is enacted, "that it shall and may be lawful to and for any one justice of the peace for the county or place within that part of the United Kingdom called England, in which any such body or bodies shall have been so removed and buried as aforesaid, by any writing under his hand, (*a*) to order and direct (*b*) the treasurer for such county to pay such sum or sums of money to such churchwarden and churchwardens, overseer and overseers, constable or headborough, for his or their costs and expenses in or about the execution of this act (after the same shall have been duly verified on oath), as to the said justice shall seem reasonable and necessary; and such treasurer shall and he is hereby authorised and required forthwith to pay the sum or sums of money so ordered and directed to be paid to the person or persons empowered to receive the same; and such treasurer shall be allowed the same in his accounts." Who are to be reimbursed by county treasurer.

Sect. 7. "In case any such churchwarden or churchwardens, overseer or overseers, constable or headborough, shall refuse or neglect to remove or cause to be removed such body or bodies from the sea shore to some convenient place prior to the interment thereof, for the space of twelve hours after such notice given to him or them, or left in writing at his or their last or usual place or places of abode by any person or persons whomsoever, or shall neglect or refuse to perform the several other duties required of him and them by this act, then and in every such case every such churchwarden or overseer, constable or headborough, shall for every such offence forfeit and pay the sum of 5*l.*" Penalty on parish officers neglecting to inter bodies.

Sect. 8. "All penalties and forfeitures which shall be incurred under this act, if not paid on conviction, shall be levied and recovered by distress and sale of the goods and chattels of the offender or offenders, by warrant (*c*) under the hand and seal of any justice of the peace for the county or place where the offence shall happen (which warrant such justice is hereby empowered to grant on the confession of the party, or upon the evidence of any credible witness upon oath), and the surplus of the money arising by such distress and sale shall be returned on demand to the owner of such goods and chattels after deducting the costs and charges of making, keeping, and selling the distress; and such penalties and forfeitures, when recovered, shall be paid to the informer or informers; and in case sufficient distress shall not be found, or such penalties and forfeitures shall not be paid forthwith, it shall and may be lawful to and for such justice, and he is hereby authorised and required, by warrant under his hand and seal, to cause the offender or offenders to be committed to the common gaol or house of correction of such Recovery of penalties.

(*a*) See form (No. 1), *post*.

(*b*) Where a party framed an order, purporting to be the order of a magistrate on the treasurer of a county, to reimburse one *Cose* the expenses of burying a dead body cast on shore: it was held by a majority of the judges, that this was a forgery, though there was no such magistrate as the individual mentioned in the order, and though the order did not state *Cose* to be a parish officer, or that the expenses incurred were reasonable and necessary. (*R.* v. *Fraud*, 1 *Brod. & Bing.* 300; 3 *Moore*, 645, S. C.)

(*c*) See the 5 Geo. IV. c. 18, "*Distress under Justices' Warrant*," Vol. II.

48 Geo. 3, c. 75.

county or place, there to remain without bail or mainprize, for any time not exceeding two calendar months nor less than fourteen days, unless such penalties and forfeitures, and all reasonable charges attending the recovery thereof, shall be sooner fully paid and satisfied."

Form of conviction.

Sect. 9. "In all cases where any conviction shall be had for any offence or offences committed against this act, or against any order of sessions, or any matter in pursuance of this act, the form of conviction shall be in the words or to the effect following; (that is to say)

"*BE it remembered, that on this day of in the year of the reign of A. B. is convicted before one of his Majesty's justices of the peace for the of having* [as the offence shall be] *and I the said do adjudge him* [or *them*] *to forfeit and pay for the same the sum of . Given under my hand and seal the day and year aforesaid.*"

Appeal (a).

Sect. 10. "If any person or persons shall think himself, herself, or themselves aggrieved by any judgment or determination, or by any matter or thing done in pursuance of this act, such person or persons may appeal to the justices of the peace at the first general or quarter sessions of the peace to be holden for the county or place (within which the matter of appeal shall arise) next after the expiration of one calendar month from the time such matter of appeal shall have arisen, the person or persons appealing having first given ten days' notice at least of his or their intention to bring such appeal, and of the matter thereof, to the person or persons so appealed against, and forthwith after such notice entering into a recognizance, before some justice of the peace for such county or place, with sufficient sureties conditioned to try such appeal and abide the order and award of the said court thereon; and the said justices at such sessions, upon due proof of such notice and recognizance having been given and entered into, are hereby authorised and required to hear and determine the matter of such appeal in a summary way, and to make such determination therein, and to award such costs to either of the parties, or otherwise, as they shall judge proper; and the said justices may, if they see cause, mitigate any fine, penalty, or forfeiture, and may also order such further satisfaction to be made to the party injured as they shall judge reasonable; and all such determinations of the said justices shall be final, binding, and conclusive upon all parties to all intents and purposes whatsoever."

Proceedings not to be quashed for want of form (b).

Sect. 11. "Where any distress shall be made for any sum of money to be levied by virtue of this act, the distress itself shall not be deemed unlawful, nor the party or parties making the same be deemed a trespasser or trespassers on account of any defect or want of form in the information, summons, conviction, warrant of distress, or other proceedings relating thereto; nor shall the party or parties distrained be deemed a trespasser or trespassers *ab initio*, on account of any irregularity that shall be afterwards done by the party or parties so distraining, but the person or persons aggrieved by such irregularity shall and may recover full satisfaction for the special damage in an action upon the case."

Penalties to be paid by persons incurring same, and not by parish.

Sect. 12. "All penalties and expenses attendant thereon, which shall be incurred under the provisions of this act, shall be paid and borne by the person or persons incurring the same, and that the parish or place wherein such person or persons ought to have acted in the duties prescribed by this act shall be wholly exempted therefrom.

Lords of manors, &c. to pay same fee as heretofore on interring bodies, &c.

Sect. 13, after reciting, that "whereas in cases of dead wrecks, wherein no living person is found, or owner known, the lords of manors on which any such dead body or dead bodies may be washed in, and who are entitled to wreck there, have usually paid a small fee for the placing such body or bodies in the ground in the state in which the same have been found, and such payments have been adduced and admitted as proof on trials at common law, of the right of such lords of manors to wrecks in such

(a) See in general, *ante*, "*Appeal.*"
(b) As to clauses of this nature, see *post*, "*Conviction.*"

manors;" it is enacted, "that in all and every such cases it shall and may be lawful to and for all and every lord or lords of any manor or manors throughout England to pay or cause to be paid to the churchwarden or churchwardens, overseer or overseers, constable or headborough, of such respective parishes and places as aforesaid, such and the like sums as he or they was or were heretofore accustomed to pay for the placing any such body or bodies into the ground as aforesaid; such sums to go in part payment and discharge of the costs and expenses to be incurred in or about the execution of this act, and credit to be given for the same by such overseers, churchwardens, constable, or headborough, in their accounts with the county to which such accounts shall be submitted; any thing in this act to the contrary thereof in anywise notwithstanding."

48 Geo. 3, c. 75.

Sect. 14. "And for defraying the expenses of the removal and burial of such body or bodies as aforesaid, and all other expenses necessary for the execution of this act," it is enacted, "that the justices of the peace at the general or quarter sessions may cause such sums of money as shall be necessary for all or any of the purposes aforesaid to be raised in the same manner as rates are directed to be raised by an act made in the twelfth year of the reign of his late Majesty King George the Second, intituled *An Act for the more easy Assessing, Collecting, and Levying of County Rate.*" See "*County Rate,*" Vol. II.

How expenses of interment defrayed.

(1.) Order for reimbursement on 48 Geo. 3, c. 75, s. 6.

To the Treasurer of the county of .

I, J. P. Esquire, one of her Majesty's justices of the peace for the county of having inquired into and ascertained upon oath the payments, costs, charges, and expenses in the account annexed, amounting to the sum of incurred by the overseers of the poor of the parish of in the said county, by reason of a dead human body having been found cast by the sea on the shore of the aforesaid parish, on the day of one thousand eight hundred and , and incurred by the said overseers of the poor at the like sums as in cases of burials made at the expense of the said parish, do hereby order you immediately on sight thereof to pay unto A. O. overseer of the poor of the before mentioned parish, the said sum of according to an act passed in the forty-eighth year of the reign of his late Majesty King George the Third, intituled "An Act for providing suitable interment in churchyards or parochial burying-grounds in England, for such dead human bodies as may be cast on shore from the sea, in cases of wreck or otherwise," and the same will be allowed you in your accounts. Given under my hand at , in the said county of this day of , in the year of our Lord one thousand eight hundred and . J. P.

(2.) Information on 48 Geo. 3, c. 75, s. 4, for finding dead human bodies cast on shore, and not giving notice thereof.

BE it remembered, that on, &c. at, &c. A. B. of, &c. farmer, cometh to wit. before me, J. P. one of her Majesty's justices of the peace for the said county, and informeth me, that C. D. late of in the said county, [labourer,] on the, &c. at, &c. the bank of, &c. did find a certain dead human body there cast on shore from the sea by wreck or otherwise, and did not, within six hours thereafter, give notice thereof to any one of the churchwardens or overseers of the said parish of , in which such dead human body was so found as aforesaid, or cause such notice to be left at the last or usual place of abode of any such churchwarden or overseer; contrary to the form of the statute in such case made and provided: Whereby, &c. [as usual to the end.]

(3.) Conviction thereon.

See the form given by the act, *ante*, 502.

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(4) Information against parish officers, on 48 Geo. 3, c. 75, for neglecting to inter a dead human body cast on shore.

[Same as the form (No. 2), but describing the offence thus]: *that on, &c. at the parish of in the said county, a certain dead human body was cast on shore from the sea by wreck or otherwise, and notice thereof was then and there given to one C. D. the churchwarden* [*churchwarden or overseer*, or if in an extra-parochial place, *constable or headborough,*] *of the said parish; and that the said C. D. well knowing the premises, did nevertheless then and there* [*refuse and*] *neglect to remove or cause to be removed the said body from the sea-shore to some convenient place prior to the interment thereof, for the space of twelve hours next after the said notice so given as aforesaid; contrary to the form of the statute in such case made and provided. Whereby, &c.* [as usual to the end.]

Burning.

As to setting fire to mines, &c. see "*Coals*," Vol. I.
As to setting fire to ships, stores, &c. see "*Ships*," "*Stores*," Vol. V.
As to threats to burn, &c. see "*Threats*," Vol. VI.
As to the punishment for servants carelessly firing houses, &c. see "*Fire*," Vol. III.

Herein of the burning:—

I. *Of Houses, Churches, Buildings, &c.* 504.
II. *Of Dwelling-Houses, some Person being therein,* 510.
III. *Of Stacks of Corn, &c. Farm Produce or Implements in Farm Buildings,* 510.
IV. *Of Crops, Woods, &c.* 511.

I. Of Houses, Churches, Buildings, &c.

Offence by common law.

Maliciously and voluntarily burning the house of another by night or by day is felony at the common law. (1 *Hawk.* c. 39.)

Offence by statute.

By stat. 7 Will. IV. & 1 Vict. c. 89, s. 3, "Whosoever shall unlawfully and maliciously set fire to any church or chapel, or to any chapel for the religious worship of persons dissenting from the United Church of England and Ireland, or shall unlawfully or maliciously set fire to any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or to any building or erection used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, with intent thereby to injure or defraud any person, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

Punishment for.

By sect. 12, "Where any person shall be convicted of any offence punishable under this act for which imprisonment may be awarded, it shall be lawful for the Court to sentence the offender to be imprisoned, or imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the Court in its discretion shall seem meet."

Provisions extend to farm buildings.

It having been doubted whether the above provisions extended to the setting fire to a hovel or shed not being appendant to a house, it is enacted by the 7 & 8 Vict. c. 62, s. 1, "That whoever shall unlawfully and maliciously set fire to any hovel, shed, or fold, or to any farm building, or any building or erection used in farming land, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, with intent thereby to injure or defraud any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

Punishment of whipping.

Sect. 3. "That every male person under the age of eighteen years who shall be convicted of any offence under this act shall be liable, at the discretion of the court before which he shall be convicted, in addition to any other sentence which may be passed upon him, to be publicly or privately whipped, in such manner, and as often, not exceeding thrice, as the Court shall direct."

Sect. 4. "That this act shall be deemed a part of the 7 Will. 4 & 1 Vict. c. 89.

1. *Of Houses, Churches, &c.*

By the 5 & 6 Vict. c. 38, s. 1, these offences are not triable at any quarter sessions.

Offence not triable at sessions.

With respect to what building the offence extends at common law, it extends only to a dwelling-house, and to all outhouses that are parcel thereof, though not contiguous to it, nor under the same roof; as in the case of burglary, the barn, stable, cow-house, sheep-house, dairy-house, mill-house. (1 *Hale*, 567.) But if the barn or out-house be not parcel of a dwelling-house, it is not felony unless the barn have hay or corn in it; and then, though it be no parcel of a dwelling-house, it is felony. (3 *Inst.* 67.)

What house, or building, &c. the offence extends to.

The above statutes do not alter the nature of the offence, or create any new offence, except that they extend to the burning of other buildings than dwelling-houses, or out-houses parcel thereof.

The building in respect of which the offence is committed must come within the ordinary and established meaning of the words used in the statutes. The mere using the building for a particular purpose does not necessarily alter the nature of the building. Therefore a building intended for and constructed as a dwelling-house, but which had not been completed or inhabited, and in which the owner had deposited straw and agricultural implements, was held not a house, outhouse or barn within the 9 Geo. I. (*Elsmore* v. *St. Briavells*, 2 *Man. & R.* 514; 8 *B. & Cres.* 461, S. C.)

An open building in a field, at a distance from and out of sight of the owner's house, though boarded round and covered in, (*R.* v *Ellison*, *Moody*, *C. C.* 336,) a cart-hovel, consisting of a stubbled roof supported by uprights, in a field at a distance from other buildings, (*R.* v. *Parrot*, 6 *Car. & P.* 402,) was not within the 7 Will. 4 & 1 Vict. c. 89. But an open shed in a farm-yard, composed of upright posts supporting pieces of wood laid across them, and covered with straw as a roof, was. (*R.* v. *Stallion*, 1 *Mood. C. C.* 398, and see *R.* v. *Houghton*, 5 *C. & P.* 555.) So was a pig-stye in a yard, into which the back door of the prosecutor's house opened, and which yard was bounded by fences and other buildings of the prosecutor, and by a cottage and barn let to a tenant, but which did not open into the yard. (*R.* v. *James*, 1 *Car. & Kir.* 303.) But now by the 7 & 8 Vict. c. 62, s. 2, *supra*, it is an offence to set fire to any farm building.

A school-room, which was separated from the dwelling-house by a narrow passage, about a yard wide, the roof of which was partly overhung by that of the dwelling-house, the two buildings, together with some others, and the court which inclosed them, being rented by the same person, was ruled to be well described as an *outhouse*. (*R.* v. *Winter*, *Russ. & Ry.* 295.)

As to how far the burning of part of a dwelling-house, &c. may be an offence: North was indicted for feloniously, wilfully and maliciously, against the form of the statute 9 Geo. I. c. 22, setting fire to a certain outhouse of J. Taylor, situate at Knaresborough. It appeared that the prisoner had set fire to and burnt part of a building of the prosecutor, which was situated in a yard of his at the back of his dwelling-house, which was in the street of the town of Knaresborough. The building was about four or five yards distant from the dwelling-house, but not joined to it. The yard was inclosed on all sides, in part by the dwelling-house, in another part by a wall, in a third part by a railing, which separated it from a field, and in the remaining part by a hedge. The prosecutor kept a public house, and also carried on the business of a flax dresser. The buildings set fire to, and in part burned, consisted of a stable and a chamber over it, which was used by the prosecutor as a shop for keeping and dressing flax. It was objected on behalf of the prisoner that this building was not an *outhouse* within the stat. 9 Geo. I. c. 22, as that must be understood to mean outhouses, which in contemplation of law were not part of the dwelling, which it was insisted this was, and that the indictment should have been for arson at common law. The jury found the prisoner guilty, and the point was reserved. November, 1795, (*Hotham*, B. absent), all the other judges agreed that the verdict was right. They said, that though for some purposes this might be part of the dwelling-house, yet still in fact it was an outhouse. In *Breeme's case* it was considered that the

1. *Of Houses, Churches, &c.*

stat. 9 Geo. I. did not alter the nature of the crime, or create any new offence, but only excluded the principal from clergy more clearly than he was before. (*North's case*, 2 *East's P. C.* 1021.)

Upon the construction of stat. 9 Geo. I. c. 22, it has been holden that a common gaol is a house within the meaning of it. The entrance to the prison was through the dwelling-house of the gaoler, and the prisoners were sometimes allowed to lie in it. All the judges held that the dwelling-house was to be considered as part of the prison, and the whole prison was the house of the corporation to whom it belonged. One set of the counts there laid it to be the house of the corporation, another of the gaoler, and a third of the person whom the gaoler suffered to live in the dwelling-house. (*Donovan's case, Lanc.* 1770; 2 *Bl. Rep.* 682; 2 *East's P. C.* 1020, S. C.; *post*, 507.)

A cotton-mill was held to be within the meaning of the 9 Geo. III. c. 29, s. 2, relating to the burning of mills. (*Anon.* 2 *Russ.* 493.)

It matters not whose house was burnt.

At common law the offence could not be committed by a party in burning his own house. And a person seised in fee, or but possessed for years, of a house standing by itself at a distance from all others, could not commit felony in burning the same. So a man so seised or possessed of a house in a town, who burned his own with an intent to burn his neighbour's, but in the event burned his own only, was not guilty of felony; it was, however, certainly an offence highly punishable in regard to the malice thereof, and the great danger to the public which attended it; and the offender was liable to be severely fined, and imprisoned during the Queen's pleasure, and set on the pillory, and bound to his good behaviour. (1 *Hawk.* c. 39, s. 3; *Breeme's case*, 1 *Leach*, 220, 4th ed.; *Holme's case*, *Cro. Car.* 376.) The frequent commission of the latter offence, and the very serious mischief that resulted from its being merely a misdemeanor, at last attracted the attention of the legislature, and the party who would occasion, by burning his own possessions, an injury to another, the extent of which in many cases cannot be calculated, is now guilty of a felony; formerly by 43 Geo. III. c. 58, usually called Lord Ellenborough's Act, and now by 7 Will. IV. & 1 Vict. c. 89, s. 3, *supra*.

The burning must be maliciously and unlawfully.

The burning must be done unlawfully and maliciously to constitute the offence; for if it be done by mischance or negligence, it is no felony. (3 *Inst.* 67). As if an unqualified person in sporting happen to set fire to the thatch of a house; or even if a man were shooting at the poultry of another, by which means the house is fired, that is, provided he did not mean to steal the poultry, but merely to commit a trespass; for otherwise the first intent being felonious, the party must abide all the consequences. (*East's P. C.* 1019; 1 *Hale*, 569.)

But if a man maliciously intending only to burn one person's house happen thereby to burn the house of another, it is certain that he may be indicted as having maliciously burned the house of that other; for where a felonious design against one man misseth its aim, and takes effect upon another, it shall have the like construction as if it had been levied against him who suffers by it. (1 *Hawk.* c. 39, s. 5; 1 *Hale*, 569.)

Even if a man by wilfully setting fire to his own house burn also the house of one of his neighbours, it will be felony; (see *R.* v. *Probert*, 2 *East's P. C.* 1031; *R.* v. *Isaac*, *id.*); for the law in such a case implies malice, particularly if the party's house were so situate that the probable consequences of its taking fire was that the fire would communicate to the houses in its neighbourhood. (See per *Parke*, J. in *Sweetapple* v. *Jesse*, 5 *B. & Adol.* 31; 2 *Nev. & M.* 41, S. C.)

There must be a burning.

Neither a bare intention to burn a house, nor even an actual attempt to do it by putting fire to part of a house, will constitute the offence, if no part of it be burned: but if any part of the house, &c. be burned, the offence will be complete, notwithstanding the fire afterwards be put out, or go out of itself. (1 *Hawk.* c. 39, s. 4; 5 *East's P. C.* 1020.) Where it was proved that the floor near the hearth was scorched, and it was in fact charred in a trifling way, that it had been at a red heat, though not in a blaze, it was held, that the offence was complete. (*Reg.* v. *Parker*, 9 *Car. & P.* 45.) But in another

case, where it appeared that a small fagot was set on fire on the boarded floor of a room, and that the fagot was nearly consumed—that the boards of the floor were scorched black, but not burnt, and that no part of the floor was consumed; it was held that the offence was not complete. (*R.* v. *Russell*, 1 *C. & Marsh.* 541.) And where, upon an indictment on the repealed statute of 9 Geo. I. c. 22, for setting fire to a paper mill, it appeared that the defendant set fire to some paper that was drying in one of the lofts, but no part of the mill itself was burnt; the judges held that it did not amount to an offence within the act. (*R.* v. *Taylor*, 1 *Leach*, 49.) And where the defendant set fire to a parcel of unthrashed wheat, it was holden not to be within the statute. (*R.* v. *Judd*, 2 *T. R.* 255.)

1. *Of Houses, Churches, &c.*

The attempt to commit arson is a misdemeanor at common law, and as such may be punished severely. (1 *Wils.* 139; see *ante*, "*Attempts.*")

The burning must be with the intention to injure some person who is not identified with the defendant. Therefore a married woman cannot be indicted for setting fire to the house of her husband with intent to injure him. (*R.* v. *March*, *R. & M.* 182.)

The burning must be with intent to injure.

Where the offence consists of the setting fire to the house of a third person, the intent to injure that person is inferred from the act, for every person is deemed to intend the necessary consequence of his own act; and therefore, where the defendant was indicted for setting fire to a certain mill, with intent to injure the occupiers thereof, it was holden that he was properly convicted, although it appeared at the trial that he was a harmless, inoffensive man, and had no motive to induce him to commit the act. (*R.* v. *Farrington*, *R. & R.* 207.) But this doctrine can only arise where the act is wilful; and, therefore, if the fire appear to be the result of accident, the party who is the cause of it will not be liable. (*Supra.*) On the other hand, where the defendant is charged with setting fire to his own house, the intent to defraud cannot be inferred from the act itself, but must be proved by other evidence. Where, therefore, upon an indictment for arson, with intent to defraud an insurance company, the policy was inadmissible, by reason of its not being stamped, a majority of the judges held that it could not be received in evidence, and, as the insurance could not otherwise be proved, the defendant ought to be acquitted. (*R.* v. *Gilson*, *R. & R.* 138; *Jervis's Arch. C. L.* 9 ed. 320.)

As to the form of the indictment in describing the building, it is sufficient to use the language used by the act, calling it a house, &c. according to the fact. (2 *East's P. C.* 1033.) Although the premises set on fire form part of the mansion, being within the curtilage, it will be no variance to charge them as an outhouse in general terms. (*R.* v. *North*, 2 *East's P. C.* 1033; *ante*, 505.) Where the indictment described the house in some of the counts as "a certain outhouse," in others as "a certain house," and the evidence was of a burning of a school-room, separated from the dwelling-house by a small passage, but the roof of one extending over the roof of the other; the judges are understood to have holden that the evidence satisfied the description in both sets of counts. (*R.* v. *Winter*, *R. & R.* 295; *ante*, 505.) So, where the indictment charged the burning of "a certain house" of the corporation of Liverpool, and the proof was of a burning of a gaol belonging to the corporation, the judges held it to be sufficient. (*R.* v. *Donnevan*, 2 *W. Bl.* 682; 2 *East's P. C.* 1020; 1 *Leach*, 69, S. C. *ante*, 506.)

Form of indictment.

The name of the owner of the house, &c. must be stated in the same manner as in burglary. (*R.* v. *Standfield*, 2 *East's P. C.* 1034.) It is therefore necessary to determine the party to whom the premises belong. This, however, is not so difficult an investigation as in the case of a burglarious entry, for it may be inferred, from the cases deciding that a party cannot, at common law, be guilty of arson by setting fire to houses in which he has an interest, what possession is sufficient in the party charged as the owner. When any doubt is entertained on this part of the subject, the difficulty may be obviated by the insertion of several counts to correspond with the evidence. (See

1. *Of Houses, Churches, &c.*

3 *Chit. C. L.* 1126.) If the premises be described as in the possession of A. B. proof that they are in the possession of the tenants of A. B. will support the indictment. (*R.* v. *Ball, R. & M. C. C.* 30.) So if the possession of a house be obtained wrongfully, it may be described as the house of the wrongful occupier. (*R.* v. *Wallis, Moody, C. C.* 334.) If a man, maliciously intending to burn the house of A., happen to burn the house of B., he may be indicted as having maliciously burned the house of B. (1 *Hawk.* c. 18, s. 18.) Where a parish pauper set fire to a house in which he was put to reside by the overseers, and the trustees, in whom the legal ownership was vested, were not known, it was holden that it might be described as the house of the overseers, or of persons unknown. (*R.* v. *Rickman*, 2 *East's P. C.* 1034.) As to describing the ownership of the house in burglary, see *ante*, 488.

The parish in which the building is alleged to have been situated must be stated according to the fact; a variance will be fatal. On an indictment for setting fire to a stack of pulse, it was holden that the offence was not of a local nature. (*R.* v. *Woodward, Moody, C. C.* 323.) But in this case the indictment gave no local description to the property destroyed. (*Jervis's Arch. C. L.* 9 ed. 317.)

A variance between the day stated in the indictment, as that on which the offence was committed, and the day proved, will be immaterial. Where the indictment alleged the offence to have been committed in the night-time, and it was proved to have been committed in the day-time, the judges held the variance to be immaterial. (*R.* v. *Minton*, 2 *East's P. C.* 1021.)

It is necessary to aver that the defendant "feloniously, unlawfully, and maliciously" set fire, &c. (See 2 *East's P. C.* 1021; *R.* v. *Turner, R. & M. C. C.* 239.)

As the words of the statute must be strictly pursued, it will be essential, in laying the intent, not to omit the word "thereby." (*Anon.* 5 *Ev. St.* 334.)

It was holden by six judges against five, that on the trial of an indictment on 43 Geo. III. c. 58, laying the intention to defraud the insurers, an unstamped policy of insurance could not be given in evidence. (*R.* v. *Gelson*, 2 *Leach*, 1007; 1 *Taunt.* 95; *R. & R.* 138, S. C.)

Where a house was robbed and burnt, the defendant being found in possession of some of the goods which were in the house at the time it was burnt, was admitted as evidence tending to prove him guilty of the arson. (*R.* v. *Rickman*, 2 *East*, 1035.)

Forms.

Information for setting fire to a house, on 7 Will. 4, and 1 Vict. c. 89, s. 3.

County of } *BE it remembered, that on, &c. at, &c. A. B. of, &c. cometh before me*
to wit. } *J. P. Esquire, one of her Majesty's justices of the peace in and for the said county of , and complaineth and maketh oath, that on, &c. the house,* [or *barn,* &c. according to the fact,] *of the said A. B. situate at the parish of , in the said county, was, as he verily believes, maliciously, unlawfully, and feloniously set fire to, and that he the said A. B. hath just cause to suspect, and doth suspect that one C. D. of , in the said county, labourer, did unlawfully, maliciously and feloniously set fire to the said* [*house*]; *and thereupon the said A. B. prayeth the judgment of me in the premises, that my warrant may issue against the said C. D. to answer the premises.*

Sworn and exhibited before me the day and year first above mentioned. *J. P.* *A. B.*

Warrant thereon.

County of } *To the constable of the parish of , in the said county.*
to wit. }

WHEREAS A. B. of , [*yeoman,*] *hath this day made complaint on oath before me J. P. Esquire, one of her Majesty's justices of the peace in and for the said county, that* [state the offence as in the information.] *These are therefore to command you forthwith to apprehend and bring before me, or some other of her Majesty's justices of the peace, acting in and for the said county, the body of the said C. D. to answer the said complaint, and to be further dealt with according to law. Given under my hand and seal, &c.* J. P. (L. S.)

Forms.

[Commencement as usual, *ante*, p. 9, (No. 1.)] *on, &c. at, &c. in the said county, unlawfully, maliciously, and feloniously did set fire to a certain house* [according to the fact] *of A. B. there situate, with intent thereby then and there to injure the said A. B.* [or *to defraud a certain insurance company, called*]: *against the form of the statute in that case made and provided. And you the said keeper, &c.* [as usual to the end.]

Commitment thereon.

[Commencement as usual, *ante*, p. 9, (No. 1.)] *on the day of , A. D. , at the parish of , in the said county, unlawfully, maliciously and feloniously did set fire to a certain church there situate,* [or *to a certain chapel there situate,* or *to a certain chapel for the religious worship of persons dissenting from the united Church of England and Ireland there situate, and duly registered and recorded,* see form of indictment, *infra,*] *against the form of the statute in that case made and provided. And you the said keeper, &c.* [as usual as *ante*, p. 9, to the end.]

The like, for setting fire to a church.

—— *THE jurors for our Lady the Queen upon their oath present, that C. D. late of the parish of , in the county of , labourer, on the day of , in the year of the reign of our Lady the now Queen Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, feloniously, unlawfully, wilfully, and maliciously did set fire to and burn a certain dwelling-house of one A. B. there situate, against the peace of our said Lady the Queen, her crown and dignity.* [If the house were not a dwelling-house, but merely a building, which was parcel of the dwelling-house, describe it accordingly.]

Indictment for arson at common law.

—— *THE jurors for our Lady the Queen upon their oath present, that C. D. late of the parish of , in the county of , labourer, on the day of , in the year of the reign of our Lady the now Queen Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully, maliciously and feloniously did set fire to a certain dwelling house* [according to the fact, see the act, *ante*, 504,] *of A. B. there situate, with intent thereby then and there to injure the said A. B.* [or *to defraud a certain insurance company, called*] *against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.*

The like, on 7 Will. 4 & 1 Vict. c. 89, s. 3, for setting fire to a house, &c.

—— *THE jurors for our Lady the Queen upon their oath present, that C. D. late of the parish of , in the county of , labourer, on the day of , in the year of the reign of our Lady the now Queen Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, feloniously, wilfully, maliciously and unlawfully did set fire to a certain church* [ante, 504,] *there situate: contrary to the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.*

The like, for setting fire to a church.

—— *THE jurors for our Lady the Queen upon their oath present, that C. D. late of the parish of , in the county of , labourer, on the day of , in the year of the reign of our Lady the now Queen Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, a certain building there situate and being, called the* [*Lower Cells,*] (*the same then and there being the prison of the borough of , in the county aforesaid*) *then and there feloniously, unlawfully, maliciously and injuriously did set fire to, and the same building called the* [*Lower Cells*] *did by such firing then and there burn, consume, and destroy, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. And the jurors aforesaid, on their oath aforesaid, do further present, that the said C. D. on the day and year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, a certain building there situate and being, called the* [*Lower Cells*], *then and there feloniously, unlawfully, maliciously, and injuriously did set fire to, and the same building then and there feloniously, unlawfully, wickedly, wilfully, and injuriously did, by such firing, burn, consume and destroy, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.*

The like, for setting fire to a place of confinement in a borough.

Second count.

II. Burning of Houses with Persons therein.

Burning houses with persons therein.

The 7 Will. I V. & 1 Vict. c. 89, s. 2, enacts, "That whosoever shall unlawfully and maliciously set fire to any dwelling-house, any person being therein, shall be guilty of felony, and being convicted thereof shall suffer death."

The sentence under this section may be recorded; (4 Geo. IV. c. 48.) See title, "*Judgment*," Vol. III.

Not triable at sessions.

This offence is not triable at any quarter sessions. (5 & 6 Vict. c. 38, s. 1.)

Indictment for.

—— *THE jurors for our Lady the Queen upon their oath present, that C. D. late of the parish of , in the county of , labourer, on the day of , in the year of the reign of our Lady the now Queen Victoria, to wit, at the parish aforesaid, in the county aforesaid, feloniously, unlawfully and maliciously did set fire to a certain dwelling-house of A. B. there situate, the said A. B. then being in the said dwelling-house, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.*

III. Burning of Stacks, Farm Produce, or Implements in Farm Buildings.

Setting fire to stacks of corn, &c.

The 7 Will. IV. & 1 Vict. c. 89, s. 10, enacts, "That whosoever shall unlawfully and maliciously set fire to any stack of corn, grain, pulse, tares, straw, haulm, stubble, furze, heath, fern, hay, turf, peat, coals, charcoal. or wood, or any steer of wood, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

As to adding hard labour or solitary confinement to the imprisonment, see sect. 12, *ante*, 504.

Setting fire to farm produce or implements in farm buildings.

The 7 & 8 Vict. c. 62, s. 2, enacts, "That whosoever shall unlawfully and maliciously set fire to any hay, straw, wood, or other vegetable produce being in any farm house or farm building, or to any implement of husbandry being in any farm house or farm building, with intent thereby to set fire to such farm house or farm building, and to injure or defraud any person, shall be liable to the pains and penalties of unlawfully and maliciously setting fire to the said farm house or farm building with intent thereby to injure or defraud such person." By sect. 3, *ante*, 504, males under eighteen may be whipped, in addition to any other sentence, and the act is, by sect. 4, to be deemed part of the 7 Will. 4 & 1 Vict. c. 89.

These offences are not triable at any quarter sessions. (5 & 6 Vict. c. 38, s. 1.)

The property in respect of which the offence is committed must come within the ordinary and established meaning of the words used in the statute. An indictment for setting fire to a stack of beans, (*R.* v. *Woodward*, *Moody C. C.* 323), or barley, (*R.* v. *Swathens*, 4 *C. & P.* 548), is good; for the Court will take notice that beans are pulse, and barley corn; but it is said that a stack of stubble cannot be described as a stack of straw. (*R.* v. *Turner* or *Reader*, 4 *C. & P.* 245; *R. & M. C. C.* 241, S. C.) And setting fire to a score of faggots, which were piled one upon another in a loft which was made by means of a temporary floor put over an archway roofed in between two houses, and under which carts could go, is not setting fire to a stack of wood within the 7 Will. IV. & 1 Vict. c. 89, s. 10. (*R.* v. *Aris*, 6 *C. & P.* 348.)

It was never doubted that burning *one rick*, &c. was within the statute, 22 & 23 Car. II. c. 7, though that statute has *ricks* in the plural. (See *Hussel's case*, 1 *Leach*, 1.)

[Commencement as usual, *ante*, p. 9, (No. 1.)] *on the day of* A. D. *, at the parish of , in the said county, unlawfully, maliciously, and feloniously did set fire to a certain stack of barley,* [*corn, grain, pulse, straw, hay,* or *wood,* according to the fact,] *of A. B. then and there being , against the form of the statute in that case made and provided. And you the said keeper, &c.* [as usual as *ante*, p. 9, to the end.]

Commitment on 7 Will. 4 & 1 Vict. c. 80, s. 10, for setting fire to a stack of corn, &c.

—— *THE jurors for our Lady the Queen upon their oath present, that C. D. late of the parish of , in the county of , labourer, on the day of , in the year of the reign of our Lady the now Queen Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, feloniously, wilfully, maliciously, and unlawfully did set fire to a certain stack of hay of and belonging to one A. B. then and there being against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.*

Indictment for the like offence.

IV. Burning of Crops, Woods, &c.

By stat. 7 & 8 Geo. IV. c. 30, s. 17, if any person shall unlawfully and maliciously set fire to any crop of corn, grain or pulse, whether standing or cut down, or to any part of a wood, coppice or plantation of trees, or to any heath, gorze, furze, or fern, wheresoever the same may be growing, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice or thrice publicly or privately whipped, (if the Court shall so think fit,) in addition to such imprisonment." See the general clauses affecting all the provisions of this act, "*Malicious Injuries to Property*," Vol. V.

Setting fire to crops of corn, &c. woods, &c.

By the 1 Vict. c. 90, s. 5, it shall not be lawful for any Court to direct that any offender shall be kept in solitary confinement for any longer period than one month at a time, or than three months in the space of one year.

The offence is not triable at any quarter sessions. (5 & 6 Vict. c. 38, s. 1.)

Where A. and B. were charged with setting fire to a wood, and it appeared that they set fire to a summer-house, which was in the wood, and that from the summer-house the fire was communicated to the wood, it was held, that they might be properly convicted on this indictment under the 7 & 8 Geo. IV. c. 30, s. 17. (*Reg.* v. *Price*, 9 *Car. & P.* 729.)

[Commencement as usual, *ante*, p. 9, (No. 1.)] *on the day of* A. D. *, at the parish of , in the said county, unlawfully, maliciously and feloniously did set fire to a certain crop of barley of A. B. then and there standing and growing, against the form of the statute in that case made and provided. And you the said keeper, &c.* [as usual, as *ante*, p. 9, to the end.]

Commitment for setting fire to crops, plantations, &c.

—— *THE jurors for our Lady the Queen upon their oath present, that C. D. late of the parish of , in the county of , labourer, on the day of , in the year of the reign of our Lady the now Queen Victoria, at the parish aforesaid, in the county aforesaid, feloniously, unlawfully and maliciously did set fire to a certain crop of wheat* [as the case may be] *of A. B. then and there standing and growing, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.*

Indictment for like offence.

County of } *To the Constable of , and to the Keeper of the House of Correction at , in the .*

WHEREAS, A. B. servant of C. D. of, &c. was on the day of the date hereof law-

Punishment for Servants, &c.

Commitment of a servant for negligently setting fire to a dwelling house. (a)

fully convicted before us, W. S. and S. P. Esquires, two of her Majesty's justices of the peace for the said county, upon the oath of E. F. of, &c. that he the said A. B. did, on the day of last, through negligence, set fire to, or cause to be fired, the dwelling-house of the said C. D. situate at , in the parish of , in the said county, by reason whereof, and by force of the statutes in that case made and provided, he the said A. B. hath forfeited the sum of one hundred pounds: And whereas the churchwardens of the parish of where the said fire did happen, have made appear unto us upon oath, that immediately upon the said conviction they did duly demand of the said A. B. the sum of one hundred pounds, to be distributed by them as the law directs, but the said A. B. did refuse and neglect to pay the same: These are therefore to command you, in her Majesty's name, to convey the said A. B. to the house of correction at aforesaid, and deliver him to the keeper thereof, together with this precept: and you the said keeper are hereby commanded to receive the said A. B. into your custody, and him detain and keep in the said house of correction to hard labour, for the space of eighteen months next ensuing. Given under our hands and seals this day of , A. D. 1844.

W. S. (L. S.)
S. P. (L. S.)

Burning in the Hand of Felons.

This punishment is now abolished by the 19 Geo. III. c. 73, s. 3, and 3 Geo. IV. c. 38, s. 1.

Butcher.

Conspiring to raise price of victuals.

By stat. 2 & 3 Edw. VI. c. 15, if butchers conspired not to sell their victuals but at certain prices, they were subject to severe penalties, but that act was repealed by the 5 Geo. IV. c. 95. But it is an offence at common law to conspire to raise the price of victuals. See *post*, "*Conspiracy*." See also title "*Forestalling*," Vol. III.

Not to kill in a walled town.

By stat. 4 Hen. VII. c. 3, no butcher shall slay any beast within any walled town except Carlisle and Berwick, on pain of forfeiting for every ox 12*d.*, every cow and other beast 8*d.*, half to the king and half to him that will sue.

Selling unwholesome flesh.

A butcher that selleth swine's flesh measled, or flesh dead of the murrain, shall for the first time be grievously amerced; the second time suffer judgment of the pillory; (b) the third time to be imprisoned and make fine; and the fourth time forswear the town. (*Ordinance for Bakers*, 1 *Hawk. Stat.* 1, p. 181.) As to how far this would be an offence at common law, see the cases as to selling bad bread, &c. *ante*, 421.

Not to kill or sell on Lord's Day.

By stat. 3 Car. I. c. 1, if any butcher shall kill or sell any victual on the Lord's Day he shall forfeit 6*s.* 8*d.*, one third to the informer and two thirds to the poor, on conviction before one justice, on his own view, or confession, or oath of two witnesses, to be levied by the constable or churchwarden, (See "*Lord's Day*," Vol. III.) An indictment against a butcher for selling meat on a Sunday should conclude against the form of the statute; but if the offender keep open shop, the usual method is to indict at the sessions for the nuisance. (*R.* v. *Brotherton*. 1 *Stra.* 702; "*Nuisance*," Vol. V.)

As to slaughtering horses, see "*Horses*," Vol. III.

For offences as to hides, see "*Leather*," Vol. III.

(a) This form is misplaced; it should have been printed under title "*Fire*," Vol. III.

(b) This punishment of pillory is now abolished in all cases. (7 Will. IV. & 1 Vict. c. 23. See tit. "*Pillory*," &c. Vol. V.

Butter and Cheese (a).

I. *Concerning the Packing, Weight and Quality of Butter*, 513.
II. *Concerning the Shipping of Butter and Cheese for London*, 515.

I. Concerning the Packing, Weight and Quality of Butter, &c.

Former acts repealed.

By stat. 36 Geo. III. c. 86, s. 19, the 13 & 14 Car. II. c. 26, and so much of 4 Will. III. c. 7, as discharges persons from the effect of any part of 13 & 14 Car. II. for preventing frauds in the sellers of butter after the factor or buyer hath contracted for the same, are repealed; and new regulations are made respecting the packing, weight and sale of butter as follows:—

Regulations for making vessels for packing butter.

By sect. 1. Every cooper or other person who shall make any vessel for the packing of butter shall make the same of good and well-seasoned timber, and tight and not leaky, and shall groove in the heads and bottoms thereof; and every such vessel shall be a tub, firkin, or half-firkin, and no other; and shall, when delivered by any such cooper or person making the same, be of the weight and proportion, and capable of containing the several quantities of butter hereinafter mentioned, viz. every tub shall weigh of itself, including the top and bottom, not less than 11lb. nor more than 15lb. avoirdupois weight, and neither such top nor bottom shall be more than five-eighths of an inch thick in any part thereof, and shall be capable of containing 84lb. average of butter, and not less; every firkin shall weigh of itself, including the top and bottom, not less than 7lb. nor more than 11lb., and neither the top nor bottom shall be more than four-eighths of an inch thick in any part, and shall be capable of containing not less than 56lb. of butter; and every half firkin shall weigh of itself, including the top and bottom, not less than 4lb. nor more than 6lb., and neither the top nor bottom shall be more than three-eighths of an inch thick in any part, and it shall be capable of containing not less than 28lb. of butter, on pain of forfeiture by the cooper or other person making the same, of 10*s.* for every such vessel. (*b*)

Weight of tub.

Weight of firkin.

Of half-firkin.

Name, place of abode, and weights to be branded.

Sect. 2. And every such maker, before such vessel shall go out of his possession, shall, on the outside of the bottom, with an iron, brand his christian name and surname at full length, in permanent and legible letters, together with the exact weight or tare thereof, on the like penalty.

And by stat. 38 Geo. III. c. 73, s. 1, Every such maker shall moreover mark in like manner, in addition to his name, his place of abode, or dwelling, in the following manner, viz. if he dwell in a city or market town, then the name thereof; if in a village, township, liberty, hamlet, or other division of a parish, then the name of the parish wherein the same is situate; and if in an extra-parochial place, then the name of the next adjoining parish; on pain of forfeiting 10*s.* for every default therein.

Factors buying or selling in vessels not legally marked.

Sect. 2. And every factor or agent for buying or selling butter for others, who shall buy, sell, or offer to sale, or have in his custody for sale, or shall order, consign, forward or send, any vessel containing butter for sale, which shall not be made, and externally marked, and have the butter therein imprinted, according to the directions of this and the above act, shall forfeit 20*s.* for every such offence.

(*a*) An Act of Parliament will most probably be passed this Session for the repeal of 4 W. & M. c. 7; 36 Geo. III. c. 86, and 38 Geo. III. c. 73, and if so it will be found in the *Addenda*, Vol. VI. under title "*Butter and Cheese.*"

(*b*) The avoirdupois weight is that by which the sale of butter is regulated, and a custom in a particular place, that every pound of butter shall weigh eighteen ounces, is bad, being contrary to the express provision of the legislature, the object of which is to establish a uniformity of weights and measures. (*Noble* v. *Durell*, 3 *T. R.* 271; *Hockin* v. *Cooke*, 4 *T. R.* 314; *R.* v. *Major*, *id.* 760.) But it has never been decided that a custom to sell by a lump of a particular weight exceeding sixteen ounces is invalid in law. See *post*, "*Weights and Measures*," Vol. VI.

1. *Packing, Weight and Quality of.*

Sect. 3. And every cheesemonger or seller or dealer in butter on his own account, who shall offer for sale, or have in his possession for sale, any vessel containing such butter, which shall not be externally marked as aforesaid, shall forfeit 10s. for every such offence.

Or cheesemongers and others.

Directions for packing of butter.

By stat. 36 Geo. III. c. 86, s. 3, And every dairyman, farmer, or seller of butter, or other person who shall pack any butter for sale, shall pack the same in vessels so made and marked as aforesaid and no other, and shall properly soak and season such vessel before such packing, and when so soaked and seasoned shall, on the bottom thereof on the inside, and on the top on the outside, with an iron, brand his christian and surname at full length in like letters, and also on the outside of the top, and on the bouge or body thereof, the true weight or tare of such empty vessel when so soaked and seasoned, and also his name in like manner on the bouge or body across two different staves at least, to prevent the same being taken out and changed; and shall distinctly and at full length imprint his christian and surname upon the top of the butter in such vessel when filled, on pain of forfeiting 5*l.* for every default thereof.

Quantities to be packed in each vessel.

Butter not to be mixed.

What salt to be used.

Sect. 4. And every dairyman, farmer, or seller of butter, or other person, packing butter for sale, shall, (exclusive of the tare of such vessel,) pack in every tub not less than 84lb., firkin, 56lb., and half-firkin, 28lb., net, of good and merchantable butter; and no butter which is old or corrupt shall be mixed or packed up into any such vessel with that which is new and sound, nor shall any whey butter be packed or mixed with that which is made of cream, but every such vessel shall be of one sort and goodness throughout; and no butter shall be salted with any great salt, but with fine small salt, and not intermixed with more than is needful for its preservation; on pain of forfeiting 5*l.* for every offence.

Practising fraud in the sale of butter.

Sect. 5. And if any change, alteration, fraud, or deceit, shall be used or practised, either in the vessel wherein butter is packed for sale as aforesaid, or in the butter itself, whether in quantity, quality, weight or otherwise, or in any such brands or marks as aforesaid, or in the staves whereon the same shall be placed, or in any other manner howsoever after the packing thereof for sale as aforesaid; every person concerned therein shall forfeit 30*l.* for every such offence.

To deliver the full quantity.

Sect. 6. And every cheesemonger, dealer in butter, or other person who shall sell any tub, firkin, or half-firkin, shall deliver therein the full quantity aforesaid, and in default shall be liable to make satisfaction for what is wanting, and be liable to an action for recovery of such satisfaction, with costs.

Not to be re-packed for sale again.

Sect. 7. And no cheesemonger, dealer, or other person, shall re-pack for sale any butter in any such vessel as aforesaid, on pain of forfeiting 5*l.* for every tub, firkin, or half-firkin so re-packed.

Foreign butter.

Sect. 8. Provided that no person shall be liable to any of the penalties of this act for using any such vessel as aforesaid after the British butter packed therein hath been taken thereout, for the re-packing for sale any foreign butter, who shall first entirely cut out or efface the names of the original dairyman, farmer, or seller of butter, leaving the name and tare of the cooper, and the tare of the original dairyman, farmer or seller thereon, and shall afterwards with an iron brand his name in words at length and the words *foreign butter* in permanent and legible letters, upon the bouge or body of every such vessel across two staves at the least, to denote that such butter is foreign butter.

Counterfeiting or forging marks.

Sect. 9. And if any person shall hereafter be convicted of counterfeiting or forging any of the names or marks of such owners, farmers, or dairymen, as aforesaid, or any part thereof, or cause the same to be done, he shall for every offence forfeit 40*l.*

In an action brought by a farmer to recover the price of fifteen firkins of butter, sold by him to defendant, it appeared that the firkins were not marked according to the act. It was held, that the provisions which required the vessel to be branded with the name of the cooper, seller, &c. being intended for the protection of the public against fraud, indirectly prohibited any sale

of butter in vessels not properly marked; that the subject-matter of this contract was in such a state from the vessels not being properly marked, that the sale of it was forbidden by act of parliament, and consequently that the contract of sale was void, and the plaintiff could not recover. It was held, further, that although there was a penalty imposed in the same clause of the act which directed the thing to be done, yet the remedy of the public against a person infringing the clause was not thereby limited to a proceeding for the penalty; but that the clause might be used against him as a defence to an action. (*Forster* v. *Taylor*, 3 *Nev. & M* 244; 5 *B. & Adol.* 887, S. C.; and see *Cope* v. *Rowlands*, 2 *M. & W.* 149.)

1. *Packing, Weight and Quality of.*

By sect. 13, 14, and stat. 38 Geo. III. c. 73, s. 4, all penalties above 5*l.* are to be recovered in the courts at Westminster; and all offences against this act, the mode of determining which is not hereinbefore prescribed, and where the penalty shall not exceed 5*l.*, shall be heard and determined by one justice of the county, &c. or place where the offence shall be committed, or alleged to be committed, who on proof upon oath by one witness may levy such penalties by distress (*a*) and sale of the offender's goods, (returning the overplus, after deducting the costs,) to be applied to the use of the informer; and for want of sufficient distress, or if such penalty be not forthwith paid, such offender shall be committed to the gaol or house of correction, without bail, for (not exceeding) three calendar months, nor less than twenty-eight days, unless such penalty and all reasonable charges be sooner paid.

Recovery and application of penalties.

Sect. 11. And the conviction may be drawn out in the following form, or to the like effect:

Form of conviction.

County of } BE it remembered, that on this day of , A. O. is convicted } before J. P. one of his Majesty's justices of the peace for the said county of , [or for the riding or division of the said county of , or for the city, liberty, or town of , as the case may be,] for that the said A. O. on [time of committing the offence,] *at* [place of committing offence,] *did* [here state the offence against the act according to the fact,] *contrary to the form of the statute in that case made and provided; and the said J. P. doth adjudge him or her to pay and forfeit for the said offence the sum of . Given under my hand and seal the day and year first above-mentioned.*

Which conviction shall be written on parchment, and transmitted to the next sessions to be there filed.

Sect. 11, 12. And if any person shall think himself aggrieved by the judgment of the said justice, he may appeal to the next sessions for the county or place where the offence shall be committed, or alleged to be committed, who, upon receiving such conviction drawn up as aforesaid, shall hear and determine the same, and may award costs to either party, as to them shall seem meet.

Appeal. (*b*)

Sect. 13. And no such conviction or judgment shall be set aside by such sessions for want of form, if the material facts alleged therein be proved to their satisfaction, nor shall the same be removed by *certiorari* or other process into any other court. (*c*)

Conviction not quashed for want of form, nor removed by *certiorari*.

Sect. 16. Provided, that nothing herein shall extend to the packing of butter in any pot or other vessel not capable of containing more than 14lb.

Vessels not exceeding 14lb.

Sect 17. Provided also, that every information, prosecution, or suit, shall be commenced within four months after the offence committed.

Limitation of actions.

II. Concerning the Shipping of Butter and Cheese for London.

By stat. 4 Will. III. c. 7, s. 4, Every warehouse-keeper, weigher, searcher, or shipper of butter and cheese, shall receive all butter and cheese that shall

No undue preference.

(*a*) See "*Distress under Justices Warrant*," Vol. II.

(*b*) See in general, *ante*, "*Appeal*."

(*c*) In a case which occurred, A. D. 1777, it was holden, that an information *qui tam* upon the old act, 8 Geo. I. c. 27, for a fraud in weighing and packing butter, exhibited in the sheriff's court, was removeable into the Court of King's Bench by writ of *habeas corpus cum causâ*. (*Hartley* v. *Hooker*, *Cowp.* 523.)

2. *Shipping of, for London.* be brought to him for the London cheesemongers, and ship the same without undue preference; and shall have for his pains 2*s.* 6*d.* for every load; and if he shall make default, he shall, on conviction before one justice, on oath of one witness, or confession, forfeit for every firkin of butter 10*s.* and for every weigh of cheese 5*s.*, half to the churchwardens and overseers for the use of the poor, and half to the informer, to be levied by the constable by distress and sale.

Book of entry. Sect. 5. And he shall keep a book of entry of receiving and shipping the goods on pain of 2*s.* 6*d.* for every firkin of butter and weigh of cheese, to be levied and applied in like manner; and for want of distress, to be committed till paid.

Master of a ship refusing to take in. Sect. 6. A master of a ship refusing to take in butter or cheese, before he is full laden, (s. 8, except it be a cheesemonger's own ship sent for his own goods,) shall forfeit for every firkin of butter refused 5*s.*, and for every weigh of cheese 2*s.* 6*d.*, to be levied and applied in like manner.

Appeal. Sect. 10. Persons aggrieved by the determination of the justice may appeal to the next sessions, giving 20*l.* bond with one or more sureties to the party to pay costs (within a month after,) if he is not relieved on his appeal.

Exception for Cheshire and Lancashire. Sect. 9. But this act shall not extend to any warehouse in Cheshire or Lancashire.

York and New Malton. There are special directions in stat. 8 Geo. I. c. 27, concerning the selling of butter in the city of York, and stat. 17 Geo. II. c. 8, concerning the same in New Malton.

Information on 36 Geo. 3, c. 86, for selling butter in a tub not marked with seller's name, &c.

} BE it remembered, that on, &c. at, &c. A. B. of , in the said county, to wit. § [labourer,] cometh before me J. P. Esquire, one of his Majesty's justices of the peace in and for the said county, and on his oath giveth me, the said justice, to understand and be informed, that A. O. of , in the said county, farmer and seller of butter, within four months now last past, that is to say, on, &c. at, &c. did pack for sale and sell to the said A. B. a quantity of butter, of the weight, to wit, of pounds, in a tub and vessel, whereon the christian and surname of the said A. O. was nowhere branded with iron, or otherwise marked on the outside, [as the case may be,] *against the form of the statute in that case made and provided, whereby the said A. O. hath forfeited for his said offence the sum of 5l.; wherefore the said A. B. prayeth the judgment of me, the said justice, in the premises, and that the said A. O. may be summoned to appear before me, the said justice, to answer the same.*

Sworn and exhibited before me, *A. B.*

J. P.

Conviction. The act gives a form of conviction, see *ante*, 515.

Buttons.

Foreign buttons. FOREIGN BUTTONS.]—By stat. 13 & 14 Car. II. c. 13, s. 2; 4 Will. III. c. 10, s. 2, no person shall sell or offer to sale, or import, any foreign bone, lace, cut work, embroidery, fringe, band strings, buttons, or needle-work, made of thread and silk, or either of them, or any foreign buttons whatsoever, on pain that he who shall offer them to sale shall forfeit the same and 50*l.*, and the importer shall forfeit the same and 100*l.* half to the king and half to him that shall sue.

Search for foreign buttons. And by sect. 3 of both acts, on complaint and information given to a justice of the peace, at reasonable times, he shall issue his warrant to the constable to enter and search for such manufactures in the shops being open, or warehouses and dwelling-houses of such persons as shall be suspected, and to seize the same.

Wooden buttons. WOODEN BUTTONS.]—By stat. 10 Will. III. c. 2, no person shall make,

sell, or set on, any buttons made of wood only, and turned in imitation of other buttons, on pain of 40*s.* a dozen, half to the king and half to him that shall sue in any court of record. *Wooden Buttons.*

In *R.* v. *Roberts*, 1 *Ld. Raym.* 712, an information was exhibited against the defendant, for having made wooden buttons contrary to the statute. Upon trial, the jury found a special verdict, that all the button was of wood, but there was in it a shank of wire. And after argument, judgment was given for the king, namely, that this was a button of wood, notwithstanding the shank, which is no essential part of buttons; for buttons of silk and hair have no shanks. See also *Dunn* v. *Hinchdy*, 2 *Ld. Raym.* 1273.

Cloth Buttons.]—By the said act, 10 Will. III. c. 2, no person shall make, sell, or set on, any buttons made of cloth, serge, drugget, frize, camlet, or other stuffs of which clothes are usually made, on pain of 40*s.* a dozen, half to the king and half to him that shall sue in any court of record. Cloth buttons.

And by stat. 8 Ann. c. 6, no tailor or other person shall make, sell, set on, use, or bind on any clothes, any buttons or button-holes made of or used, or bound with serge, drugget, frize, camlet, or other stuffs of which clothes are usually made; on pain of 5*l.* a dozen, half to the king and half to him that shall sue in any court of record; or on complaint to two justices, they may summon witnesses, and levy the penalty, and return the overplus, if any be; and if any person is aggrieved, he may appeal to the next sessions.

But by this act no power is given to make distress. The next stat. is the 4 Geo. I. c. 7, whereby it is enacted as follows:—

No tailor or other person shall make, sell, set on, use, or bind on any clothes, any buttons or button-holes made of, or used, or bound with cloth, serge, drugget, frize, camlet, or any stuffs that clothes are usually made of, (velvet excepted,) on pain of 40*s.* for every dozen of such buttons and button-holes, or in proportion for any lesser quantity, to be determined by one justice where the offence shall be discovered, or the offender shall inhabit, on oath of one witness, in three months after the offence committed; and to be distributed, (charges of conviction first deducted,) half to the informer and half to the poor of the parish or place where the offence shall be discovered; if not paid, (being lawfully demanded,) in fourteen days after conviction, the justice shall issue his warrant to the constable where the offender dwells, or can be found, to levy it by distress and sale; and where no sufficient distress can be found, he shall be committed to the common gaol of the county or place where he shall be found, to be kept to hard labour for three calendar months.

Sect. 6. Persons aggrieved may appeal to the sessions, giving sufficient notice; and the determination in such sessions shall be final by any order or warrant made by any justice upon any such conviction, and the sessions may allow costs to the party aggrieved.

Sect. 9. Tailors or other persons, causing their apprentices or servants to make such clothes, shall themselves be subject to the penalties in this act contained.

Sect. 8. All such clothes, made with such buttons and button-holes, *exposed to sale*, shall be forfeited and seized to the uses in this act, to be recovered and disposed of as the other penalties.

And by stat. 7 Geo. I. st. 1, c. 12, no person shall *use or wear* on any clothes, (velvet excepted,) any such buttons or button-holes, on pain of 40*s.* for every dozen of such buttons or button-holes, or in proportion for every lesser quantity of such buttons and button-holes, on conviction by confession or oath of one witness; and any justice of the peace, where the offence shall be committed, or the offender shall inhabit, shall, on complaint or information on oath of any credible person, in one month after the offence, summon the party, and on his appearance or contempt, examine the matter, and on due proof by confession, or oath of one witness, convict the offender, and on refusal to pay when demanded, at the time appointed by the justice, cause the forfeiture by his warrant to be levied by distress and sale; the said penal- Using or wearing cloth buttons.

Cloth Buttons.

ties to be half to him on whose oath the party shall be convicted, and half to the poor of the parish where the offence shall be committed. And persons aggrieved may appeal to the next quarter sessions, giving eight days' notice; and the judgment of the said sessions shall be final.

To him on whose oath the party shall be convicted.]—This is almost the only instance where a share of the penalty is given in express words, in a popular action, to the party on whose oath any person is convicted; and the contrary doctrine seems generally to prevail, that the defendant shall not be condemned upon the sole testimony of the plaintiff, swearing for his own interest. It is certainly against the common law, that such a person should be a witness at all; and therefore his right to give evidence in his own cause, and the power to convict the defendant upon that sole evidence, must depend on the express words of some statute.

Metal buttons.

Metal Buttons.]—The first and indeed the only act of parliament to regulate the manufacture of metal buttons was passed in the year 1796, 36 Geo. III. c. 60. All the other statutes before mentioned were passed for employing and encouraging the consumption of raw silk and mohair yarn, see 7 Geo. I. st. 1, c. 12. At the time of passing the 36 Geo. III. the manufacture and sale of metal buttons had been for many years a great branch of trade in this kingdom, but the increase of the manufacture had been greatly impeded by the fraudulent practice of marking the buttons as "gilt" or "plated," which, in fact, were not so, to the great injury of the purchaser and of the fair trader. This statute was therefore passed to regulate the sale of metal buttons, but the 20th section enacts it shall not extend to certain buttons.

Ordering false marks on buttons.

The first section of this statute, 36 Geo. III. c. 60, enacts that no person who shall order or apply for any metal buttons from any manufacturer or maker of buttons shall direct the words *gilt* or *plated*, or any other word, letter, figure, mark, or device indicating the quality, to be printed, cast, stamped, or marked in or upon any part of such buttons, or any word, letter, figure, mark, or device, whether the same do or do not indicate the quality, to be printed, &c. or marked in or upon the underside of such buttons, unless such person do at the same time order such buttons to be gilt with gold or plated with silver respectively; and no person shall procure or purchase any metal buttons not being so gilt or plated, having the words gilt or plated, or any other word, &c. or device printed, &c. or marked thereon, or any word, &c. printed, &c. on the underside, whether the same do or do not indicate the quality, knowing the same not to be so gilt and plated as aforesaid; on pain of forfeiting in every such case such buttons, and also 5*l.* for any quantity not exceeding twelve dozen, and if above, after the rate of 1*l.* for every twelve dozen.

Procuring buttons with false marks.

No marks to be used but such as express the real quality.

Sect. 2. And no person shall print, cast, stamp, or mark, or cause to be so done, upon any part of any metal button, the words *gilt* or *plated*, or any other word, letter, figure, mark or device, indicating the quality, or on the underside, whether the same do or do not indicate the quality, unless such buttons are before *bonâ fide* plated with silver, or afterwards gilt with gold, or destroyed before sold; and no person shall put or affix upon any such buttons having the words *gilt* or *plated*, or other words, &c. or devices as aforesaid indicating the quality, on any part thereof, or on the underside, whether the same do or do not indicate the quality, any ornament whatsoever, unless those parts not covered thereby be *bonâ fide* plated or gilt before such ornament be put or affixed thereon. And no person shall put or pack, or cause to be put or packed for sale, upon any card, paper, or other substance, or sell or expose to sale any metal buttons, not being gilt or plated as aforesaid, if the words *gilt* or *plated*, or any other word, &c. or device as aforesaid, indicating the quality, be printed, &c. or marked thereon, or upon such card, (not being the pattern card,) paper, or other substance; or on the underside of such buttons, whether the same do or do not indicate the quality, knowing the same not to be so gilt or plated; on pain of forfeiting, in every such case,

Nor any buttons to be packed with false marks.

such buttons, and also 5*l.* for any quantity exceeding one dozen, and not exceeding twelve dozen; and if above twelve dozen, after the rate of 1*l.* for every twelve dozen.

Metal Buttons.

36 Geo. 3, c. 60.

A conviction upon this clause, charging that the defendants did the act "unlawfully and fraudulently, contrary to the form of the statute," is bad, without expressly charging that they did it "knowingly;" and such defect is not cured by a proviso in the statute, that no conviction for any offence in the act should be set aside for want of form, or through the mistake of any fact, circumstance, or otherwise, provided the *material* facts alleged were proved; for this in effect requires all material facts to be alleged, and knowledge is a material fact to constitute such an offence. (*R.* v. *Jukes*, 8 *T. R.* 536.)

No other than words *gilt* or *plated* to be used.

Sect. 3. And no person shall print, &c. or mark, or cause so to be done, in or upon any metal button, any word, letter, figure, mark, or device indicating the quality thereof, except the words *gilt* or *plated;* or shall pack or cause to be packed for sale in or upon any card, (except the pattern card,) paper, or other substance, or parcel; or offer or expose to sale, or cause to be sold or exposed to sale any metal buttons having any word, &c. or device indicating the quality thereof, other than the words *gilt* or *plated*, printed, &c. or marked thereon; on pain of forfeiting such buttons, together with 5*l.* for any quantity exceeding one dozen, and not exceeding twelve dozen; and if exceeding twelve dozen, after the rate of 1*l.* for every twelve dozen.

Except words *double* and *treble* gilt.

Sect. 4. Provided, that nothing herein shall extend to inflict any fine, penalty, or punishment upon any person, who shall print, &c. or mark, or cause to be printed, &c. the words *double gilt* in or upon any metal buttons, or put, place, or pack for sale in or upon any card (except the pattern card), paper, or other parcel, or expose to sale any such buttons, having the words *double gilt* thereon; provided continually from the time of gilding thereof gold shall remain put and equally spread upon the upper surface of the said buttons, exclusive of the edges, in the proportion of ten grains to such quantity of the said buttons, the upper surfaces of which, exclusive of the edges, shall be equal to the superficies of a circle twelve inches in diameter; or who shall print, &c. the words *treble gilt* in or upon any metal buttons, or put upon any card, &c. or expose to sale any metal buttons having the words *treble gilt* thereon, having fifteen grains to the like quantity of buttons as aforesaid, on the like superficies as aforesaid; any thing hereinbefore said to the contrary notwithstanding.

Except the pattern card.]—The defendant was convicted upon the above statute for unlawfully and fraudulently placing for sale upon certain cards and papers divers dozens of metal buttons, marked with the words *double gilt* and *treble gilt*, the same not being so gilt within the meaning of the statute; but the conviction did not negative the exception introduced in the clause, that the buttons had not been exposed to sale in this instance *upon the pattern cards;* wherefore the court quashed the conviction. (*R.* v. *Jukes*, 8 *T. R.* 542).

Penalty on making false bills of parcels, &c.

Sect. 5. And if any person shall make out, send, or deliver, for, with, or in relation to, any metal buttons, any list, bill of parcels, or invoice expressing therein any other than the real quality of such buttons, knowing the same, he shall forfeit 20*l.*

Penalty on making buttons of different qualities.

Sect. 6. No person shall knowingly intermix, or cause to be intermixed, any metal button or buttons that shall not be *bonâ fide* gilt or plated, upon any card (except pattern card), paper, or other substance, whereon or wherein any metal button or buttons so gilt or plated shall be put, nor intermix the same in any other manner, on pain of forfeiting such buttons, and also 5*l.* for any quantity exceeding one dozen, and not exceeding twelve dozen; if exceeding twelve dozen, 1*l.* for every twelve dozen.

What gilt and plated buttons.

Sect. 7. And for the better ascertaining what shall be deemed a gilt or plated button, no metal buttons shall be deemed gilt buttons unless continually, from the time of gilding thereof, gold shall remain equally spread upon the upper surface thereof, exclusive of the edges, in the proportion of five

Metal Buttons.

36 Geo. 3, c. 60.

grains to a superficies of a circle twelve inches in diameter; and no metal buttons shall be deemed to be plated, unless the superficies of the upper surface thereof be made of a plate of silver fixed upon copper, or a mixture thereof with other metals, previous to the same being rolled into sheets or fillets.

Recovery and application of penalties.

Sect. 8, 14, 15, and 16. One justice, where the offence is committed or the offender resides, may, by warrant, cause such metal buttons as shall be liable to forfeiture under this act to be seized, and to keep them in safe custody, for the purpose of producing the same in evidence upon any prosecution or action, and when no further necessary, such justices shall order such buttons to be destroyed. And two justices where any offender shall reside, or where any offence shall be committed, may hear and determine the same, who, on information or complaint, within three calendar months, shall summon the party accused and witnesses on each side, and examine into the facts, and on proof either by confession, or oath of one witness, shall give judgment for the pecuniary penalty with costs, to be allowed by such justices, and shall levy the same by distress (*a*), and cause sale thereof, if not redeemed within five days inclusive of the day of seizure; half to the informer or person suing, and half to the poor, and for want of sufficient distress, shall commit such offender to gaol where the information shall be laid, for any time not exceeding three calendar months, unless such penalty and costs be sooner paid.

Appeal.

Sect. 9. If any person shall think himself aggrieved by the judgment of such justices, he may (on giving security with sufficient surety to the amount of such penalty and costs, together with such further costs as shall be awarded in case such judgment be affirmed) appeal to the next sessions where such conviction shall be made, who may summon and examine witnesses, and hear and finally determine the same, and award costs as they shall think reasonable.

Mitigation.

Sect. 10. Provided that the said justices, and also such sessions, may mitigate any such penalty, so as not to reduce the same below one half; or where such penalties shall be less than 40*l.* below 20*l.*

Form of conviction.

Sect. 11 and 12. And the conviction may be in the following form (*mutatis mutandis*), as the case may be, which shall be effectual without stating the case, or the facts, or the evidence, in any particular manner.

BE it remembered, that on the day of , in the year of our Lord , at , in the county of , A. I. came before us J. P. and K. B., two of his Majesty's justices of the peace for the said county, [*city*, or *place*, as the case may be], *and informed us that A. O. of , on the day of , now last past, at , in the said county,* [*city*, or *place*, as the case may be], here set forth the fact for which the information is laid]: *Whereupon the said A. O., after being duly summoned to answer the said charge, appeared before us on the day of , at , in the said county,* [*city*, or *place*], *and having heard the charge contained in the said information, declared he was not guilty of the said offence* [or as the case may be, *did not appear before us pursuant to the said summons*]; [or "*did neglect and refuse to make any defence against the said charge;*"] *but the same being fully proved before us upon the oath of A. W., a credible witness,* [or as the case may be], *acknowledged and voluntarily confessed the same to be true; and it manifestly appeared to us that the said A. O. is guilty of the offence charged upon him in the said information; we do therefore hereby convict him of the offence aforesaid, and do declare and adjudge that he the said A. O. hath forfeited the said buttons, together with the sum of of lawful money of Great Britain, for the offence aforesaid, to be distributed as the law directs, according to the form of the statute in that case made and provided. Given under our hands and seals the day of .*

And no such conviction shall be set aside for want of form, or through the mistake of any fact, circumstance, or other matter whatsoever, provided the material facts alleged in the conviction be proved to the satisfaction of the said court.

Witnesses not appearing.

Sect. 13. Witnesses not appearing, having been duly summoned, without

(*a*) See the 5 Geo. IV. c. 18, *post*, "*Distress by Justice's Warrant*," Vol. II.

reasonable excuse, to be allowed by such justices, or refusing to be examined on oath, shall forfeit 5*l*.

Metal Buttons.

36 Geo. 3, c. 60.

Sect. 17. Any person may be a witness notwithstanding his being an inhabitant of the parish or place where the offence shall be committed.

Inhabitants may be witnesses.

Sect. 18. And if any person liable to any of the offences aforesaid shall, before information against him, discover to two justices the persons by whose order he did the act which subjected him to such penalty, so as such person be convicted thereof, he shall not be liable to the penalty, but shall be entitled to a moiety of the penalty as other informers.

Offenders discovering by whom employed, indemnified.

Sect. 19. Provided also, that if any maker of buttons, who shall have ordered any metal buttons to be gilt, shall before the burnishing thereof appear before two justices, and prove by one witness that he ordered the said buttons to be gilt in manner required by this act, and delivered gold sufficient for that purpose, or paid or contracted to pay a proper sum in that behalf, and shall afterwards prosecute such gilder or other person to conviction, he shall not be liable to any fine, forfeiture, penalty, or punishment, on account of the said buttons not being gilt with gold; any thing herein contained to the contrary notwithstanding.

Manufacturers not liable to penalties in certain cases.

Sect. 20. Provided also, that this act shall not extend to buttons made of gold, silver, tin, pewter, lead, or mixtures of tin and lead, or iron tinned, or of *Bath* or *white metal*, or any of these metals inlaid with steel, or buttons plated upon shells.

Buttons to which act not to extend.

Sect. 15. No information shall be exhibited, or action brought, unless within three calendar months after the offence committed.

Limitation of proceedings.

Sect. 21. Every suit or action commenced against any person for what he may do in pursuance of this act shall be commenced within six calendar months.

Information on 7 Geo. 1, st. 1, c. 12, for wearing buttons bound with cloth.

County of } BE it remembered, that on the day of , in the year of our
Lord , at the town of , in the said county, A. B. of the town
to wit. } and parish of aforesaid, [yeoman], in his proper person cometh before me J. P. Esquire, one of his Majesty's justices of the peace in and for the said county, and being first duly sworn before me, the said justice, upon his corporal oath, as well for himself as for the poor of the said parish of , giveth me, the said justice, to understand and be informed, that A. O. of the parish of aforesaid in the county aforesaid, [gentleman], within one month now last past, to wit, on the day of , at the parish of aforesaid, in the county aforesaid, [one dozen of coat buttons bound with cloth], then and there unlawfully and against the form of the statute did use and wear, [or as the case may be], whereby the said A. O. for his offence aforesaid, hath forfeited the sum of 40s. of lawful money of Great Britain; and the said A. B. prayeth the judgment of me, the said justice, in the premises, and that the said A. O. may be summoned to appear before me, the said justice, to answer the same, and that such proceedings may thereupon be had as the statute in this behalf made and provided doth direct. (Signed) A. B.

Exhibited before me on the oath of the said A. B. the informant, the day and year first above written.

The act gives the form of conviction, *ante*, 520, and see the forms in Paley on Convictions.

Buying of Titles.

By the common law.

By the Common Law.]—It seemeth to be a high offence at common law to buy or sell any doubtful title to lands known to be disputed, to the intent that the buyer may carry on the suit, which the seller doth not think it worth his while to do, and on that consideration sells his pretensions at an under rate; and it seemeth not to be material whether the title so sold be a good or bad one, or whether the seller were in possession or not, unless his possession were lawful and uncontested; for all practices of this kind are by all means to be discountenanced, as manifestly tending to oppression, by giving oppor-

By the Common Law.

tunities to great men to purchase the disputed titles of others, to the great grievance of the adverse parties, who may often be unable or discouraged to defend their titles against such powerful persons, which perhaps they might safely enough maintain against their proper adversary. (1 *Hawk.* c. 86, s. 1.)

13 Edw. I, c. 40.

By Statute.—By stat. 13 Edw. I. c. 49, no person of the King's house shall buy any title whilst the thing is in dispute; on pain of both the buyer and the seller being punished at the King's pleasure.

32 Hen. 8, c. 9.

And by stat. 32 Hen. VIII. c. 9, ss. 2, 6, none shall buy any pretenced right in any land, unless the seller hath been in possession of the same, or of the reversion or remainder thereof, or taken the rents and profits thereof, for one year next before; on pain that the seller shall forfeit the land, and the buyer the value, half to the King and half to him that shall sue within one year.

Pretended Right.]—But he who is in lawful possession may purchase the pretended title of any others.

One year before.]—But no conveyance made by one who hath the uncontested possession and undisputed absolute propriety of lands, is in any way within the meaning of this statute. (1 *Hawk.* c. 86, s. 15.)

31 Eliz. c. 5, s. 4.

By stat. 31 Eliz. c. 5, s. 4, the offence of buying of titles may be laid in any county at the pleasure of the informer.

For other matters relating to buying of titles, see "*Maintenance*," Vol. V.

Cables, see "*Cordage for Shipping*," *post.*

Cabriolets, see "*Hackney Coaches*," Vol. III.

Calendar.

See *ante*, "*Almanac.*"

By sheriff.

THE sheriff is to make a calendar of the prisoners in his gaol, and deliver it to the justices of gaol delivery, stating the prisoners and the crime for which they are detained in custody. (2 *Hale*, 122; see "*Gaol*," Vol. II.)

By gaoler.

On the determination of the quarter session, the gaoler is required, on the second day afterwards, to transmit by the post, to one of her Majesty's principal secretaries of state a calendar, containing the names, the crimes and the sentences of every prisoner tried at such session, under penalty of 20*l.* if he shall neglect or refuse to transmit such calendar, or shall *wilfully* transmit a calendar containing any false or imperfect statement. (4 Geo. IV. c. 64, s. 20.)

Calendar month.

As to calendar and lunar months, and as to time in general, see "*Time*," Vol. VI.

Calico, see "*Excise*," Vol. II.

Calves, see "*Cattle*," "*Butcher.*"

Cambrics, see "*Linen*," Vol. III.

Canals, see "*Rivers*," Vol. V.

Candles, see "*Excise*," Vol. II.

Capias, see "*Process*," Vol. V.

Caption of Indictment, see "*Indictment*," Vol. III.

Caption of Sessions, see "*Sessions*, Vol. V.

Cards and Dice.

Duties.

By the second section of the 9 Geo. IV. c. 18, the duties for cards and dice are:—

"For and upon every license to be taken out annually by every maker of playing cards or dice in the united kingdom, the sum of five shillings:

"And for and in respect of every pack of playing cards which shall be made fit for sale or use in the united kingdom, the sum of one shilling:

"And for and in respect of every pair of dice which shall be made fit for sale or use in the united kingdom the sum of twenty shillings."

These duties and all other the regulations respecting them are under the commissioners of the stamp duties.

Search warrant. (a)

The only provision of the act which relates peculiarly to the jurisdiction of magistrates is contained in the 19th section, which enacts, "That whenever there shall be cause to suspect that any person shall make or cause to be made any playing cards or dice in any house or place whatsoever in any part of the united kingdom, without license duly obtained as by this act required, upon affidavit being made of such suspicion by any person before any justice of the peace for the county or place where such cards or dice shall be or shall be suspected to be making or made, it shall and may be lawful for any officer employed by and acting under the commissioners of stamps, in the day-time, and in the presence of a constable or other lawful officer of the peace (who is hereby required to be aiding and assisting therein,) by warrant from such justice of the peace before whom such affidavit shall be made, to be directed to such officer of stamps as aforesaid, which warrant the said justice of the peace is hereby authorized and required to grant, to break open the door or any part of such house or place in which any such cards or dice shall so as aforesaid be suspected to be so made or making, and thereupon to enter into such house or place, and to seize all cards or dice which shall be therein found, made, or begun to be made, and all the tools, materials and utensils for making such cards or dice which shall be there found; and all such cards, dice, tools, materials and utensils shall be seized and carried away, and shall be detained and lodged in any place appointed for that purpose by the said commissioners or their proper officer, and shall be absolutely forfeited, and

(a) See in general, *post*, "*Search Warrant*," Vol. V.

9 Geo. 4, c. 18.

shall and may be sold or destroyed by the direction and at the discretion of the said commissioners."

Forgery, &c. of.

With respect to the *forgery* of cards and dice the 35th section of the act enacts, "That if any person shall forge or counterfeit, or shall cause or procure to be forged or counterfeited, any type, die, seal, stamp, mark, plate or device, or any part of any type, die, seal, stamp, mark, plate or device, which shall be at any time provided, made or used, by or under the authority of the commissioners of stamps in pursuance of this act; or shall counterfeit or shall cause or procure to be counterfeited or resembled, the impression of any such type, die, seal, stamp, mark, plate or device, or any part thereof, upon any playing card or dice, or upon any label, thread, or paper; or shall forge or counterfeit the name, handwriting or signature of any sealing officer, or other officer of stamps, to or upon any wrapper, paper or material in which any dice shall be actually enclosed; or shall forge or counterfeit, or shall cause or procure to be forged or counterfeited any mark or name, or any part of any mark or name, directed to be used by the commissioners of stamps in pursuance of this act, in order to distinguish the maker of any such cards or dice respectively, and printed or marked on or affixed to or making part of the wrapper, label or paper in which any playing cards or dice shall be actually enclosed, with intent to defraud his Majesty, his heirs or successors, of any of the duties at any time by law payable upon cards or dice; or shall utter, or sell or expose to sale, or part with for use or play, any card, die, ace of spades, label, wrapper, or Jew whatsoever, with such counterfeit seal, stamp, mark, device, impression, name or signature, knowing the same to be counterfeit; or shall privately or fraudulently use any seal, stamp, mark, plate, device or label at any time provided, made or used by or under the authority of the commissioners of stamps in pursuance of this act, with intent to defraud his Majesty, his heirs and successors, of any of the duties at any time by law payable upon cards or dice; every person convicted of any such offence in due form of law shall be adjudged a felon, and shall suffer death."

But by 1 Will. IV. c. 66, the punishment of death for this offence is abolished, and the offender is subjected to transportation or imprisonment. (See "*Forgery*," Vol. III.)

As to gaming, see "*Gaming*," Vol. III.; "*Disorderly House*," Vol. II.

Carnal Knowledge, see "*Rape*," Vol. V.

Carriers.

I. *Rates for Carriage and Porterage of Goods*, 524.
II. *Travelling on a Sunday*, 529.
III. *Other Matters as to*, 530.

I. Rates for Carriage and Porterage of Goods.

Rates for carriage of goods.

RATES for Carriage of Goods.]—The stat. 7 & 8 Geo. IV. c. 39, after reciting the 24th section of 3 Will. & M. c. 12, and the 3d section of the stat. 21 Geo. II. c. 28, (which empowered magistrates at the quarter sessions to fix rates of carriage and impose penalties on persons taking other rates, which enactments are set out in prior editions of this work, tit. "*Carriers*,") enacts, that the same shall be repealed, and also, "any other powers or provisions in the said recited acts contained, which relate to the settling the rates of the carriage of goods."

"There is nothing unreasonable in a carrier requiring a greater sum when he carries goods of greater value, for he is to be paid not only for his labour in carrying, but for the risk which he runs, which is greater in proportion to the value of the goods. I would not, however, have it understood that carriers are at liberty by law to charge whatever they please: a carrier is liable by law to carry every thing which is brought to him, for a *reasonable* sum to be paid for the same carriage, and not to extort what he will." *Per Lawrence*, J. (*Harris* v. *Packwood*, 3 *Taunt.* 272)

1. *Rates for Carriage, Porterage, &c.*

London Porterage Act.]—There are various regulations contained in the act of 39 Geo. III. c. lviii. as to the rates for porterage and the delivery of goods by carriers and innkeepers within London and Westminster, the borough of Southwark and places adjacent, which, though local, yet as they concern so large a portion of the magistracy and public, it is thought fit here to notice.

London Porterage Act, 39 Geo. 3, c. lviii.

The act is only cumulative in its provisions, and does not take away the modes of punishing offences (therein mentioned) which existed previously to the passing of the act, and therefore it was held in *R.* v. *Douglas*, (1 *Campb.* 212,) that a person might be indicted on 30 Geo. II. c. 24, for obtaining by false pretences a larger sum than he was entitled to.

By the first section of the act, after reciting "whereas great exactions and abuses are daily practised in the porterage or delivery of boxes, baskets, packages, parcels, trusses, game and other things, within the cities of London and Westminster, and the borough of Southwark, and the suburbs and liberties thereof respectively, and other parts contiguous thereto, brought by stage waggons, carts, public stage coaches or carriages; and whereas the laws now in being are insufficient for the prevention of such exactions and abuses:" it is enacted, "that from and after the 5th day of July, 1799, no innkeeper, warehousekeeper or other person, to whom any box, basket, package, parcel, truss, game or other thing whatsoever, not exceeding fifty-six pounds weight, is brought by any stage waggon or cart, or any public stage coach or carriage, or any porter or other person employed by such innkeeper, warehousekeeper or other person, in the porterage or delivery of any such box, basket, package, parcel, truss, game or other thing, within the cities of London and Westminster, and the borough of Southwark, and the suburbs and liberties thereof respectively, and other parts contiguous thereto, not exceeding the distance of half a mile from the end of the carriage pavement in the several streets and places within the said cities, borough and liberties, shall ask or demand, or receive or take, in respect of such porterage or delivery, any greater rate or price than the several rates or prices hereinafter mentioned: (that is to say,)

Rates for porterage of parcels not exceeding half a cwt.

"For any distance not exceeding a quarter of a mile, the sum of three pence:

"For any greater distance than a quarter of a mile, but not exceeding half a mile, the sum of four pence:

"For any greater distance than half a mile, but not exceeding one mile, the sum of six pence:

"For any greater distance than one mile, but not exceeding one mile and a half, the sum of eight pence:

"For any greater distance than one mile and a half, but not exceeding two miles, the sum of ten pence: and so in like manner the additional sum of three pence for every further distance not exceeding half a mile."

Sect. 2. "If any porter or other person employed in the porterage or delivery of such boxes, baskets, packages, parcels, trusses, game or other things as aforesaid, shall ask or demand, or receive or take, of and from any person or persons in respect of such porterage or delivery, any greater sum or sums than the rates or prices herein before fixed on that behalf, such porter or other persons shall for every such offence forfeit a sum not exceeding twenty shillings, nor less than five shillings."

Penalty on taking more than rates.

Sect. 3. "Before any such box, basket, packet, package, parcel, truss,

Tickets.

1. *Rates for Porterage, &c.*

39 Geo. 3, c. lviii.

game, or other thing whatsoever is sent from the inn, warehouse or other place to which the same is brought or conveyed, there shall be made out and given to the porter or other person employed in the delivery thereof, a card or ticket, whereon shall be distinctly printed, written or marked, the name and description of the inn, warehouse or other place from whence the same is sent, and the sum due for the carriage thereof, and also the sum due for the porterage or delivery thereof, according to the rates and prices aforesaid, and the Christian name and surname of the porter or other person employed in such delivery, which card or ticket shall be delivered by the porter or other person employed as aforesaid, at the same time, and together with such box, basket, packet, package, parcel, truss, game or other thing; and if any such box, basket, or other article shall be sent from any inn, warehouse, or other place, without such card or ticket as aforesaid, every such innkeeper, warehousekeeper, or other person, shall for every such offence forfeit and pay any sum not exceeding forty shillings, nor less than five shillings; and any porter or other person employed in the delivery of any such box, basket, or other article, who shall not at the time of such delivery leave therewith such card or ticket as aforesaid, or who shall wilfully alter, obliterate or deface any thing written or expressed thereon, shall for every such offence forfeit and pay the sum of forty shillings; and if any such porter or other person shall, upon the delivery of such box, basket or other article, ask or demand, or take or receive any larger sum for the carriage of such article than is written or expressed as aforesaid, every such porter or other person shall for every such offence forfeit and pay the sum of twenty shillings."

Penalty on innkeeper, &c. not making out such.

On porter not delivering or defacing same.

On porter overcharging.

Parcels brought by coaches shall be delivered in six hours, &c.

Sect. 4. "Every box, basket, package, parcel, truss, game or other thing, brought to any inn, warehouse or other place, by any public stage coach or carriage, other than stage waggons, for the purpose of delivery within the limits aforesaid, (except where the same shall be directed to be left till called for,) shall be delivered according to the direction thereof within six hours after the arrival of any such box, basket or other article, at such inn, warehouse or other place, unless such arrival shall be between the hours of four in the evening and seven in the morning, and in that case every such delivery shall be made within six hours after such hour in the morning, and in default thereof every innkeeper, warehousekeeper or other person, to whose inn, warehouse or other place such box, basket or other article shall be brought as aforesaid, shall forfeit and pay for every such offence any sum not exceeding twenty shillings, nor less than ten shillings."

Penalty.

Parcels brought by waggons to be delivered in 24 hours.

Sect. 5. "Every box, basket, package, parcel, truss, game or other thing brought to any inn, warehouse or other place, by any public stage waggon for the purpose of delivery within the limits aforesaid, (except where the same shall be directed to be left till called for,) shall be delivered according to the direction thereof within twenty-four hours after the arrival of any such box, basket or other article at such inn, warehouse or other place, and in default thereof every innkeeper, warehousekeeper or other person, to whose inn, warehouse or other place, such box, basket or other article shall be brought as aforesaid, shall forfeit and pay for every such offence any sum not exceeding twenty shillings, nor less than ten shillings."

Penalty.

Parcels directed to be left till called for.

Sect. 6. "Every such box, basket, package, parcel, truss, game or other thing brought to such inn, warehouse or other place as aforesaid, which shall be directed to be left till called for, shall, upon the demand of the person properly authorized to receive the same, be delivered to such person without any charge or demand whatsoever, other than what is justly due for the carriage thereof, and the additional sum of two pence for the warehouse room thereof; and if the same be not delivered to such person upon such demand, or any charge other than as aforesaid be made or received in respect thereof, every innkeeper, warehousekeeper or other person, to whose inn, warehouse or other place such box, basket or other article shall be brought as aforesaid, shall forfeit and pay for every such offence or overcharge any sum not exceeding twenty shillings, nor less than ten shillings."

Warehouse room.

Sect. 7. "If such box, basket, or other article so directed to be left till called for, be not sent for from such inn, warehouse or other place, before

the end of one week after the same is brought to such inn, warehouse or other place, it shall be lawful to and for such innkeeper, warehousekeeper or other person, to charge and receive the further sum of one penny for the warehouse room thereof, and so in like manner if the same be not sent for before the end of the second or any subsequent week, to charge the further sum of one penny weekly."

1. *Rates for Porterage, &c.*

30 Geo. 3, c. lviii.

Sect. 8. "If any such box, basket, or other article brought to such inn, warehouse, or other place as aforesaid, which is not directed to be left till called for, shall, before the same is sent for delivery from such inn, warehouse, or other place, be demanded by any person properly authorized to receive the same, such box, basket, or other article shall be thereupon delivered to such person so demanding the same; and it shall in such case be lawful to and for such innkeeper, warehousekeeper, or other person, to charge and take the sum justly due for the carriage thereof, and also the sum of two pence for the warehouse room thereof; but if the same be not delivered to such person upon such demand, or any charge other than as aforesaid be made or received in respect thereof, every innkeeper, warehousekeeper, or other person, to whose inn, warehouse, or other place such box, basket, or other article shall be brought as aforesaid, shall forfeit and pay for every such offence any sum not exceeding twenty shillings, nor less than ten shillings."

Proviso for parcels not directed to be left till called for.

Sect. 9. "And for the preventing the misbehaviour of porters or other persons employed in the porterage or delivery of such boxes, baskets, packages, parcels, trusses, game, or other things as aforesaid," it is further enacted, "that upon complaint made of any non-delivery, neglect, misconduct, or misbehaviour in such employment to any justice of the peace within whose jurisdiction the offence has been committed, or the offender shall be or reside, it shall and may be lawful to and for such justice of the peace to grant a warrant to bring before him the person against whom such complaint shall be made, and upon proof, made upon oath, (which oath such justice is hereby empowered to administer,) of any such non-delivery, neglect, misconduct, or misbehaviour of such porter or other person, to impose a fine or penalty upon such porter or other person not exceeding the sum of twenty shillings, nor less than five shillings."

Misbehaviour of porters punishable by one justice, by fine.

Sect. 10. "If any person to whom such box, basket, package, parcel, truss, game, or other article as aforesaid shall be directed, shall, upon the delivery thereof, neglect or refuse to pay to the porter or other person employed to deliver the same, the money justly due for the carriage thereof, and also due for the porterage or delivery thereof, according to the rates aforesaid, or for the warehouse room thereof, as the case may be, it shall and may be lawful to and for any justice of the peace within whose jurisdiction such neglect or refusal shall be made, or the person charged with such offence shall reside, upon complaint thereof made, to grant a warrant to bring before him the person against whom such complaint shall be made, and upon proof thereof, made upon oath, (which oath such justice is hereby empowered to administer,) to award reasonable satisfaction to the party grieved, for his damage and costs, and for his loss of time in recovering the same, and on non-payment of the sum so awarded, by warrant under his hand and seal, to levy the same by distress and sale of the goods and chattels of the offender, rendering to such offender the overplus of such distress, if any there be, after deducting the charges of making the same."

Recovery of rates of porterage.

Distress.

Sect. 11. "No person shall be prosecuted for any offence against this act, unless information of such offence be given to a justice of the peace within fourteen days next after the commission of such offence."

Information to be laid within 14 days.

Sect. 12. "Nothing in this act shall extend, or be construed to extend, to authorize the employment of any porter or other person in the porterage or delivery of parcels within the city of London contrary to the laws and usages of the said city."

Not to authorize employment of porters contrary to usage of London.

Sect. 13. "And, for the speedy recovery of all and every the penalties and forfeitures which shall be incurred under this act," it is further enacted, "that it shall and may be lawful for any one or more justice or justices of the peace within whose jurisdiction any offence or offences against this act shall be

Penalties may be recovered before one justice, &c.

1. *Rates for Porterage, &c.*

39 Geo. 3, c. lviii.

committed, or the person charged with such offence shall reside, upon complaint or information to him or them made, to summon the party or parties accused, and also the witnesses on either side, to appear before him or them at a certain time or place in such summons to be specified, and upon the appearance of the party or parties accused, or in default of his, her, or their appearance according to such summons, (due proof being made of the service of such summons,) to proceed to hear and determine the matter in a summary way, and upon due proof made of the offence, either by the voluntary confession of the party or parties accused, or by the oath of one or more credible witness or witnesses, (which oath or oaths the said justice or justices is or are empowered to administer,) to convict the party or parties, and to award and adjudge the penalties imposed by this act to be paid by such offender or offenders, together with reasonable costs and charges attending such conviction, and upon non-payment of the sum so awarded, either immediately or at such time as the said justice or justices shall appoint, not exceeding seven days, such justice or justices before whom such conviction shall be had is or are hereby empowered and authorized to issue his or their warrant for apprehending such offender; and in case such offender shall escape or go out of the jurisdiction of such justice or justices, it shall and may be lawful for any other justice of the peace of the county or place where such offender shall be found, by indorsement of such warrant, to authorize the execution thereof within the jurisdiction of such justice, and the justice or justices who granted such warrant may, upon the offender being brought before him or them, commit such offender to some public prison or house of correction of the city, county, or place in which such offence shall have been committed, or such offender shall have resided, there to remain without bail or mainprize for any term not exceeding one calendar month, or less than fourteen days from the day of every such commitment, unless such offender shall sooner pay the sum to be mentioned in every such warrant of commitment."

Costs.

Warrant to apprehend.

Backing warrant.

Commitment.

Penalty on witnesses not attending, &c.

Sect. 14. "If any person or persons shall be summoned as a witness or witnesses to give evidence before any such justice or justices of the peace touching any matter contained in this act, and shall have had a reasonable sum of money paid or tendered to him for his loss of time and expenses, and shall neglect or refuse to appear at the time and place for that purpose appointed, without a reasonable excuse for such his or their neglect or refusal, to be allowed of by such justice or justices, every such person shall forfeit or pay for every such offence any sum not exceeding forty shillings, nor less than twenty shillings, to be levied and paid in such manner and by such means as hereinbefore directed with respect to other penalties; and if any person or persons summoned as a witness or witnesses to give evidence as aforesaid shall appear at the time and place for that purpose appointed, but shall refuse to answer any lawful questions such justice or justices may think proper to put to him, such justice or justices may commit every such person to some prison or house of correction of the city, county, or place within the jurisdiction of such justice or justices, for any time not exceeding fourteen days from the time of every such commitment."

Refusing to give evidence.

Form of conviction;

Sect. 15. "The justice or justices of the peace before whom any offender shall be convicted as aforesaid shall cause the said conviction to be made out in the following form of words, or any form of words to the same effect; (that is to say,)

BE it remembered, that on this day of , in the year of his
to wit. Majesty King , A. B. is convicted before me [or *us*] *one* [or *two*] *of his Majesty's justices of the peace for the city of London* [or *for the city and liberty of Westminster*, or *for the county of* , as the case may be,] *for that the said A. B on the day of , now last past, did, contrary to the statute in that case made and provided* [here state the offence against the act]; *and I* [or *we*] *do declare and adjudge, that the said A. B. hath forfeited the sum of of lawful money of Great Britain for the offence aforesaid. Given under my hand and seal,* [or *our hands and seals,*] *the day and year aforesaid.*

to be certified to the sessions.

And the said justice or justices before whom such conviction shall be had shall certify the same to the next general or quarter sessions of the peace to

be holden for the city, county, liberty, or place wherein such conviction was had, to be filed and kept amongst the records of the said general or quarter sessions, and such conviction shall be good and valid in the law to all intents and purposes, and shall not be quashed, set aside, or judged void or insufficient for want of form only, and shall not be liable to be removed by *certiorari* into his majesty's Court of King's Bench, but shall be deemed and taken to be final to all intents and purposes whatsoever."

1 *Rates for Porterage, &c.* 30 Geo. 3, c. lviii.

Sect. 16. "All and every person and persons who shall think him, her, or themselves aggrieved by the judgment or determination of any such justice or justices as aforesaid, may appeal to the justices of the peace for the city, liberty, county, or place where such judgment shall be given, at their then next general or general quarter sessions of the peace, unless such next general or general quarter sessions of the peace shall happen to be holden within six days next after any such conviction, and in such case such person or persons may appeal to the second general or general quarter sessions of the peace which shall be holden for any such city, liberty, county or place, next after any such conviction, but no such appeal shall be received, heard, or determined, unless the appellant or appellants shall first enter into a recognizance with two sufficient sureties, before such justice or justices so convicting as aforesaid, in the sum of ten pounds each, to appear and prosecute every such appeal with effect; and the justices of the peace at such general or general quarter sessions of the peace are hereby authorised and required, on every such appeal being made, and on reasonable notice thereof given to the other party, finally to hear and determine the matter of every such appeal, and to make such order and to award such costs therein as they in their discretion shall see meet, and which said order and determination shall be final and conclusive to all parties, and no *certiorari* shall be allowed to remove any such proceedings or determination."

Appeal.

Sect. 17. "One moiety of the penalties by this act imposed shall, when recovered, go and be paid to the person or persons who shall prosecute to conviction any such offender or offenders, and the other moiety to the poor of the parish in which the offence shall be committed."

Penalties, half to informer, half to poor.

Sect. 18. "No person shall be sued or prosecuted for anything done in pursuance and in execution of this act after the expiration of six months from the time when the offence was committed, and every such suit or prosecution shall be brought in the city, county, or place where such offence shall have been committed, and not elsewhere; and every person so sued shall and may plead the general issue, (not guilty,) and may give this act and the special matter in evidence at any trial to be had thereupon; and if a verdict shall be found for the defendant or defendants, or if the plaintiff shall become nonsuit or discontinue his action after the defendant shall have appeared, or if judgment shall be given upon a demurrer against the plaintiff or plaintiffs, the defendant or defendants in every such action shall receive double costs, and have the like remedy for the same as defendants have in other cases for the recovery of their costs." But the provisions in this section are materially altered by the 5 & 6 Vict. c. 97, which see, title "*Justices*," Vol. III.

Limitation of actions.

Venue.

General issue.

Double costs.

Sect. 19. "This act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such by all judges, justices, and other persons whomsoever, without specially pleading the same."

Public act.

II. Travelling on a Sunday.

By stat. 3 Car. I. c. 1, no carrier with any horse or horses, nor waggonman, carman, or wainman, with their respective carriages, shall, by themselves or any other, travel on the Lord's Day, on pain of 20s., on conviction in six months before one justice, (or mayor,) on view or confession, or oath of two witnesses, to be levied by the constable or churchwardens by distress, to the use of the poor, except that the justice may reward the informer with any sum not exceeding a third part.

Carrier travelling on Sundays.

The driver of a *van* travelling to and from London and York is a carrier

2. *Travelling on Sunday.*

39 Geo. 3, c. lviii.

within the meaning of stat. 3 Car. I., and liable to be stopped and convicted in the penalty of 20s. for travelling on the Lord's Day. (*Ex parte Middleton*, 3 *B. & Cres.* 164; 4 *D. & R.* 824, S. C.)

Stage coaches may travel on a Sunday. (*Sandiman* v. *Breach*, 7 *B. & Cres.* 96; 9 *D. & R.* 796, S. C.)

See further, "*Lord's Day*," Vol. III.

III. Other Matters as to.

Painting name, &c. on cart.

As to their painting their names, &c. on the cart, &c., see "*Highways in general*," and "*Highways, Turnpike*," Vol. III., also "*Stage Coaches*," Vol. V.

Game.

They cannot be licensed to deal in game. See "*Game*," Vol. III.

Indictable for not carrying a passenger.

It would seem that a common carrier for the carriage of passengers may, under circumstances, be indicted for refusing to carry one. (Per *Patteson*, J., in *Pozzi* v. *Shipton*, 1 *P. & D.* 12.)

Larceny by or from carrier.

It hath been holden that a carrier embezzling goods which he has received to carry to a certain place, is not guilty of felony, because there was not a felonious *taking*; but is liable only to a civil action. (1 *Hawk.* c. 33, s. 3, 5.)

But it hath been resolved that if a carrier *open a pack* and *take out part of* the goods, *with intent to steal* it, he may be guilty of felony; in which case it may be said, not only that such possession of a part distinct from the whole was gained by wrong, and not delivered by the owner, but also that it was obtained basely, fraudulently and clandestinely, in hopes to prevent its being discovered at all, or fixed upon any one when discovered. (1 *Hawk.* c. 33, s. 5.)

Also it seems clear that if a carrier, *after he has brought* the goods to the place appointed, take them away again secretly, with intent to steal them, he is guilty of felony, because the possession which he received from the owner being determined, his second taking is in all respects the same as if he were a mere stranger. (1 *Hawk.* c. 33, s. 5.)

Also it hath been resolved, if goods be delivered to a carrier to be carried to a certain place, and he *carries them to another* place, and disposeth of them to his own use, that this is felony; because this declareth that his intention originally was not to take the goods upon the agreement and contract of the party, but only with a design of stealing them. (*Kel.* 81, 82.)

Where the prosecutor had sent forty sacks of wheat to the prisoner, a warehouseman and wharfinger, for safe custody, and the prisoner emptied several sacks of the wheat contained in them, which he sold, and then substituted for it other wheat of an inferior quality; it was doubted at first whether, as the prisoner had appropriated to his own use the whole of the wheat in each of the sacks which he had emptied, he could be deemed guilty of larceny; but upon the question being referred to the judges, they were unanimously of opinion that taking the whole of the wheat out of a sack was as much larceny as the taking of a part merely; and the prisoner had judgment accordingly. (*R.* v. *Brazier*, *R. & R.* 337.)

Upon an indictment against the captain of a ship for larceny, it appeared that the ship, laden with casks of butter, and bound from Waterford to Newhaven, put into Cowes on her way, through stress of weather; most of the casks were stowed in the hold, and battened down, but some were on deck; the prisoner had thirteen of them on deck landed at Cowes, pretending they were his own property; and when he arrived at Newhaven, he informed the consignees that these casks had been thrown overboard: the judges held that this was not larceny; but it seemed to be admitted at the trial, that if the prisoner had broken bulk by taking the thirteen casks from those which were battened down, he must have been convicted. (*R.* v. *Edward Madox*, *Russ. & Ry.* 92.)

A., the owner of a boat, was employed by B., the captain of a ship, to carry a number of wooden staves ashore in his boat. B.'s men were put into

3. *Other Matters as to.*

the boat, but were under the control of A., who did not deliver all the staves, but took one of them away to the house of his mother: held, that this was a bailment of the staves to A., and not a charge only; and that a mere non-delivery of the staves would not have been a larceny in A.; but that if A. separated one of the staves from the rest, and carried it to a place different from that of its destination, with intent to appropriate it to his own use, that was equivalent to a breaking of bulk, and therefore would be sufficient to constitute a larceny. (*R.* v. *Howell*, 7 *Car. & P.* 325.)

So where a person, not being the servant of the prosecutor, received from him a parcel containing notes to take to a coach office, and on the way he abstracted the notes, and applied them to his own use, he was holden guilty of larceny. (*Reg.* v. *Jenkins*, 9 *C. & P.* 38.)

This rule as to carriers and other bailees, however, does not extend to their servants: if the servant of a carrier convert the property entrusted to him to his own use, he will be guilty of larceny, even in cases where a conversion by his master would be merely a breach of trust. Upon an indictment for stealing a quantity of barilla, it appeared that the prosecutors employed one Bryant, a master carman, to cart some barilla for them from the London Docks, and Bryant sent Harding, his carter, for it; Harding, in collusion with others, whilst on his way from the docks with a cart-load of the barilla, allowed the others to take away the whole of it, together with the cart, horses, &c.: some doubt being entertained whether, as the barilla was delivered to Harding to carry, he could be deemed guilty of larceny in converting it to his use, the question was submitted to the judges; but they were unanimously of opinion that this was larceny in the servant, and that it was immaterial whether the barilla was stated to be the property of the prosecutors or of Bryant. (*R.* v. *Harding and others*, *R. & R.* 125; and see further, "*Larceny*," Vol. III.)

Carrier may indict for goods stolen as his own property.

Where goods are stolen from the carrier, he may prefer an indictment against the felon, as for his own goods; for though he has not the absolute property, yet he has such a possessory property that he may maintain an action of trespass against any one who takes them from him, and so may indict a thief for taking them; and the indictment will be good also, if it charge that the goods are the property of the real owner. (*Kel.* 39.)

Person stealing his own goods from carrier.

There is a special case, wherein it is said, that a man may commit larceny by stealing his own goods delivered to the carrier, with intent to make him answer for them; for the carrier had a special kind of property in the goods, in respect whereof, if a stranger had stolen them, he might have been indicted generally as having stolen the said carrier's goods; and the injury is altogether as great, and the fraud as base, where they are taken away by the very owner. (1 *Hawk.* c. 34, s. 30.)

Liability when robbed.

Where goods are delivered to a carrier, and he is robbed of them, he shall be charged and answer for them, by reason of the hire: this was at the common law, before the hundred was answerable over to him; because such robbery might be by consent and combination, carried on in such a manner that no proof could be had of it. (*Lane* v. *Cotton*, 1 *Salk.* 143; *Boyce* v. *Chapman*, 2 *Scott*, 365.)

And although it may be thought a hard case that a poor carrier who is robbed on the road, without any manner of default in him, should be answerable for all the goods he takes, yet the inconvenience would be far more intolerable if he were not so; for it would be in his power to combine with robbers, or to pretend a robbery, or some other accident, without a possibility of remedy to the party; and the law will not expose him to so great a temptation, but he must be honest at his peril. (*Lane* v. *Cotton*, 12 *Mod.* 482; 1 *Salk.* 143, S. C. See the case of *Latham* v. *Stanbury*, 3 *Stark.* 143.)

Carts, see "*Highways*," Vol. III.; "*Police*," Vol. V.

Carts, Taxed, see "*Taxes*," Vol. VI.

Case, see "*Sessions*." Vol. V.

Castration, see "*Cattle*," *post*; "*Maim*," Vol. V.

Casual Death, see "*Coroner*," "*Deodand*," *post*, Vol. II.

Catholics, see "*Popery*," Vol. V.

Cats *are within the 5 & 6 Will. IV. c. 59, s. 2, post, 536, against the Ill-treatment of Cattle, &c. But are not within the 7 & 8 Geo. IV. c. 29, as to Stealing of Animals, nor is it Felony at Common Law to steal them*, see "*Larceny*," Vol. III.

Cattle and Animals.

I. *Importation of*, 532.
II. *Buying or Selling, &c. of*, 532.
III. *Killing or Maiming of*, 533.
IV. *Ill-treatment of*, 535.

As to stealing of, and killing with intent to steal, see "*Larceny*," Vol. III.

As to slaughtering Horses, &c. and some laws relating to them, see "*Horses*," Vol. III.

As to Dogs, see *post*, "*Dogs*," Vol. II.

I. Importation of.

Importation of.

The importation of cattle from foreign countries and the colonies is now regulated, and the duties fixed by the 5 & 6 Vict. c. 47, for which act see "*Excise and Customs*," Vol. II.

The 5 Geo. III. c. 43, s. 11, relative to the importation of cattle from the *Isle of Man*, and the 5 Geo. III. c. 10, made perpetual by the 16 Geo. III. c. 8, relative to the importation of cattle from *Ireland*, are repealed by the 6 Geo. IV. c. 105. See "*Excise and Customs*," Vol. II.

By the 6th article of the union with Scotland, no Scots cattle carried into England shall be liable to any other duties than those to which cattle of England are liable.

II. Buying and Selling, &c. of.

None shall buy and sell in the same market.

By stats. 3 & 4 Edw. VI. c. 19, and 3 Car. I. c. 4, ss. 7 and 8, no person shall buy any ox, steer, ront, cow, heifer, or calf, and sell the same again alive in the same market or fair, on pain of forfeiting double value, half to the king, and half to him who shall sue. And the said statute 3 & 4 Edw. VI. c. 19, is not repealed by stat. 12 Geo. III. c. 71, which repeals the general fore-

stalling, ingrossing, and regrating act of 5 & 6 Edw. VI. c. 11, and other subsequent acts enforcing the same; but hath no reference to any preceding act. But it seems questionable, if the statutes 3 & 4 Edw. VI. c. 19, and 3 Car. I. c. 4, ss. 7 and 8, be not expired. See *Tyrwhitt and Tyndal's Digest of Statutes*, title *Cattle*.

2. *Buying and Selling, &c. of.*

By 31 Geo. II. c. 40, no salesman, broker, or factor, employed in buying cattle for others, shall buy for himself in *London*, or within the *Bills of Mortality*, on penalty of double the value of the cattle bought or sold.

Factor buying for himself.

By 3 Car. I. c. 1, no drovers are to travel with cattle on Sundays, on penalty of 20*s*. See "*Lord's Day*," Vol. III.

Drovers not to drive on Sunday.

III. Killing and Maiming of.

By stat. 7 & 8 Geo. IV. c. 30, s. 16, "if any person shall unlawfully and maliciously kill, maim, or wound any cattle, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and if a male, to be once, twice, or thrice publicly or privately whipped, (if the Court shall so think fit), in addition to such imprisonment." See the general clauses affecting all the provisions of this act, "*Malicious Injuries to Property*," Vol. V.

Killing or maiming cattle.

But by the 7 Will. IV. & 1 Vict. c. 90, s. 2, so much of the 7 & 8 Geo. IV. c. 30, ss. 16, 18, *as relates to the punishment of persons convicted of any of the offences therein specified*, is repealed; and it is enacted, "That every person convicted after the commencement of this act (1st Oct. 1837) of any of such offences respectively, shall be liable to be transported beyond the seas for any term not exceeding fifteen years, and not less than ten years; or to be imprisoned for any term not exceeding three years;" and by sect. 3, with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year.

Punishment.

It is no offence at common law to main a horse. Thus an indictment at common law charged that the prisoner "on the 23d of May, 33 Geo. III. with force and arms at, &c. one black gelding of the value of 30*l*. of the goods and chattels of William Collyer, then and there being, then and there unlawfully did maim, to the great damage of Collyer, and against the peace," &c. But upon reference to the judges after conviction, they all held that the indictment contained no indictable offence; for if the case were not within the Black Act, the fact in itself was only a trespass; for that the words *vi et armis* did not imply force sufficient to support an indictment. (*R* v. *Ranger*, 2 *East's P. C.* 1074.) This, however, is now remedied by the above act.

Offence at common law.

To bring a case within the prior act of 9 Geo. I. c. 22, the offender must have been actuated by malice *against the owner* of the animal, and not merely against the animal itself. (See *R.* v. *Pearce*, 2 *East's P. C.* 1072; 1 *Leach*, 527, S. C.; *R.* v. *Kean*, 2 *East's P. C.* 1073; 1 *Leach*, 539, n. S. C.; *R.* v. *Shepherd*, 1 *Leach*, 539; 2 *East's P. C.* 1073, S. C.) And malice against the servant or relative of the owner was not within the act; (*R.* v. *Austen*, *Russ. & Ry. C. C.* 490;) nor was malice against a stranger. (*Curtis* v. *Hundred of Godley*, 3 *B. & Cres.* 248; 5 *D. & R.* 73, S. C.)

Malice.

But this is now otherwise under the 7 & 8 Geo. IV. c. 30, the 25th section of which provides that the act shall apply to cases whether the offence were conceived against the owner of the property in respect of which it was committed *or otherwise*. See the enactment, title "*Malicious Injuries to Property*," Vol. V. p. 22.

It is not necessary to give evidence of express malice, for this will be presumed till the contrary appears. (2 *East's P. C.* 1074; *ante*, tit. "*Burning*," 506.) If it appear that the act was done purposely, the jury may thence presume that it was done maliciously. In *Dawson's case*, who was indicted for poisoning horses, in order to prevent them from running a race, defendant

3. *Killing or Maiming of.*

having betted against them, it was holden that this intent was sufficient to bring the case within the act, and defendant was convicted and executed. (See 3 *Chit. C. L.* 1087, n.; and see *R.* v. *Dobbs*, 1 *East's P. C.* 573.)

If, however, it appear on the evidence that the defendant was a servant to the prosecutor, and, in irritation, because his master would not let him have another horse to drive in a team, he committed the injury on the horse which he desired to have exchanged, he will not be deemed within the act. (1 *Leach*, 539.)

Nor will a man who maims cattle to prevent their trespassing on an inclosure. (*Id. in notis;* 2 *East's P. C.* 1073.)

The prosecutor may give evidence of administering at different times to show the intent; but if the jury are satisfied that the prisoner administered the poison under an idea that it would improve the appearance of the horse, they ought to acquit him. (*Rex* v. *Mogg*, 4 *C. & P.* 364.)

Nature of the cattle.

Horses, mares and colts, as well as oxen, &c. are within the meaning of the act; (*Paty's case*, 2 *Bla. Rep.* 721; 2 *East's P. C.* 1074;) so are asses; (*R.* v. *Whitney*, *R. & M. C. C.* 3;) so are pigs. (*R.* v. *Chapple*, *R. & R.* 77.)

Nature of injury to.

Unless the maim or wound were mortal it was not felony within the 22 & 23 Car. II. c. 7. (*R.* v. *Haywood*, 2 *East's P. C.* 1076; *R. & R.* 16, S. C.) But it is otherwise under the present act. J. Haywood was tried on an indictment on the Black Act, (9 Geo. I. c. 3, s. 2,) containing two counts; one for maliciously maiming, the other for maliciously wounding a gelding, against the statute, &c. It appeared that the prisoner had maliciously and with an intent to injure the prosecutor, driven a nail into the frog of the horse's foot, which had at the time rendered the horse useless to the owner; but at the trial the prosecutor said that the horse was likely to do well, and to be perfectly sound again in a short time. After conviction, judgment was respited upon a doubt whether as the horse was likely to recover, and as the wound was not a permanent injury, the offence were within the statute. In Michaelmas term, 1801, all the judges held the conviction right. The words of the stat. 9 Geo. I. c. 22, are, "shall unlawfully and maliciously kill, maim or *wound* any cattle," &c. which word "wound" appears to be used as contradistinguished from a permanent injury, such as maiming. (*Id.*)

Injuring a sheep by setting a dog at it, is not a maiming or wounding within the act. (*R.* v. *Hughes*, 2 *C. & P. C. N. P.* 420; *R.* v. *Chalkley*, *R. & R.* 258; *sed quære*, *Deac. C. D.* 204.)

But where the prisoner set fire to a cow-house in which was a cow, which was burnt to death, *Taunton*, J., held, that the prisoner could be convicted upon an indictment for killing the cow. (*R.* v. *Haughton*, 5 *C. & P.* 559.)

And pouring acid into the eye of a mare, and thereby blinding her, is a maiming within the act. (*R.* v. *Owens*, *R. & M. C. C.* 205.)

It should seem, however, that giving poison to a person's horse, however maliciously done, is no felony, and not within the act, unless the horse die, the words of the act being "*kill, maim*, or *wound*." An attempt to commit a felony is an indictable misdemeanor, and it should seem that the offender in such a case might be indicted accordingly. See *ante*, "*Attempts*."

The indictment.

It is not necessary to aver in the indictment that the animals are *cattle*, in order to bring them within the statute; (2 *Bla. Rep.* 733;) but it must state the species of cattle wounded or injured; to state that the prisoners wounded *certain cattle* is insufficient. (*R.* v. *Chalkley*, *Russ. & Ry.* 258.)

If the statement be, that he maimed certain cattle, *viz.* a mare, there must be evidence that the animal maimed is of the description specified. (*Id.*)

If a prisoner mix poison with the corn intended for the feed of eight horses, and then gives each horse his feed from this mixture, an indictment, charging that he did administer the poison to the eight horses is correct. (*Rex* v. *Mogg*, 4 *C. & P.* 364.)

On an indictment for maliciously killing two sheep, the property in them may be laid to be in the agister. (*R.* v *Woodward*, 2 *East's P. C.* 653.)

The indictment must conclude against the statute. (*R.* v. *Ranger*, 2 *East's P. C.* 1074.)

As to the other points on indictments in general, *post*, "*Indictment*," Vol. III.

3. *Killing or Maiming of.*

[Commencement as usual, *ante*, p. 9, (No. 1.)] *that the said C. D. on, &c. at, &c. one brown* [*gelding*,] *the property of A. B. unlawfully, maliciously and feloniously did kill*, [*maim* or *wound*, according to the fact,] *against the form of the statute in such case made and provided. And you the said keeper, &c.* [as usual, as *ante*, p. 9, to the end.]

(1.) Commitment on 7 & 8 Geo. 4, c. 30, s. 16, for killing or maiming cattle.

—— *to wit. THE jurors for our Lady the Queen upon their oath present, that C. D. late of the parish of , in the county of , labourer, on the day of , in the year of the reign of our Lady the now Queen Victoria, with force and arms at the parish aforesaid, in the county aforesaid, one brown gelding of the price of thirty pounds, the property of A. B. then and there being, then and there unlawfully, maliciously and feloniously did kill*, [*maim* or *wound*, according to the fact,] *against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.* [Add other counts, as the case may require.]

(2.) Indictment for like offence.

IV. Ill-treatment of.

By the 5 & 6 Will. IV. c. 59, intituled "*An Act to consolidate and amend the several Laws relating to the cruel and improper treatment of Animals, and the mischiefs arising from the driving of Cattle, and to make other Provisions in regard thereto;*" reciting, "Whereas frequent accidents arise from improperly driving cattle, and many and great cruelties are practised by improperly driving and conveying cattle to, at and from public markets and otherwise, as well as in slaughtering and keeping and detaining the same without food and nourishment, to the great and needless increase of the sufferings of dumb animals and to the demoralization of the people, and whereby the lives and property of his majesty's subjects are greatly endangered and injured: and whereas it is expedient to reduce into one act, and to alter, amend and enlarge the powers and provisions of several acts now in force relating to the cruel and improper treatment of cattle, and the mischiefs arising from the driving thereof, and also to prevent as far as possible the cruel and improper treatment of cattle and other animals, and to make divers provisions in regard thereto:" it is enacted, "that the act hereinafter mentioned, (that is to say,) an act passed in the third year of the reign of his late majesty King George the Fourth, intituled '*An Act to prevent the cruel and improper treatment of Cattle*,' and so much of an act passed in the third year of the reign of his present majesty, intituled '*An Act for the more effectual Administration of Justice in the Office of a Justice of the Peace in the several Police Offices established in the Metropolis, and for the more effectual Prevention of Depredations on the River Thames and its Vicinity for three years*,' as recites and enacts as follows, (that is to say,) 'And whereas divers places in and about the metropolis are kept and used for the purpose of fighting or baiting of bears or other animals, at which places idle and disorderly persons commonly assemble, to the interruption of good order and the danger of the public peace; be it therefore enacted, that any person who shall, within five miles of Temple Bar, keep or use or shall act in the management or conducting of any premises or place whatsoever for the purpose of fighting or baiting of bears, cock-fighting, baiting or fighting of badgers or other animals, shall, on conviction thereof before any one justice of the peace, forfeit any sum not exceeding five pounds, and in default of immediate payment shall be liable to be imprisoned and kept to hard labour for any time not exceeding two months, unless the said penalty shall be sooner paid,' shall be and the same are hereby severally repealed, and made null and void to all intents and purposes, save and except as to any penalties or forfeitures incurred and not recovered, and to any offences or other matters committed and done before the passing of this act."

5 & 6 Will. 4, c. 59.

Repeals 3 Geo. 4, c. 71, and part of 3 Will. 4, c. 19.

4. *Ill-treatment of.*

5 & 6 Will. 4, c. 59. Persons cruelly beating or ill-treating cattle, &c. or improperly driving same, &c. may be fined or imprisoned.

Sect. 2. "If any person shall from and after the passing of this act wantonly and cruelly beat, ill-treat, abuse or torture any horse, mare, gelding, bull, (*a*) ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, dog or any other cattle (*b*) or domestic animal, or if any person who shall drive any cattle or other animal shall by negligence or ill usage in the driving thereof, be the means whereby any mischief, damage or injury shall be done by any such cattle or other animal, every such offender, being convicted of any or either of the said offences before any one justice of the peace for the city, town or county in which any such offence shall have been committed, shall for every such offence forfeit and pay (over and above the amount of the damage or injury (if any) done thereby, which damage or injury shall and may be ascertained and determined by such justice,) such a sum of money not exceeding forty shillings nor less than five shillings with costs, as to such justice shall seem meet; or the offender shall, in default of payment, be committed to the common gaol or house of correction for the city, town or county in which such offence shall have been committed, there to be imprisoned for any time not exceeding fourteen days; provided that nothing in this act contained shall prevent or abridge any remedy by action against the employer of any such offender where the amount of the damage is not sought to be recovered by virtue of this act."

Persons keeping pits for fighting dogs or baiting bears, &c. guilty of a nuisance, and liable to penalties. (*c*)

Sect. 3. "And whereas cruelties are greatly promoted and encouraged by persons keeping houses, rooms, pits, grounds or other places for the fighting or baiting of dogs, bulls, bears or other animals, and for fighting cocks, and by persons aiding or assisting therein, and the same are great nuisances and annoyances to the neighbourhood in which they are situate, and tend to demoralize those who frequent such places; be it therefore enacted, that from and after the passing of this act, if any person shall keep or use any house, room, pit, ground or other place for the purpose of running, baiting or fighting any bull, bear, badger, dog or other animal, (whether of domestic or wild nature or kind,) or for cock-fighting, or in which any bull, bear, badger, dog, or other such animal shall be baited, run or fought, every such person shall be liable to a penalty not exceeding five pounds nor less than ten shillings for every day in which he shall so keep and use such house, room, pit, ground or place for any of the purposes aforesaid; provided always, that the person who shall act as the manager of any such house, room, pit, ground, or other place, or who shall receive any money for the admission of any person thereto, or who shall assist in any such baiting or fighting, or bull-running, shall be deemed and taken to be the keeper of the same for the purposes of this act, and be liable to all such penalties as are by this act imposed upon the person who shall actually keep any such house, room, pit, ground or other places for the purposes aforesaid."

The person who shall be manager of such house to be deemed the keeper.

Parties impounding cattle to provide sufficient food for them (*d*).

Sect. 4. "And whereas great cruelties are practised by reason of keeping and detaining horses, asses, and other cattle and animals impounded and confined without food frequently for many days; for remedy whereof be it enacted, that from and after the passing of this act every person who shall impound or confine, or cause to be impounded or confined, any horse, ass, or other cattle or animal, in any common pound, open pound, or close pound, or in any inclosed place, shall and he is hereby required to find, provide, and supply such horse, ass, and other cattle or animal so impounded or confined, daily with good and sufficient food and nourishment for so long a time

(*a*) Bulls or bull-baiting were not within the 3 Geo IV. c. 71. (*Ex parte Hill*, 3 *C. & P.* 225; 1 *M. & Ry. M. C.* 105, S. C.)

(*b*) See the interpretation clause, s. 21, *post*

(*c*) See further the provisions in the Police Acts relative to this offence, "*Police*," Vol. V.

(*d*) It seems that under this section the person who is bound to supply food to impounded cattle is the distrainer or person at whose suit they are impounded, and not the pound-keeper. But if the pound-keeper supplies the food at the request of the distrainer, or the distrainer joins with the pound-keeper in a subsequent sale of the cattle under this act, the pound-keeper and the distrainer are for this purpose to be considered as one. (*Mason* v. *Newland*, 9 *Car. & P.* 575.)

It seems also that the section excludes

as such horse, ass, or other cattle or animal shall remain and continue so impounded or confined as aforesaid; and every such person who shall so find, provide and supply any such horse, ass, or other cattle or animal, with such daily food and nourishment as aforesaid, shall and may, and he and they are hereby authorised and empowered to recover of and from the owner or owners of such cattle or animal not exceeding double the full value of the food and nourishment so supplied to such cattle or animal as aforesaid, by proceeding before any one justice of the peace within whose jurisdiction such cattle or animal shall have been so impounded and supplied with food as aforesaid, in like manner as any penalty or forfeiture, or any damage or injury, may be recovered under and by virtue of any of the powers or authorities in this act contained, and which value of the food and nourishment so to be supplied as aforesaid such justice is hereby fully authorised and empowered to ascertain, determine, and enforce as aforesaid; and every person who shall have so supplied such food and nourishment as aforesaid shall be at liberty if he shall so think fit, instead of proceeding for the recovery of the value thereof as last aforesaid, after the expiration of seven clear days from the time of impounding the same, to sell any such horse, ass, or other cattle or animal, openly at any public market (after having given three days public printed notice thereof) for the most money that can be then got for the same, and to apply the produce in discharge of the value of such food and nourishment so supplied as aforesaid, and the expenses of and attending such sale, rendering the overplus (if any) to the owner of such cattle or animal." (a)

4. *Ill-treatment of.*

5 & 6 Will. 4, c. 50.

Remedy for recovery thereof. (a)

Sect. 5. "In case any horse, ass, or other cattle or animal shall at any time so remain impounded or confined as aforesaid without sufficient daily food or nourishment more than twenty-four hours, it shall and may be lawful to and for any person or persons whomsoever from time to time and as often as shall be necessary to enter into and upon any such common pound, open pound or close pound, or other inclosed place in which any such cattle or animal shall be so impounded or confined, and to supply such cattle or animal with such good and sufficient food and nourishment during so long a time as such cattle or animal shall so remain and continue impounded or confined as aforesaid, without being liable to any action of trespass or other proceeding by any person or persons whomsoever for or by reason of such entry or entries for the purposes aforesaid." (b)

Persons may enter pounds for the purpose of feeding cattle. (b)

Sect. 6. "In case any such person who shall so impound or confine, or cause to be impounded or confined, any such horse, ass, or other cattle or animal as aforesaid, shall refuse or neglect to find, provide, and supply such daily good and sufficient food and nourishment to such cattle and animal so impounded or confined as aforesaid, he and they shall for every day during which he or they shall so refuse or neglect to find, provide and supply the same as aforesaid, forfeit and pay the sum of five shillings; which last sum and sums of money shall and may be recoverable by proceeding before any one justice of the peace in like manner as hereinbefore provided for the recovery of any penalty, forfeiture, damage or injury as hereinbefore mentioned."

Penalty on parties neglecting to feed impounded cattle.

Sect. 7. "And whereas great cruelty is practised by reason of diseased, old, and worn-out horses sold or taken to knackers or slaughtermen for the

As to slaughtering horses, &c.

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any right in the owner of the cattle to supply them with food while in the pound.

(a) The distrainer who supplies the food may either apply to a magistrate to allow any sum not exceeding double the value of the food, or may sell the cattle; but no magistrate ought to allow more than the actual value of the food, if the owner of the cattle was willing to supply the food himself. (*Id.*)

If the cattle be sold under the act, the distrainer can only get the single value of the food, and not the amount of the damage for which the cattle were distrained, as all the overplus beyond the value of the food and the expenses of the sale, is to be returned to the owner of the cattle. (*Id.*)

(b) This section does not give any person a right to any payment; it merely allows charitable persons to supply food to impounded cattle, without being liable to an action for doing so. (*Id.*)

4. *Ill-treatment of.*

5 & 6 Will. 4, c. 59.

purpose of slaughter, being frequently resold or compelled to work, or kept without sufficient food; for remedy whereof be it further enacted, that if any person keeping or using any house or place for the purpose of slaughtering or killing any horse or cattle (which shall not be for butcher's meat) shall at any time hereafter slaughter or kill any horse or cattle (not being for butcher's meat) without having previously taken out a license for that purpose, and without having previously affixed over the outer gate or entrance from the public highway to said licensed premises, the board and inscription in manner and form prescribed according to the provisions of an act of parliament passed in the twenty-sixth year of the reign of King George the Third, intituled '*An Act for Regulating Houses and other places kept for the purpose of Slaughtering Horses,*' (see '*Horses, Slaughtering of,*' Vol. III.) every such person shall, for every such offence, forfeit and pay any sum not exceeding five pounds nor less than ten shillings, or be liable to such punishment as in the said act is provided."

26 Geo. 3, c. 71.

Horses to be slaughtered within three days after purchase, and in meantime to be provided with food.

Sect. 8. "Every person so keeping or using any house or place for the purpose of slaughtering or killing horses or other cattle shall kill and slaughter every such horse or cattle within three days next after such horse or other cattle shall have been purchased by or brought and delivered to him or any person in his service and employ, for the purpose of slaughter as aforesaid, and shall also in the meantime, and until such horse or other cattle shall have been so slaughtered, find and provide such horse or other cattle with good and sufficient daily food and nourishment, and shall also at the time of receiving such horse or cattle for the purposes aforesaid, enter in the book which by the said act of the twenty-sixth of George the Third is required to be kept by such person for the purposes in the said act mentioned, a correct description of the colour and gender of the horse so purchased by or delivered to him for the purposes aforesaid, with the date of receiving the same; and if any such horse or other cattle so received for the purpose of being slaughtered as aforesaid shall be employed in any manner of work, or shall not be supplied with good and sufficient food during the time he shall survive, every such person so receiving every such horse or other cattle shall for each and every such offence forfeit and pay any sum not exceeding forty shillings nor less than five shillings for every day on which such offence shall be committed or continued." (See "*Horses, Slaughtering of,*" Vol. III.)

Any constable or peace officer, or the owner of any cattle, may seize offenders.

Sect. 9. "And for the more easy and effectual apprehension of all offenders against this act, be it further enacted, that when and so often as any of the said offences shall happen, it shall and may be lawful to or for any constable or other peace officer, or for the owner of any such cattle or animal, upon view thereof, or upon the information of any other person (who shall declare his, her, or their name or names and place or places of abode to the said constable or other peace officer), to seize and secure by the authority of this act, and forthwith and without any other authority or warrant to convey any such offender before any one justice of the peace within whose jurisdiction the offence shall have been committed, to be dealt with according to law, and such justice shall forthwith proceed to examine upon oath any witness or witnesses who shall appear or be produced to give information touching any such offence (which oath the said justice is hereby authorised and empowered to administer)."

As to names of offenders.

Sect. 10. "If any person who shall be apprehended for having committed any offence against this act shall refuse to discover his name and place of abode to the justice before whom he shall be brought, such person refusing shall immediately be delivered over to a constable or other peace officer, and shall by him be conveyed to the common gaol or house of correction for the city, town, or county within which the offence shall have been committed, or in which the offender shall have been apprehended, there to remain for a space not exceeding one calendar month, or until he shall make known his name and place of abode to the said justice."

Limitation as to summary proceedings.

Sect. 11. "The prosecution of every offence punishable under this act shall be commenced within three calendar months next after the commission of the

offence, and not otherwise; and the evidence of the party complaining shall be admitted in proof of the offence, and also the evidence of any overseer or inhabitant of the parish in which the offence shall have been committed, notwithstanding any forfeiture or penalty incurred by the offence may be payable to the overseers of the poor of such parish."

4. *Ill-treatment of.*

5 & 6 Will. 4, c. 59.

Sect. 12. "In every case of a conviction under this act, where the sum which shall be awarded for the amount of the damage or injury done, or which shall be imposed as a penalty by any such justice as aforesaid for any offence contrary to this act, shall not be paid either immediately upon or after the conviction, or within such period as such justice shall at the time of the conviction appoint, it shall be lawful for such justice (unless where otherwise specially directed) to commit the offender to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, according to the discretion of such justice, for any term not exceeding fourteen days, where the amount of the sum awarded, or the penalty imposed, or both, (as the case may be,) together with the costs, shall not exceed five pounds, and for any term not exceeding two calendar months where the amount, with costs, shall exceed five pounds; the commitment to be determinable in each of the cases aforesaid upon payment of the sum or sums awarded and costs."

As to convictions.

Sect. 13. "It shall be lawful for any one such justice as aforesaid, in all cases in which no other mode of proceeding is specially provided or directed by this act, or in any case where any person shall not be conveyed before any justice by the authority of this act, upon information or complaint made by any person of any offence against the provisions of this act, within fourteen days next after the commission of any such offence, to summon the party accused to appear before such justice, or before any other justice of the peace, at a time and place to be by him named; and either on the appearance of the party accused, or in default thereof, it shall be lawful for such justice or any other justice, at the time and place to be appointed for such appearance, to proceed to examine into the matter, and upon due proof made thereof by voluntary confession of the party, or by oath of one or more credible witness or witnesses, to award, order, give judgment or convict for the damage or injury, penalty or forfeiture, as the case may be."

Mode of proceeding for penalties, &c.

Sect. 14. "In every case where there shall be a conviction for any offence contrary to this act, the same shall be drawn or made out according to the form following, or to the effect thereof, or as near thereto as the case shall require; (*videlicet*,)

Form of conviction.

County [or as the case may be] *of* } *BE it remembered, that on the day of , in the year of our Lord , at , in the county* [or as the case may be] *of , A. B. is convicted before me J. P., one of his Majesty's justices of the peace for the said county,* [or as the case may be,] *for that he the said A. B. on the day of , in the year , at , in the said , did* [here specify the offence, and on a second conviction state the first,] *and I the said J. P. do adjudge the said A. B. for his said offence to forfeit and pay the sum of* , [here state the penalty actually imposed, or the penalty and also the amount of the injury done, or as the case may be,] *and also to pay the sum of for costs, and in default of immediate payment of the said sums, to be imprisoned in the* , [or, in the case of a second or subsequent conviction, *to be there kept to hard labour*] *for the space of , unless the said sums shall be sooner paid; and I direct that the said sum of* [the penalty] *shall be paid as follows; that is to say, one moiety thereof to the overseers of the poor of the said parish of , to be by them applied according to the directions of the statute in that case made and provided, and the other moiety thereof to C. D. of* [*the prosecutor*, or as the case may be]; *and that the said sum of* [the sum for the amount of injury done, if any sum is awarded] *shall be paid to E. F.* [*or the said C. D.* as the case may be]; *and I order that the said sum of for costs shall be paid to the said C. D. Given under my hand and seal the day and year first above mentioned.*

Sect. 15. "Any summons issued by any such justice requiring the appearance of any defendant, against any of the provisions of this act, shall be deemed and taken to be well and sufficiently served in case either the summons or copy thereof be served personally on such person as aforesaid, or be

Service of justice's summons.

4. *Ill-treatment of.*

left at his usual or last known place of abode, in whatever county the same may be so served or left."

5 & 6 Will. 4, c. 59.

Penalty on constable refusing or neglecting to serve summons, &c.

Sect. 16. "If any constable or other peace officer shall refuse or neglect to serve or execute any such summons or warrant granted or issued by any justice of the peace pursuant to any of the provisions of this act, every such constable or peace officer so offending, and being convicted thereof upon the information of any person before any justice of the peace, shall forfeit any sum not exceeding five pounds as shall be awarded by such justice, and in default of payment thereof shall be committed by such justice to the county gaol or house of correction of the city, town or county in which such justice has jurisdiction, there to be kept for the space of time not exceeding one calendar month, unless such penalty shall be sooner paid."

Distribution of penalties, &c.

Sect. 17. "All pecuniary penalties which shall be recovered before any justice of the peace under the provisions of this act shall respectively be divided, paid and distributed in the following manner; (that is to say,) one moiety thereof to the overseers of the poor of the parish in which any of the offences aforesaid shall have been committed, to be by such overseers applied in aid of the rates of their respective parishes, and the other moiety thereof, with full costs, to the person who shall inform and prosecute for the same, or to such other person as to such justice shall seem fit and proper; and that all and every sum or sums of money which shall or may be ascertained, determined, adjudged and ordered by any justice of the peace, under the authority of this act, to be paid as the amount of any damage or injury occasioned by the commission of any of the offences hereinbefore mentioned, shall be paid to the person who shall or may have sustained such damage or injury according to the order or determination and at the discretion of any such justice."

Informants or complainants not disqualified.

Sect. 18. "Upon the hearing of any information or complaint exhibited or made under any of the provisions of this act, any person giving or making such information or complaint, or other person, shall be deemed and is hereby declared to be a competent witness, notwithstanding he may be entitled to any part of the pecuniary penalty, on the conviction of any offender, upon any such information or complaint as aforesaid."

Limitation of actions.

Venue.

Notice of action. (*a*)

General issue.

Sect. 19. "All actions and prosecutions which may be brought or commenced against any person for any thing done in pursuance or under the authority of this act shall be commenced within one calendar month next after the fact committed, and not afterwards, and shall be brought and tried in the county or place where the cause of action shall arise, and not elsewhere; and notice in writing of any such action (*a*), and specifying the cause thereof, shall be given to the defendant fourteen clear days at least before the commencement of any such action; and the defendant in such action may plead the general issue, and give this act and any other matter or thing in evidence at

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(*a*) A mare was distrained damage feasant by A. and detained in the pound by the pound-keeper B. for several days. B. supplied the mare with food while in the pound, and A. and B. joined in selling the mare for the keep: held, in an action of trover by the owner of the mare against A. and B., that if they *bonâ fide* and honestly intended to sell the mare under the provisions of sect. 4 of this act, they were entitled to notice of action, and to have the venue laid in the proper county; but on these facts the judge would not nonsuit, but left it to the jury to say whether the defendants meant *bonâ fide* to act upon the provisions of that statute; and that, if they did, the defendants were entitled to their verdict. (*Mason* v. *Newland*, 9 *Car. & P.* 575.)

A hired driver of a cabriolet having brought home the horse apparently much ill-used by him, the owner's son (in the owner's absence) called in a policeman, and told him that the driver had ill-used the horse. The policeman said, that if the complainant charged the driver with cruelty to the horse, he would take him into custody. The complainant said, "I do;" and the policeman apprehended the driver under sect. 9: held, that the complainant must be considered not as a party giving information to the officer, in consequence of which the driver was arrested, but as a principal causing the arrest to be made; and that he was not entitled to the notice of action which the statute requires to be given to persons sued for any thing done in pursuance of it. (*Hopkins* v. *Crowe*, 4 *Ad. & E.* 774.)

any trial to be had thereupon; and if the cause of action shall appear to arise from or in respect of any matter or thing done in pursuance and by the authority of this act, or if any such action shall be brought after the expiration of one calendar month, or shall be brought in any other county or place than as aforesaid, or if notice of such action shall not have been given in manner aforesaid, or if tender of sufficient amends shall have been made before such action commenced, or if a sufficient sum of money shall have been paid into court after such action commenced by or on behalf of the defendant, the jury shall find a verdict for the defendant; and if a verdict shall pass for the defendant, or if the plaintiff shall become nonsuit, or shall discontinue any such action, or if, on demurrer or otherwise, judgment shall be given against him, the defendant shall recover his full costs of suit as between attorney and client, and shall have the like remedy for the same as every defendant may have for costs of suit in other cases at law; and although a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant unless the judge before whom the trial shall be had shall certify his approbation of the action and of the verdict obtained thereon." As to clauses of this nature in general see "*Justices*," Vol. III.; *post*, "*Constable*."

4. *Ill-treatment of.*

5 & 6 Will. 4, c. 59.

Tender of amends.

Costs.

Sect. 20. "In case any person shall consider himself aggrieved by any adjudication or conviction made by any justice of the peace under the authority of this act, such party shall and may appeal against such adjudication or conviction on giving fourteen days' notice of such appeal, and the cause and matter thereof, to such justice, to the next quarter sessions to be held next after the expiration of the said fourteen days in or for the town, city, riding, county or division within which such adjudication or conviction shall have been made; and such court of quarter sessions shall hear or determine the said appeal, and award to the party appealing against or supporting such adjudication or conviction such costs as to them shall seem reasonable." See in general, *ante*, "*Appeal*."

Appeal to quarter sessions.

Sect. 21. "And in order to avoid the repetition, and to prevent any misconstruction of the terms and expressions used in this act, be it further enacted, that whenever in this act, with reference to any person, cattle, animal, matter or thing, any word or words is or are used importing the singular number or the masculine or feminine gender only, yet such word or words shall be understood to include several persons or animals as well as one person or animal, and females as well as males, and several matters or things as well as one matter or thing, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction; and that where the word 'cattle' is used alone in this act the same shall be understood and taken for any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep or lamb, or any other cattle or domestic animal."

Construction of terms used in this act.

The formal parts of the conviction as prescribed by the act will be found *ante*, p. 539. State the offence thus:] *On , at , did wantonly and cruelly beat, ill treat and abuse a certain* [*horse*], *against the form of the statute in such case made and provided. And I the said J. P. do adjudge*, &c.

Conviction on s. 2, for ill treating cattle.

The formal parts of the conviction as prescribed by the act will be found *ante*, p. 539. State the offence thus:] *On , at , was driving a certain ox in and along a certain public highway and street there, and whilst he the said A. B. was so driving the said ox as aforesaid, he then and there ill used the same by beating it, by means of which said ill usage the said A. B. then and there caused the said ox to run against a certain carriage of one A. B. which then was in the said highway* [state the injury done according to the fact,] *thereby doing damage unto the said A. B. to the amount of . And I the said J. P. do adjudge*, &c.

The like, for improperly driving and doing damage.

The formal parts of the conviction as prescribed by the act will be found *ante*, p. 539. State the offence thus:] *On , at , impounded a certain horse*

The like, on s. 4 & 6, for not providing with food cattle impounded.

4. *Ill-treatment of.*

in the common pound there, and on that day and also on did [refuse and] neglect to find, provide, or supply the said horse daily with good and sufficient food and nourishment, but on the contrary thereof, during all the time aforesaid he the said C. D. did not find, provide, or supply the said horse with any food or nourishment whatsoever [or as the case may be]; *against the form of the statute in such case made and provided. And I the said J. P. do adjudge,* &c.

Central Criminal Court.

As to the sessions in general and the practice of it, see "*Sessions*," Vol. V.

4 & 5 W. 4, c. 36.

By stat. 4 & 5 Will. IV. c. 36, intituled "*An Act for establishing a New Court for the Trial of Offences committed in the Metropolis and parts adjoining*," [25th July, 1834,] reciting, "Whereas it is expedient, for the more effective and uniform administration of justice in criminal cases, that offences committed in the metropolis and certain parts adjoining thereto should be tried by justices and judges of oyer and terminer and gaol delivery in the city of London;" it is enacted, "That the lord mayor for the time being of the city of London, the lord chancellor or lord keeper of the great seal, and all the judges for the time being of his majesty's Courts of King's Bench, Common Pleas and Exchequer, the chief judge and the two other judges in bankruptcy, the judges of the admiralty, the dean of the arches, the aldermen of the city of London, the recorder, the common serjeant, the judges of the sheriff's court of the city of London, for the time being, and any person or persons who hath or shall have been lord chancellor, lord keeper, or a judge of any of his majesty's superior courts of Westminster, together with such others as his majesty, his heirs and successors, shall from time to time name and appoint by any general commission as hereinafter stated, shall be and be taken to be the judges of a court to be called the 'Central Criminal Court,' to which his majesty, and his heirs and successors, may direct his general commission as hereinafter mentioned; and which court shall have jurisdiction to hear, try and determine all offences committed or alleged to be committed as hereinafter specified."

The lord mayor of London, the lord chancellor, the judges, the aldermen, recorder and common serjeant of London, and such others as his majesty may appoint, to be judges of a court to be called the "Central Criminal Court."

His majesty may issue a commission of oyer and terminer and gaol delivery for London and Middlesex, and certain parts of Essex, Kent and Surrey.

Sect. 2. "It shall be lawful for his majesty, his heirs and successors, from time to time to command and cause to be issued commissions of oyer and terminer, to inquire of, hear and determine all treasons, murders, felonies and misdemeanors committed within the city of London and county of Middlesex, and those parts of the counties of Essex, Kent and Surrey, within the parishes of Barking, East Ham, West Ham, Little Ilford, Low Layton, Walthamstow, Wanstead St. Mary, Woodford and Chingford, in the county of Essex; Charlton, Lee, Lewisham, Greenwich, Woolwich, Eltham, Plumstead, St. Nicholas Deptford, that part of St. Paul Deptford which is within the said county of Kent, the liberty of Kidbrook, and the hamlet of Mottingham, in the county of Kent; and the borough of Southwark, the parishes of Battersea, Bermondsey, Camberwell, Christchurch, Clapham, Lambeth, St. Mary Newington, Rotherhithe, Streatham, Barnes, Putney, that part of St. Paul Deptford which is within the said county of Surrey, Tooting, Graveney, Wandsworth, Merton, Mortlake, Kew, Richmond, Wimbleton, the Clink Liberty, and the district of Lambeth Palace; in the county of Surrey; and also commissions of gaol delivery to deliver his majesty's gaol of Newgate of the prisoners therein charged with any of the offences aforesaid, committed within the limits aforesaid; and it shall be lawful for the justices and judges of the Central Criminal Court aforesaid, or any two or more of them, to inquire of, hear, determine, and adjudge all such treasons, murders, felonies and misdemeanors, and all treasons, murders, felonies and misdemeanors which might be inquired of, heard and determined under any commission of oyer and terminer for the city of London or county of Middlesex, or commission of gaol delivery to deliver the gaol of Newgate, or which, in case the parts of the counties of Essex, Kent and Surrey respectively comprised within the limits aforesaid had been

counties of themselves, might have been inquired of, heard and determined under commissions of oyer and terminer and gaol delivery for such counties, and to deliver the said gaol of Newgate at such times and places in the said city or the suburbs thereof as by the said commissions shall be appointed, or as the said justices and judges by virtue and in pursuance thereof, or any two or more of them, shall appoint, and to award and issue all precepts and process, and use and exercise all powers and authorities belonging to justices of oyer and terminer and gaol delivery: provided always, that such court shall have power and jurisdiction to proceed on every such commission so issued as aforesaid, and act under such commission until a new commission shall be issued." 1 & 5 W. 4, c. 36.

Sect. 3. "The district situated within the limits of the jurisdiction hereinbefore established shall be deemed and taken to be, in all cases tried before the said justices and judges, one county for all purposes of venue, local description, trial, judgment and execution, not herein specially provided for; and that in all indictments and presentments preferred and tried before the said justices and judges the venue laid in the margin shall be as follows: 'Central Criminal Court to wit;' and all offences which in other indictments would be laid to have been committed in the county where the trial is had, and all material facts which would be in other indictments averred to have taken place in the county where the trial is had, shall, in indictments prepared and tried in the said court, be laid to have been committed and averred to have taken place 'within the jurisdiction of the said court.'" (a)

New district to be considered as one county and venue to be "Central Criminal Court to wit," &c.

Sect. 4. "The sheriffs of the city of London and of the counties of Middlesex, Essex, Kent and Surrey, respectively, shall execute and obey all precepts and process which the said justices and judges shall award, issue and direct unto them respectively, and shall, whenever required and commanded, summon and return from the said city of London and county of Middlesex, and from the parts of the said counties of Essex, Kent and Surrey within the limits of this act, a competent number of persons qualified according to law to inquire of, present and try all offences and other matters cognizable by the said justices and judges; and the persons so returned, whether taken wholly from the city of London or the said counties, or taken indiscriminately from the said city and the said counties, shall have authority to inquire of, present, hear, try and determine all such offences and other matters, and all issues and all matters of fact arising out of such trials or relating thereto, notwithstanding that such persons are not inhabitants of the city, county or place where such offences or other matters may be committed or arise; and any person having served upon any grand jury or petty jury summoned and returned from the said counties of Essex, Kent and Surrey, under the authority of this act, shall henceforth be exempt for and during twelve calendar months next after such service from serving upon any jury in any court (except the sessions of the peace) to be holden for the county in which such juror shall reside."

Power to summon juries from London or from the counties, or from both indiscriminately, to try all offences cognizable by the act.

As to jurors residing within the limits of the act in Essex, Kent and Surrey.

Sect. 5. "And whereas, for the more convenient distribution of prisoners, as well before trial as after, and also for rendering more effectual the punishment of imprisonment, it may be expedient that power should be given to appoint from time to time in what places of confinement within the limits of this act such prisoners shall be kept in custody; be it therefore further enacted, that it shall be lawful for his majesty by and with the advice of his privy council, from time to time to order and direct in what gaol, house of correction, or other prison, being within the limits of this act, any person or persons charged with or convicted of offences committed or alleged to have

His majesty, by order in council, to appoint the places of confinement for prisoners.

(a) But every indictment should also contain a statement of the county in which the offence was committed and the material facts took place. And where such statement was omitted, and the indictment having been removed, was tried by a Middlesex jury, the Court arrested the judgment. (*Reg.* v. *Stowell*, 12 *L. J. Rep. M. C.* 111.) But indictments with the Central Criminal Court venue may still be tried in the county in which they show the offence to have been committed. (*Reg.* v. *Meyer and Albert*, *ib.* 117.)

4 & 5 W. 4, c. 36.

been committed within the limits of this act shall be imprisoned or kept in custody; and that when and so often as his majesty, by and with the advice of his privy council, shall be pleased to give such orders and directions, the said justices and judges of oyer and terminer and gaol delivery, and all justices of the peace, coroners and other magistrates acting within the limits of this act, shall commit all persons charged or convicted before them to such gaol, house of correction, or other prison as in such orders or directions shall be expressed and commanded, any law, usage or custom to the contrary notwithstanding; provided nevertheless, and it is hereby declared, that the city, county or place in which the offence of such person or persons was committed or alleged to have been committed shall be liable to and charged with the expense of supporting and maintaining such prisoner during his imprisonment in such gaol, house of correction or other prison, at and after such rate as his majesty, by and with the advice of his privy council, shall order and direct, and shall be paid by the treasurer of the said city, county or place in which such offence was committed or alleged to have been committed: provided nevertheless, that the county of Middlesex and city of Westminster and liberty of the Tower of London shall not be liable to any charge for the support and maintenance of any prisoner charged with any offence in the said county, city or liberty, who shall be committed to his majesty's gaol of Newgate."

Penitentiary at Milbank to be one of the prisons under this act.

Sect. 6. "The general penitentiary at Milbank shall be considered one of the prisons in which his majesty by virtue of this act may, with the advice of his privy council, direct any persons charged or convicted of offences within the limits of this act to be imprisoned and kept in custody."

Persons sentenced to imprisonment beyond the limits of this act may be removed to the penitentiary at Milbank.

Sect. 7. "It shall be lawful for his majesty, by an order in writing to be notified in writing by one of his majesty's principal secretaries of state, to direct that persons who may be sentenced to imprisonment by any court or competent authority for any offence committed beyond the limits of this act, and who, having been examined by an experienced surgeon or apothecary, shall appear to be free from any putrid or infectious distemper, and fit to be removed, shall be removed to the penitentiary at Milbank, there to be imprisoned for and during their respective terms of imprisonment" [The 5 & 6 Will. IV. c. 38, s. 13, extends the power given by this section to offences committed within the limits of this act.]

Regulations in all penitentiary acts shall apply to prisoners confined there by the authority of this act.

Sect. 8. "All provisions and regulations expressed and contained in all acts made for the government of the general penitentiary at Milbank, and all powers given by such acts for the confinement, employment and management of convicts removed thereto in pursuance of such acts, shall be applicable and made available in respect of all persons, who may be removed or sent to such penitentiary in pursuance of any order in council made by the authority of this act, as fully, to all intents and purposes, as if the said regulations, provisions and powers were expressed and given by this act." [The 5 & 6 Will. IV. c. 38, s 14, extends the powers contained in penitentiary acts to all prisoners confined therein.]

Persons convicted may be imprisoned either in the county gaol or in Newgate.

Sect. 9. "It shall be lawful to and for the said justices and judges of oyer and terminer and of gaol delivery, or any two or more of them, to commit any person or persons who shall be brought before them charged with any offence cognizable by such justices and judges under and by virtue of this act, or who shall be convicted or attainted before them, to such gaol, house of correction, or other prison as may be specified in any order of council to be made by virtue of this act, or if no such order shall have been made, then to the common gaol, house of correction or other prison of the city, county or place to which such offender might have been committed if this act had not passed, or to his majesty's gaol of Newgate, there to remain until discharged by due course of law, or in execution of his or their respective judgments; and in case of such commitment to the said gaol of Newgate, execution of such judgments shall and may be had and done upon such person or persons by the sheriffs of the said city of London in the same way and as fully to all intents and purposes as if the offence of which such person or persons was or were convicted had been committed in the said city of London."

Sheriffs of London may execute judgments.

Sect. 10. "Until his majesty shall be pleased, by and with the advice of his privy council, to order and direct in what gaol, house of correction or other prison persons charged with or convicted of offences committed or alleged to have been committed within the limits of this act shall be imprisoned or kept in custody, it shall be lawful for any justice of the peace or coroner acting in and for the said counties of Essex or Kent, so far as relates to the said several parishes lying within their respective counties, to commit any person or persons charged with any of the offences aforesaid cognizable by the said justices and judges of oyer and terminer and gaol delivery by virtue of this act to his majesty's gaol of Newgate; and also for any justice of the peace or coroner acting in and for the said county of Surrey, so far as relates to the several parishes above mentioned lying within the said county of Surrey, to commit any person charged with any of the offences aforesaid cognizable by the justices and judges of oyer and terminer and gaol delivery by virtue of this act to his majesty's gaol of Horsemonger Lane or Newington, in and for the county of Surrey."

4 & 5 W. 4, c. 36.

Justices and coroners in Essex and Kent to commit offenders to Newgate, and justices and coroners in Surrey to commit offenders to Horsemonger Lane, and certify examinations to the court.

Sect. 11. "Every justice or coroner acting within the limits of this act shall specify in the commitment that the person or persons charged are committed under the authority of this act; and such justice or coroner shall in all such cases take the like examinations, informations, bailments and recognizances, and certify the same to the said justices of oyer and terminer and gaol delivery, as they are required by an act passed in the seventh year of the reign of his late majesty King George the Fourth, intituled '*An Act for improving the Administration of Criminal Justice in England;*' and any justice of the peace or coroner, in default of so doing, shall be liable to the same fines and penalties to be imposed by the said justices and judges of oyer and terminer and gaol delivery in the same manner as is mentioned in the said act; and when any person or persons shall be committed to his majesty's gaol for the county of Surrey for any offence cognizable by the said justices and judges of oyer and terminer and gaol delivery by virtue of this act, by a commitment specifying that such person or persons is or are committed under the authority of this act, the sheriff of the said county of Surrey, or the keeper of the gaol for the said county, shall, six days at least before the sitting of the next court of oyer and terminer and gaol delivery appointed under the authority of this act, or at such other time as the said justices and judges of oyer and terminer and gaol delivery, or any two or more of them, shall from time to time direct, cause such person and persons with their commitments and detainers, to be safely removed from the gaol of the said county of Surrey, without the issuing of any writ of habeas corpus, or other writ, to the said gaol of Newgate, there to remain until delivered by due course of law."

Justices and coroners to specify that persons are committed under this act, and to take examinations, &c. as required under 7 Geo. 4. c. 64. See "*Examination,*" Vol. II.

Power to remove prisoners from county gaol of Surrey to Newgate.

Power to order payment of expenses to prosecutors and witnesses.

Sect. 12. "It shall be lawful for any two of the said justices and judges of oyer and terminer and of gaol delivery to order and direct the costs and expenses of prosecutors and witnesses, in all cases where prosecutors and witnesses may be by law entitled thereto, to be paid by the treasurer of the county in which the offence of any person prosecuted would have been tried but for this act; and that every such treasurer or some known agent shall attend the said justices and judges of oyer and terminer and gaol delivery during the sitting of the court, to pay all such orders."

Treasurer of county, or his agent, to attend court to pay orders.

Sect. 13. "No bill of indictment for any misdemeanor (other than perjury or subornation of perjury) which can or may be presented to the grand jury at any sessions of the peace for the said city of Westminster and borough of Southwark, and counties of Middlesex; Essex, Kent and Surrey respectively, in which such misdemeanor was committed or alleged to have been com-

No indictment to be presented to grand jury unless the prosecutor has been bound by recognizance. (*a*)

(*a*) At a session held in January, 1842, it was ordered by the Court, "that henceforward whenever a prosecutor shall have preferred a bill of indictment against a defendant, and shall move the Court for process to issue upon the said indictment against the said defendant, the prosecutor so applying shall, before such process shall issue, himself enter into such recognizance as the Court shall direct to prosecute the law with effect against the said defendant." (See 1 *C. & Marsh.* 254.)

4 & 5 W. 4, c. 36.

mitted, shall be presented to the grand jury to be summoned under the authority of this act, unless the prosecutor or other person presenting such indictment shall have been bound by recognizance to prosecute or give evidence at the sessions to be held under the authority of this act against the person or persons accused of such misdemeanor, or unless such person or persons accused shall have been committed to or detained in custody, or shall be bound by recognizance to appear at the said sessions to be held under the authority of this act."

Court of Lord Mayor and Aldermen of London may contract with justices of Essex, Kent and Surrey, for support of their prisoners in Newgate.

Sect. 14. "It shall be lawful for the Court of the Lord Mayor and Aldermen of the city of London, having the government and ordering of the said gaol of Newgate, to enter into agreement with the justices of the peace for the said counties of Essex, Kent and Surrey, for the support and maintenance in the said gaol of Newgate of any prisoner or prisoners so committed or removed thereto under the authority of this act; and that the sum to be paid for the support and maintenance of such prisoner or prisoners in the said gaol of Newgate, and for their removal therefrom, shall be after such rate and in such manner as shall be settled and agreed by and between a committee of the said aldermen to be appointed from time to time by the said court of aldermen and a joint or separate committee of the magistrates of the said respective counties of Essex, Kent and Surrey, to be appointed at the general or quarter sessions of the peace of the said counties respectively to be holden next after the first day of January in every year; and in case the said committee, or either of them, shall not make such settlement or agreement as aforesaid, then the rate and manner in which such support and maintenance shall be paid shall, on the application of the said committee of aldermen at any time after the expiration of one month from the said respective sessions, be fixed and determined by such of the said justices and judges of oyer and terminer and gaol delivery, or any two or more of them, as hath or shall have been justices of his majesty's superior courts of Westminster; and that the amount of such support and maintenance, to be ascertained in manner aforesaid, shall be paid by the treasurer of the respective counties of Essex, Kent and Surrey, in such manner as the said justices and judges shall order and direct."

If they cannot agree, the judges to settle the amount.

Sessions to be holden in London or the suburbs twelve times at least in every year.

Sect. 15. "The said justices and judges of oyer and terminer and gaol delivery to be appointed under the authority of this act, or any two or more of them, shall hold a session for the said city of London and county of Middlesex, and the parts of the counties of Essex, Kent and Surrey hereinbefore mentioned, in the said city of London or suburbs thereof, at least twelve times in each and every year (and oftener if need be), such times to be fixed by general orders of the said court, which any eight or more of the said judges of his majesty's courts of Westminster are hereby empowered to make from time to time."

Indictments found at the sessions of the peace may be removed before justices of oyer and terminer and gaol delivery. (a)

Sect. 16. "It shall be lawful for his majesty's court of King's Bench, or any judge thereof, or any commissioner of oyer and terminer and gaol delivery under this act, being a judge of any of the superior courts of Westminster, or the chief judge or any other judge of the Court of Bankruptcy, or the recorder for the said city of London for the time being, if such court, judge, or recorder shall think proper, to issue any writ or writs of certiorari, or other process, directed to his majesty's justices of the peace acting in and for the cities of London and Westminster, the liberty of the Tower of Lon-

(a) This section does not affect the removal of indictments from the Central Criminal Court into the Queen's Bench. Such removal is entirely regulated by the 5 & 6 Will. IV. c. 33, (the Certiorari Act,) and a defendant removing such indictment under the latter statute becomes liable, in case of conviction, to pay the prosecutor the costs occasioned by such removal. (*Reg.* v. *Hawdon*, 9 *Dowl.* 100; *post*, "*Certiorari.*")

The judges of the Central Criminal Court have no power, as such, to issue any habeas corpus, or other process, to bring in a party who is in custody of the sheriff of Middlesex on a civil suit, in order that he may be committed to Newgate, to be tried for a misdemeanor before that Court; and the above 16th section does not apply to such a case. (*Rex* v. *Morgan*, 7 *Car. & P.* 642.)

don, the borough of Southwark, and the counties of Middlesex, Essex, Kent and Surrey, or either of them, commanding the said justices of the peace, or any or either of them, to certify and return into the said court of oyer and terminer and gaol delivery indictments or presentments found or taken before the said justices of the peace, or any of them, of any offences cognizable by virtue of this act, and the several recognizances, examinations and depositions relative to such indictments and presentments, so that the same offences may be dealt with, tried and determined by the said justices and judges of oyer and terminer and gaol delivery; and also for the like purpose, by writ or writs of habeas corpus, to cause any person or persons who may be in the custody of any gaol or prison charged with any offences cognizable under this act to be removed into the custody of the keeper of the gaol of Newgate." 4 & 5 W. 4, c. 36.

Sect. 17. "The justices of the peace acting in and for the said cities of London and Westminster, the liberty of the Tower of London, the borough of Southwark, and the counties of Middlesex, Essex, Kent and Surrey, shall not, at their respective general or quarter sessions of the peace or any adjournment thereof, try any person or persons charged with any capital offence, or with any of the following offences committed or alleged to be committed within the limits of this act; that is to say, housebreaking, stealing above the value of five pounds in a dwelling-house, horse-stealing, sheep-stealing, cattle-stealing, maliciously wounding cattle, bigamy, forgery, perjury, conspiracy, assault with intent to commit any felony, administering or attempting to administer poison with intent to kill or to do some grievous bodily harm, administering drugs or other things or doing any thing with intent to cause or procure abortion, manslaughter, destroying or damaging ships or vessels, the breaking of shops, warehouses, counting-houses and buildings within the curtilage of dwelling-houses, killing sheep with intent to steal the carcases, the uttering of all forged instruments, and the various offences enumerated in the act passed in the first year of the reign of his present majesty, intituled '*An Act for reducing into one Act all such Forgeries as shall henceforth be punished with Death; and for otherwise amending the Laws relative to Forgery*,' forging the assay marks on gold or silver plate, and all the offences relating to coin enumerated in the act passed in the second year of the reign of his present majesty, intituled '*An Act for consolidating and amending the Laws against Offences relating to the Coin*,' the abduction of women, bankrupts not surrendering under their commission or concealing their effects, breaking down bridges and banks of rivers, taking rewards for helping to stolen goods, personating any officer, seaman, or other persons in order to receive any wages, pay, allowance, or prize money due or supposed to be due, or any out-pensioner of Greenwich hospital in order to receive any out-pension allowance due or supposed to be due, sending threatening letters and using threats to extort money, larceny on navigable rivers and canals, and stealing and destroying goods in progress of manufacture, and larcenies after a previous conviction, embezzlement, larceny by clerks and servants, and receivers of stolen goods, whether such person or persons shall be charged as principal offenders or as accessories before or after the fact." (See further, title "*Sessions*." Vol. V.)

Quarter sessions restrained from trying certain offences.

1 Will. 4, c. 60.

2 Will. 4, c. 34.

Sect. 18. "Every recognizance which shall have been or shall be entered into for the prosecution before his majesty's justices of the peace aforesaid of any person for any offence cognizable under this act, and any recognizance for the appearance as well of any witness to give evidence upon any bill of indictment or presentment for any such offences as of any person to answer our lord the king for or concerning any such offence, or to answer generally before such justice of the peace, shall, in case any such writ of certiorari or habeas corpus be issued for the purpose of removing such indictment or presentment or such person so in custody as aforesaid, be obligatory on the parties bound by such recognizance to prosecute and appear and give evidence and do all other things therein mentioned with reference to the indictment or presentment or the person so removed as aforesaid before the justices and judges of oyer and terminer and gaol delivery acting by virtue of this act, in like manner as if such recognizance had been originally entered into for pro-

Recognizances for prosecuting, giving evidence, &c. before sessions of peace to be obligatory on persons entering into same to prosecute, give evidence, &c. before justices of oyer and terminer and gaol delivery.

4 & 5 W. 4, c. 36.

Notice of change of court to be given to parties entering into recognizances.

secuting such offence, appearing, or giving evidence, or doing such other things before the said justice and judges of oyer and terminer and gaol delivery: provided that in cases of removal from the jurisdiction of justices of the peace for the said cities of London or Westminster, the liberty of the Tower of London, the borough of Southwark, or counties of Middlesex and Surrey, two days' notice, and in case of removal from the jurisdiction of the justices of the peace for the counties of Essex and Kent one week's notice, shall have been given either personally or by leaving the same at the place of residence as of which the parties bound by such recognizance are therein described, to appear before the court of oyer and terminer and gaol delivery instead of the said other justices: provided also, that it shall be lawful for the court, judge, or recorder who shall grant such writ of certiorari or habeas corpus, and it is hereby required that such court, judge, or recorder shall cause the party applying for such writ or writs, whether he be the prosecutor or party charged with such offence, to enter into a recognizance in such sum, and with or without sureties, as the court, judge or recorder may direct, conditioned to give such notice as aforesaid to the parties bound by such recognizance to appear before the said court of oyer and terminer and gaol delivery instead of before the said other justices respectively, and to do such other things as such court, judge or recorder shall direct."

Justices may deliver over indictments found at sessions to the justices of oyer and terminer and gaol delivery.

Sect. 19. "It shall be lawful for the said justices of the peace acting in and for the said cities of London and Westminster, the liberty of the Tower of London, the borough of Southwark, and for the said counties of Middlesex, Essex, Kent and Surrey, if they shall think fit, to certify, transmit, and deliver to the said justices and judges of oyer and terminer and gaol delivery any indictment or presentment found or taken before them at their said respective general or quarter sessions of the peace, or at any adjournment thereof, for any offence or offences cognizable by the said justices and judges of oyer and terminer and gaol delivery by virtue of this act, in the same manner to all intents and purposes as the said justices of the peace might or could do if the said court of oyer and terminer and gaol delivery was holden in the county where such indictments or presentments were found or taken."

Justices to settle officers' fees, or a salary, and direct how same shall be paid.

Sect. 20. "It shall be lawful for the said justices and judges of oyer and terminer and gaol delivery, in sessions assembled, and they are hereby authorised and required, to ascertain, make, and settle a table of fees and allowances to be received and taken by the several officers of the said court, and from time to time to alter and vary the same as may to them appear just and reasonable, which said table of fees and allowances shall be hung up in the court of sessions, and a copy thereof transmitted to the clerks of the peace of the said counties of Middlesex, Essex, Kent and Surrey; or it shall be lawful for the said justices and judges to ascertain, make and settle a salary in lieu of such fees and allowances, to be paid to the said officers or either of them for the performance of their respective duties, as to the said justices and judges of oyer and terminer and gaol delivery shall seem reasonable and just, and to order and direct how and in what manner and by whom such fees and allowances or salary shall be paid, and also to order and direct such portion as they shall think fit of the expense of preparing calendars and sessions papers, and of other expenses incident to this act, to be borne and paid by the treasurer of each of the said counties, and such portion shall be paid by such treasurers accordingly; provided nevertheless, that the county of Middlesex shall not be liable to any portion of the expense of preparing calendars or sessions papers, or of any other expenses incident to this act, to which the said county would not have been liable in case this act had not been passed."

Sessions of the peace not to be affected by the sessions holden in pursuance of this act.

Sect. 21. "Nothing herein contained shall hinder or prevent, or shall be construed to hinder or prevent, the justices of the peace for the said cities of London and Westminster, the liberty of the Tower of London, the borough of Southwark, and the said counties of Middlesex, Essex, Kent and Surrey, from holding their respective general or quarter sessions of the peace in their respective jurisdictions during the sitting of the said court of oyer and

terminer and gaol delivery to be held in pursuance of this act; and that neither this act, nor the commissions of oyer and terminer and gaol delivery from time to time to be issued under the authority of this act, shall supersede, interfere with, or affect any other commission or commissions of oyer and terminer to be at any time issued by his said majesty, his heirs and successors in the said counties of Essex, Kent and Surrey, or the jurisdiction by virtue thereof, nor hinder or prevent the justices of oyer and terminer to be from time to time appointed by any commission to be issued under the authority of this act from holding their respective sessions at one and the same time, it being the true intent and meaning of this act, that the justices to be named and appointed in and by any other commissions of oyer and terminer and gaol delivery to be hereafter issued in the said counties of Essex, Kent, and Surrey; shall have the like power and jurisdiction to inquire of, hear, and determine all offences by virtue of such commissions which they would have had if this act had not been made; provided nevertheless, that they shall not be required or obliged to inquire of, hear, and determine, or to deliver the respective gaols or prisons of the same last-mentioned counties of any person or persons whose offence or offences is, are, can, or may be inquired of, dealt with, tried and determined under and by virtue of the commissioners of oyer and terminer and gaol delivery, to be from time to time issued under the authority of this act." (See "*Sessions*," Vol. V.)

4 & 5 Will. 4, c. 36.

Authorising court to try offences committed on the high seas (*a*)

Sect. 22. "And whereas it is expedient that persons charged with certain offences committed on the high seas and other places within the jurisdiction of the admiralty of England, should speedily be brought to trial; be it therefore enacted, by and with the authority aforesaid, that it shall and may be lawful for the justices and judges of oyer and terminer and gaol delivery to be named in and appointed by the commissions to be issued under the authority of this act, or any two or more of them, to inquire of, hear, and determine any offence or offences committed, or alleged to have been committed on the high seas, and other places within the jurisdiction of the admiralty of England, and to deliver the gaol of Newgate of any person or persons committed to or detained therein for any offence or offences alleged to have been done and committed upon the high seas aforesaid within the jurisdiction of the admiralty of England; and all indictments found and trials and other proceedings had and taken by and before the said justices and judges of oyer and terminer and gaol delivery shall be valid and effectual to all intents and purposes whatsoever; and that it shall and may be lawful for any three of the said justices and judges of oyer and terminer and gaol delivery to order and direct the payment of the costs and expenses of such prosecutions in manner prescribed and directed by the before recited act of the seventh of George the Fourth." [See *ante*, "*Admiralty*,"]

Saving the rights and privileges of London.

Sect. 23. "Nothing in this act contained shall extend or be construed to extend to prejudice or affect the rights, interests, privileges, franchises, or authorities of the lord mayor, alderman and recorder of the city of London, or their successors, the sheriffs of the city of London and county of Middlesex, for the time being, or to prohibit, defeat, alter, or diminish any power, authority, or jurisdiction which at the time of making this act the said lord mayor, alderman, and recorder, for the time being, of the said city, did or might lawfully use or exercise; and that notwithstanding any practice or custom of the said city of London to the contrary, it shall be lawful for the lord mayor's court of the city of London to sit on any day on which any session of the peace, oyer and terminer, and gaol delivery shall be held within the said city; and that all proceedings of the said lord mayor's court that could or might have been had or taken if such sessions were not

(*a*) An accessory before the fact to a felony committed on the high seas within the jurisdiction of the admiralty of England, may be indicted and tried at the Central Criminal Court, by virtue of the stats. 7 Geo. IV. c. 64, s. 9, and the above 22d section, although the person charged as the principal offender has not been "committed to or detained in" the gaol of Newgate for his offence. (*Reg.* v. *Wallace*, 1 *Car. & M.* 200.)

4 & 5 Will. 4, c. 26.

held, shall and may be had and taken, any practice, custom or law to the contrary notwithstanding."

Commencement of act.

Sect. 24. "This act shall commence and take effect from and after the 31st October, 1834."

Act may be altered this session.

Sect. 25. "This act may be amended or altered by any act to be passed in this present session of parliament."

Public act.

Sect. 26. "This act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such by all judges, justices and others, without being specially pleaded."

7 W. 4 & 1 Vict. c. 77.

By 7 Will. IV. & 1 Vict. c. 77, intituled "*An Act to assimilate the Practice of the Central Criminal Court to other Courts of Criminal Judicature within the Kingdom of England and Wales with respect to Offenders liable to the Punishment of Death,*" (17th July, 1837,) reciting, that "it is expedient to assimilate the practice of the Central Criminal Court to other courts of criminal judicature within the kingdom of England and Wales with respect to offenders liable to the punishment of death;" it is enacted, "that from and after the passing of this act it shall not be necessary that any report should be made to her Majesty, her heirs and successors, in the case of any prisoner convicted before the said Central Criminal Court, and now under sentence of death, or who may be hereafter convicted before such Court and sentenced to the like punishment, previously to such sentence being carried into execution; any law, usage, or custom to the contrary notwithstanding."

No report to be made to her Majesty of the case of any capital convict at the Central Criminal Court.

The judge before whom any offender already under sentence of death has been tried, may direct execution to be done on such offender.

Sect. 2. "With respect to offenders now under sentence of death, that in case any judge, being a judge of one of the superior courts of Westminster Hall, before whom any such offender has been tried, shall be of opinion that under the circumstances of such offender's case the sentence of the law ought to be carried into effect, it shall be lawful for such judge and he is hereby required, as soon after the passing of this act as conveniently may be, to order and direct execution to be done on such offender at such time and place as he shall think fit (the time so to be appointed not being less than seven days nor more than twenty-one days from the making of such order); and thereupon the sheriff or other proper officer in whose custody any such offender shall be, shall carry such sentence into effect at such time and place as may be specified in such order."

The Court may abstain from pronouncing judgment on persons convicted of crimes liable to the punishment of death, and order the same to be entered of record.

Sect. 3. "That whenever any offender shall hereafter be convicted before the said Court of any crime for which such offender shall be liable to the punishment of death, and the Court shall be of opinion that under the particular circumstances of the case such offender is a fit and proper subject to be recommended for the royal mercy, it shall and may be lawful for such Court, if it shall think fit so to do, to direct the proper officer then being present in Court to require and ask (whereupon such officer shall require and ask) if such offender hath or knoweth any thing to say why judgment of death should not be recorded against such offender; and in case such offender shall not allege any matter or thing sufficient in law to arrest or bar such judgment, the Court shall and may and is hereby authorised to abstain from pronouncing judgment of death upon such offender, and instead of pronouncing such judgment to order the same to be entered of record, and thereupon such proper officer as aforesaid shall and may and is hereby authorised to enter judgment of death on record against such offender in the usual and accustomed form, and in such and the same manner as is now used, and as if judgment of death had actually been pronounced in open Court against such offender by the Court."

Such record to have same effect as if judgment pronounced.

Sect. 4. "That a record of every such judgment so entered as aforesaid shall have the like effect to all intents and purposes and be followed by all the same consequences as if such judgment had actually been pronounced in open Court."

Court to direct execution to be done on certain offenders.

Sect. 5. "That whenever any offender shall hereafter be convicted before the said Court of any offence for which such offender shall be liable to and shall receive sentence of death, and the said Court shall be of opinion that under the circumstances of the case the judgment of the law ought to be carried into effect, it shall be lawful for the said Court and such Court is

hereby required to order and direct execution to be done on such offender in the same manner as any court of assize is empowered to order and direct execution by the law as it stood before the passing of this act." 7 W. 4 & 1 V. c. 77.

Sect. 6. "Provided always, that nothing in this act contained shall affect her majesty's royal prerogative of mercy." Not to affect the royal prerogative.

Sect. 7. "Provided always, that nothing in this act contained shall extend or be construed to extend to prejudice or affect the rights, interests, privileges, franchises or authority of the lord mayor, aldermen and recorder of the city of London, or their successors, or to prohibit, defeat, alter, or diminish any power, authority or jurisdiction which at the time of making this act the said lord mayor, aldermen and recorder for the time being of the said city did or might lawfully use or exercise, except so far as is otherwise by this act expressly provided." Saving the rights of the city of London.

Sect. 9. "That this act shall be deemed to be a public act, and shall be judicially taken notice of as such by all judges, justices, and others." Public act.

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[5 & 6 W. & M. c. 11, s. 3; 5 Geo. II. c. 19.]
XI. *Forms*, 580.

I. The Nature of the Writ. Its Use. When it lies in general.

Nature of the writ.

NATURE of the Writ.]—A *certiorari* is an original writ, issuing out of the Court of Chancery or the Queen's Bench, directed in the Queen's name to the judges or officers of inferior courts, or to justices at sessions, or out of sessions, commanding them to *certify* or to return the records or proceedings in a judicial matter depending before them, to the end that the party may have the more sure and speedy justice before the Queen, or such justices as she shall assign to determine the cause. (1 *Bac. Abr. Certiorari*, A.; *Com. Dig. Certiorari.*)

It is agreed that the Court of Queen's Bench, having a general superintendency over all courts of inferior jurisdiction, may award a *certiorari* to remove the proceedings from any of them, except some particular statute or charter invest them with absolute judicature. (*Hawk.* b, 2, c. 27, s. 22; *Bac. Abr. Certiorari*, B.; *Carth.* 494; 12 *Mod.* 386; *Com. Dig. Certiorari*, A. 1.)

What certified without certiorari.

Justices of the peace may indeed deliver or send into the Queen's Bench indictments found before them, or recognizances of the peace taken before them, or force recorded by them, without any *certiorari*. (*Dalt.* c. 195.)

Habeas corpus where defendant in custody.

If there be an indictment to be removed, and the defendant be in actual *custody*, it is usual and proper to have a *habeas corpus* to remove him, and a *certiorari* to remove the record, for without the former the defendant must continue in the same custody. (2 *Hale*, 210; *R.* v. *Duchess of Kingston*, 1 *Cowp.* 283; *R.* v. *Bethell*, 1 *Salk.* 149; see *post*, "*Habeas Corpus*," Vol. III.)

Use of the writ.

Its Use.]—The use of a *certiorari* is for the superior court the better to consider and determine the validity of appeals, indictments, or presentments and other judicial proceedings, and to prevent a partial and insufficient trial, or judgment, or the execution of a wrongful judgment, which it is thought would take place in the original jurisdiction. (2 *Hale*, 210; 4 *Bla. Com.* 320; *Dick. Sess.* 381.)

On the removal of an indictment, the trial will be either at bar or at nisi prius, by a jury of the county out of which the indictment is brought; (4 *Bla. Com.* 320, 321;) and if a fair and impartial trial cannot be had in such county, the court will, on a suggestion entered on the record, order it to be tried in the next adjoining one. (3 *Burr.* 1330; 6 *T. R.* 195. So a special jury may be obtained in the superior court, (5 *T. R.* 626,) and more time for the trial may be thus obtained, or it may be brought on more expeditiously than in the inferior court. (*Id.*) So after a special verdict on an indictment at the Old Bailey for murder, the proceeding may be removed by *certiorari*, in order to obtain the opinion of the superior court. (2 *Ld. Raym.* 1577.) It may also be requisite to issue process of outlawry against the defendant in those places where the justice's authority does not extend, but where the writ of the Court of Queen's Bench can reach him, as that Court may issue process in any part of the kingdom. (5 *T. R.* 478, 503, 505; 2 *Hale*, 210; 4 *Bla. Com.* 320, 321; *Dick. Sess.* 381; *Hand's Pract.* 46.) Thus it seems to be absolutely necessary, where the offender has escaped from the county in which he committed the offence, before any process is issued against him; for, though a magistrate's warrant may be backed into any other county, yet it may be uncertain in what county he may be; and every difficulty is obviated by removing the proceeding into the supreme court of criminal jurisdiction. (5 *T. R.* 503.) And in case of felony, if after the removal

and the issuing process, the defendant come in upon the exigent, the Queen's Bench will grant a procedendo, by which the record may be carried back to the place where the indictment was taken. (6 Hen. VIII. c. 6; 5 *T. R.* 478.) So that by this means effectual process is obtained, and a trial in the most convenient place secured to the prosecutor.

1. *What it is, and use of.*

Also on the part of an indicted *defendant* too this writ may frequently be advantageous; as for the purpose of obtaining the judgment of the Court as to the validity of the proceedings, and to have a decision of the superior court on a demurrer. (*Hand.* 40; *Cowp.* 460.) So also to enable him to plead her Majesty's pardon. (2 *Hale*, 210; 4 *Bla. Com.* 320; *Dick. Sess.* 381.) So also where the defendant is a public officer, and his attendance is necessary where he resides, (1 *Chit. Rep.* 571, notes,) this will be desirable. It may also be desirable where he is indicted at the assizes for a nuisance, in order to compel a view of the premises, so as to enable him to shape his defence, which he cannot obtain from the judges in the country, without the prosecutor's consent. (1 *Sess. Cas.* 180; 2 *Barnard.* 214.) Another ground for desiring this writ on the part of the defendant may be, that an inferior court cannot, in criminal cases, grant a new trial upon the merits, but only for irregularity in the formal proceedings, and this advantage may be gained by the removal. (13 *East*, 416, n. b; 2 *Salk.* 650; 7 *Mod.* 85, n. a; 1 *Dougl.* 380; 1 *Stra.* 113, 392; *Fost.* 198; *Sayer*, 202.) If, after a verdict against the defendant at the assizes, the judge entertain doubts as to the nature of the offence, the defendant may be brought up by habeas corpus, and committed to Newgate, and the indictment removed into the Queen's Bench by *certiorari*, for the opinion of the Court. (*Rep. temp. Hardw.* 371; 1 *Salk.* 149; *Hawk.* b. 2, c. 27, s. 31.) If, however, the defendant be out on bail, and the proceedings be removed at the instance of the prosecutor, it seems that the original recognizances will be discharged. (2 *Leach*, 560.) But he may be compelled to put in fresh bail before the higher tribunal in the manner hereafter noticed. (*Hand's Pract.* 43.)

When it lies.

When it lies in general.]—Except where a statute otherwise directs, this writ of *certiorari* lies in all *judicial* proceedings in which a writ of error does not lie(*a*), and it is a consequence of all inferior jurisdictions erected by act of parliament to have their proceedings returnable in the Queen's Bench. (*Groenvelt* v. *Burwell*, 1 *Ld. Raym.* 469; *R.* v. *Inhabitants of* ———, *in Glamorganshire*, 1 *Ld. Raym.* 580; *R.* v. *Justices of Cashiobury*, 3 *D. & R.* 35.) And therefore a *certiorari* lies to justices of the peace, even in such cases which they are empowered by statute finally to hear and determine; and the superintendency of the Court of Queen's Bench is not taken away without express words. (2 *Hawk.* c. 27, s. 23.)

Right to take away only by express enactment.

For the *certiorari* being a beneficial writ for the subject, cannot be taken away without express words. If, therefore, a statute authorising a summary conviction before a magistrate, give an appeal to the sessions, who are directed to hear and *finally* determine the matter, it does not take away the *certiorari*, even after such an appeal made and determined. (*R.* v. *Jukes*, 8 *T. R.* 542.) So, although the Conventicle Act, (22 Car. II. c. 1,) enacted that "no other Court whatsoever should intermeddle with any causes of appeal upon that act, but that they should be *finally* determined in the quarter sessions *only*;" yet it was decided that the Court of Queen's Bench was not ousted of its right by *certiorari*. (*R.* v. *Moreley*, 4 *Burr.* 1040.) Also it was there said, that the words above-mentioned only meant that the *facts should not be* re-examined. (*Id.*)

(*a*) In this respect the proceeding by *certiorari* differs from a right of appeal. A *certiorari* always lies unless it is expressly taken away, and an appeal never lies unless it is expressly given by statute. (*R.* v. *Hanson*, 4 *B. & Ald.* 521.) The practice of taking away the *certiorari* by statute, which Lord Kenyon thought had become too frequent, (see 8 *T. R.* 542,) did not begin to prevail till the beginning of the reign of Will. III. not long after the introduction of appeal to the sessions, which came into general use towards the latter end of the reign of Charles II. (*Paley, Conv.* 212.)

1. *What it is, and use of.*

So where a *new* offence is created by statute and directed to be tried in an inferior court, if such court be established according to the course of common law, all the common law consequences attach upon the proceedings, one of which is, that the indictment may be removed into the Court of Queen's Bench. (*R.* v. *Wordley*, 4 *M. & Sel.* 508; *R.* v. *Hube*, 5 *T. R.* 542; and see *R.* v. *Rogers*, 5 *B. & Ald.* 773; *Hartley* v. *Hooker*, *Cowp.* 524.)

May be so taken away though no other mode of appeal given,

But the writ of *certiorari* may be taken away by statute, although no appeal is given to the sessions. (*R.* v. *Justices of St. Alban's*, 5 *D. & R.* 538; 3 *B. & Cres.* 698.) Or although an appeal is given to the sessions, and they make an order subject to a case. (*R.* v. *Middlesex*, 8 *D. & R.* 117; 4 *D. & R. M. C.* 41, S. C.)

and though proceedings are clearly irregular or informal.

And where justices proceed under a statute, by a clause of which the writ of *certiorari* is taken away, the Court have no power to issue such a writ, although the justices may have proceeded informally. (*R.* v. *Casson*, 3 *D. & R.* 136.)

A railway act directed that compensation for lands taken by the company in certain cases should be assessed by a special jury; that the deviation from that line of railway mentioned in the act should not exceed a specified distance; and that no proceedings taken in pursuance of the act should be removed by *certiorari*. A *certiorari* was applied for to remove an inquisition, on affidavits that the jury appeared by the inquisition not to be special, though the case was one in which a special jury was requisite; and that there had been a deviation greater than the act allowed. The writ was refused, because, if the proceedings were in pursuance of the act, the *certiorari* was taken away, and if not in pursuance of the act they were merely void. (*Reg.* v. *The Bristol and Exeter Railway Company*, 11 *Ad. & Ell.* 202, n.)

A railway act provided, that in case of dispute about the value of lands taken by the company, the sheriff, under-sheriff, coroner, or some person who should have filled one of those offices, should summon a jury to assess the damages, and should give judgment, which verdict and judgment were thereby made a record, and *certiorari* was taken away for any proceeding in pursuance of such act. The sheriff of L. appointed a deputy, who presided:—neither the sheriff, nor under-sheriff, nor other qualified person being present, but the inquisition purported to have been taken before the sheriff: Held, that notwithstanding the inquisition was made a record, affidavits were admissible, to show that the proceeding was *coram non judice*; and, secondly, that the proceeding, though irregular, was nevertheless a proceeding taken in pursuance of the act, and could not be removed by *certiorari*. (*Reg.* v. *The Sheffield and Manchester Railway Company*, 3 *Per. & D.* 111; 11 *Ad. & Ell.* 194, S. C.)

And Court will not directly or indirectly interfere.

And generally, when thus taken away, the Court will not directly or indirectly in any manner enable a defendant to remove proceedings before it. (See *R.* v. *Eaton*, 2 *T. R.* 472; *R.* v. *Justices of Yorkshire*, 1 *Ad. & E.* 563.) Nor will they interfere so as to review the proceedings by mandamus. (*R.* v. *Yorkshire*, 5 *B. & Adol.* 1003; 3 *Nev. & M.* 93, S. C.)

But crown not bound by such enactment unless named.

But even where the right to this writ is taken away by the express legislative enactment, the crown is not bound by it, unless expressly mentioned. (*R.* v. *Anon.* 2 *Chit. Rep.* 136; *R.* v. *Hube*, 5 *T. R.* 542; *R.* v. *Davies*, 5 *T. R.* 626; *R.* v. *Cumberland*, 6 *id.* 194.) And it seems that the attorney-general may in all cases have a *certiorari* on behalf of the defendant. (1 *East*, 303, n.; 4 *Burr.* 2458; and see *R.* v. *Burgess*, 1 *Ld. Kenyon*, 135.) And this rule, that a statute taking away *certiorari* does not bind the crown unless named, is not limited to cases where the crown has an actual interest, but extends to all prosecutions in the name of the Queen. And the rule is not defeated by the prosecutor having become nominally defendant; as where a conviction has been quashed at sessions, with costs to be paid by the prosecutor, and he seeks to quash the order of sessions. (*Rex* v. *Boultbee*, 4 *Ad. & Ell.* 498.)

Nor does such enactment apply where there is no jurisdiction.

Nor does an enactment, taking away the writ of *certiorari*, extend to cases where the Court below has no jurisdiction. (See *R.* v. *Justices of Derbyshire*, 2 *Ld. Kenyon*, 209; and *R.* v. *Fowler*, 1 *Ad. & Ell.* 836; *R.* v. *Yorkshire*,

5 *T. R.* 629; *R.* v. *Somersetshire*, 6 *D. & R.* 469; 5 *B. & Cres.* 816.) But where by a clause in a statute it is provided that no summary conviction under it shall be removed by *certiorari*, and upon the face of a conviction, it may be that the justices have no jurisdiction, or that having jurisdiction, they have omitted to set it forth, the defendant cannot obtain a *certiorari* to remove such conviction, unless he shows by affidavit that there was no jurisdiction. (*R.* v. *Long*, 1 *M. & R.* 139.) And where an order or a conviction under a statute shows a jurisdiction upon the face of it, it has been doubted whether, under any circumstances, a *certiorari* ought to issue. (*Anon.* 1 *B. & Adol.* 382.) But according to a later case, it seems that on the question of *jurisdiction* to make an order or conviction the Court may, on the order or conviction being removed, look into the facts and receive affidavits. (*Reg.* v. *Bolton*, 1 *Ad. & Ell. N. S.* 66; 4 *P. & D.* 679, S.C.; *R.* v. *Sheffield, &c. Railway Co. supra.*) Upon a *certiorari* to remove an order of sessions relating to an order of removal, the clerk of the peace returned the original order, the order of sessions, and a statement of facts from which it appeared, that the notice of the grounds of appeal was insufficient under the 4 & 5 Will. IV. c. 76, s. 81: it was held, that as the order of sessions was good on the face of it, and the sessions had not stated any case for the opinion of the Court, the statement of the clerk of the peace could not be noticed. (*Reg.* v. *Inhabitants of Abergele*, 5 *Ad. & Ell.* 795.)

1. *What it is, and use of.*

A paving act empowered commissioners to levy rates, giving to parties grieved an appeal to the quarter sessions, whose order was to be final; and no order, rate, &c. was to be removed by *certiorari*. On appeal against a rate, the respondents objected to the admission of certain evidence; the sessions, by a majority of eleven magistrates to eight, held the evidence admissible; three of the eleven magistrates were partners in a company to which belonged certain premises assessed to the rate in the name of the occupier. The sessions having quashed the rate, it was held, that a question in the cause having been decided by a Court improperly constituted, on account of the interest of the three magistrates, the clause prohibiting *certiorari* did not operate; and the Court of Q. B. had the order of sessions brought up by *certiorari*, and quashed it on affidavit of the above facts, although the affidavits did not satisfy the Court that the magistrates had acted partially. But if a party to the appeal, knowing of the interest, expressly or impliedly assent to the interested magistrate acting, such party cannot afterwards make the objection. (*Reg.* v. *Cheltenham* (*Commissioners, &c.*) 1 *Ad. & E. N. S.* 467.)

Nor where there is malversation.

Where an indictment was framed on an offence created by a statute taking away the *certiorari*, and contained also counts for another offence as to which it was not taken away, the writ was held issuable. (*R.* v. *Saunders*, 5 *D. & R.* 611; and see *R.* v. *Fowler*, 1 *Ad. & Ell.* 836.)

Nor where the writ is only partially taken away.

And where by the words of a statute the *certiorari* is taken away, but by its general tenor that is only done to give the option of appeal to the sessions, the right of proceeding by *certiorari* is only barred by the party adopting the method of appeal. On a motion to remove by *certiorari* a conviction by a justice on stat. 16 Geo. III. c. 30, (now repealed by 7 & 8 Geo. IV. c. 27,) to prevent the stealing of deer, it was objected that no *certiorari* lay; for by the 23d section it is enacted, that no conviction or judgment should be removed by *certiorari*. But the Court were of opinion that the result of the several provisions in the act was, that the defendant had an option either to remove the proceedings from before the convicting justice by *certiorari*, or to appeal to the sessions; that if he had adopted the latter mode, the *certiorari* would have been barred, but not in the former case. *Buller*, J. The language of the Court has always been, that the king has a right to remove proceedings by *certiorari* of course; but that where a defendant makes an application of this sort, he must always lay a ground for it before the Court. Lord *Mansfield*, C. J. has laid down this distinction again and again, that on the part of the crown it is a matter of course for the Court to grant it, but not so on the part of the defendant. And *Buller*, J. on a subsequent day said, that the rule requiring the defendant to lay a ground before the Court for granting a *certiorari* had obtained since the time of Car. II., and that it appeared that it

Nor where it is taken away to give defendant an option of appealing.

1. *What it is, and use of.*

was then held as clear law, that a *certiorari* ought not to be granted but upon a ground shown. (*R.* v. *Eaton*, 2 *T. R.* 89.)

Where a subsequent statute not taken away, the writ in express terms.

Where a statute imposed penalties to be recovered on summary conviction, and took away the right of *certiorari*, and a later statute on the same subject imposed additional penalties on other persons, and contained a clause by which it was provided that all the powers, *provisions*, exemptions, penalties, forfeitures, payments, remedies, matters and things contained in the former act should be as effectual for carrying the same into execution as if re-enacted; it was held, on a conviction on the latter statute, that the clause in the former statute taking away *certiorari* was extended by inference to the new statute. (*R.* v. *Fell*, 1 *B. & Adolph.* 380.) A river navigation act provided that no proceeding to be taken in pursuance thereof should be removed by *certiorari*: by a subsequent statute for improving the same navigation, it was enacted that all the powers, provisions, exemptions, rules, remedies, regulations, penalties, forfeitures, articles, matters and things whatsoever contained in the former act should be in full force, and extend to and be applied and enforced as to that act and the matters therein contained, in as full a manner to all intents and purposes as if therein re-enacted; it was held, that these were sufficient words to take away the *certiorari* on proceedings under the latter act. (*R.* v. *Justices of Yorkshire, W. R.* 1 *Adol. & Ell.* 563.)

II. What Proceedings removable by, and on what Grounds granted.

In general.

In general.]—A *certiorari* does not lie to remove other than *judicial* acts, *ante*, 553. Therefore it does not lie to remove a mere order of Court or warrant of apprehension issued by a magistrate; (*R.* v. *Lloyd. Cald.* 309; *R.* v. *Lediard, Say.* 6;) nor a poor rate; (*R.* v. *King*, 2 *T. R.* 235; *R.* v. *Wavell*, 1 *Dougl.* 116;) nor an assessment of the land-tax; (*R.* v. *King*, 2 *T. R* 234;) nor a warrant of distress to levy a poor rate; (*Exp. Taunton*, 1 *Dowl. P. C.* 54;) nor an appointment of a surveyor under the Highway Act, 13 Geo. III. c. 78, when that act was in force. (*R.* v. *Justices of St. Alban's*, 5 *D. & R.* 538; 3 *B. & Cres.* 698, S. C.) But an appointment of overseers prior to the New Poor Law Act could be removed by *certiorari*. (*R.* v. *Warwick*, 2 *Stra.* 991; see *R.* v. *Somersetshire*, 1 *D. & Ry.* 443.) It lies to the Poor Law Commissioners to bring up an order to build a workhouse. (*R.* v. *P. L. Com.* 8 *A. & Ell.* 54.)

A recognizance.

The Court has refused to grant the writ to remove a recognizance before justices of oyer and terminer, &c. because the Court below is most proper to judge upon the whole circumstances of the case, which are equitably to be considered whether it ought to be estreated or not. (2 *Hawk.* c. 27, s. 33; *Lofft*, 321.)

Order of estreat.

It will lie to remove an order of sessions to estreat a recognizance. (See *R.* v. *Yorkshire, W. R. Js.*, 7 *A. & Ell.* 583; 2 *N. & P.* 457, S. C.)

A presentment.

A presentment at a court leet for a nuisance; (*Cowp.* 458,) and an information at the quarter sessions, for exercising a trade without having served an apprenticeship, (*Cowp.* 369,) have been held removable by this writ.

An information.

Articles of peace.

Articles of the peace exhibited at quarter sessions and the order to find sureties made thereupon, are removable by this writ, and the Court of Queen's Bench may examine into the sufficiency of the articles to warrant the order. (*Reg.* v. *Dunn*, 4 *Per. & Dav.* 415.)

Railway inquisition.

Where an act of parliament for making a railway directed that inquisitions for assessing compensation to the owners of lands required by the company should be taken before the sheriff of the county, and that such inquisitions and judgments thereupon should be kept by the clerk of the peace among the records of the county, and be deemed records to all intents, &c.: it was held, first, that a *certiorari* lies even after judgment to remove such an inquisition; secondly, that the rule to show cause why the writ should not issue was properly directed to the clerk of the company, although the inquisition was out of their custody. (*Reg.* v. *Manchester and Leeds Railway Co.* 1 *Per. & D.* 164.)

Indictments and presentments.]—The writ lies to remove indictments from the sessions, and other inferior criminal jurisdictions, before verdict.

2. *What proceedings removable by, &c.*

Indictments and presentments.

At the instance of the crown the writ is demandable of *absolute right*, and the Court is bound to grant it. (1 *Burr.* 2458; *R.* v. *Eaton*, 2 *T. R.* 89; 1 *East*, 303, n. d.) And, therefore, when it is applied for by the attorney-general, or other officer of the crown, either as a prosecutor, or when he takes up the defence of the party indicted, on account of his being an officer of the crown, or for some other reason, it must issue as a matter of course, and the Court or judge has no discretion to exercise; (*Id. ibid.*; 4 *Burr.* 2458; 1 *East*, 303, n. d.; *R.* v. *Thomas*, *Mich. Term*, 1815;) and even where a statute takes away the *certiorari*, it does not, as we have already seen, extend to the crown, unless expressly mentioned, *ante*, 554.

At the instance of the crown.

And upon the ground that every indictment is at the suit of the Queen, the writ was before the 4 & 5 Will. IV. c. 33, usually awarded as a matter of course to *private prosecutors*, and this even from the Old Bailey, though it was even before that act, as it still is now, in the power of the judges to refuse it or to award a *procedendo*, if cause be shown why it ought not to have been issued. (See *Cases in King's Bench*, 38; *R.* v. *Lewis*, 4 *Burr.* 2458; *R.* v. *Gwynne*, 2 *Burr.* 752.) But now, by the 5 & 6 Will. IV. c. 33, for preventing the vexatious removal of indictments into the Court of Queen's Bench, s. 1, after reciting that "it is expedient to prevent prosecutors of indictments and presentments from vexatiously removing the same out of inferior courts into his Majesty's Court of King's Bench:" it is enacted, "that from and after the passing of this act, [21 August, 1835,] no writ of *certiorari* shall issue from the Court of King's Bench at Westminster for removing into that Court any indictment or presentment from any court of session, assize, oyer and terminer, or gaol delivery, or any other Court, at the instance of the prosecutor or any other person, (except his majesty's attorney-general,) without motion made first in the Court of King's Bench, or before some judge of that Court, and leave obtained to remove such indictment or presentment, in the same manner as similar motions may now be made and leave given where such application is made on the part of defendants; any law, practice or use to the contrary in anywise notwithstanding."

At the prosecutor's instance.

5 & 6 W. 4, c. 33.

The mere fact of a defendant on an indictment at sessions being in the commission of the peace for the county has been considered not a sufficient ground within the above enactment for removing the indictment at the prosecutor's instance. (*R.* v. *Fellowes*, 4 *Dowl.* 607.) But it would be otherwise where he has been guilty of endeavouring to create prejudices in his favour, as by circulating among the other magistrates a printed account of the charges brought against him, or the like. (*Reg.* v. *Grover*, 8 *Dowl.* 325.) And in a recent case of an indictment at a borough sessions for a libel, where the number of jurors in the borough was small, and the defendant was intimate with many of them, a *certiorari* was granted to remove it. (*Reg.* v. *Ousley*, 6 *Jur.* 62; *Garbett* v. *Ouseley*, *id.* 193, *cor. Williams*, J.; and see *Reban* v. *Trevor*, 4 *Jur.* 292.)

It is left to the discretion of the Court or judge either to grant or deny it at the prayer of the defendant. (*R.* v. *Lewis and others*, 4 *Burr.* 2456; 2 *Hawk.* c. 27, s. 27.) And in the exercise of their discretion it is seldom granted when the offence charged against him is serious, and particularly affecting the public. Thus they generally refuse to remove an indictment for any heinous misdemeanor. (2 *Hawk.* c. 27, s. 28; *R.* v. *Pusey*, 2 *Stra.* 717. They refused it in a recent case of an indictment for an impious libel; *R.* v. *Heywood*, 4 *Jur.* 413. As to removing an indictment for murder, see *R.* v. *Mead*, 3 *D. & R.* 301; *R.* v. *Thomas*, 4 *M. & Sel.* 442; or for an unnatural crime, see *R.* v. *Holden*, 2 *Nev. & M.* 167; 5 *B. & Ad.* 347; for a felony, see *R.* v. *Penprase*, 4 *id.* 575; 1 *Nev. & M.* 312.) So they are still more reluctant to grant these applications without the assent of the prosecutor, when they are made to remove proceedings from a jurisdiction of superior eminence, as before justices of assize or gaol delivery, or from the Central Criminal Court, or from the Old Bailey, or from the Middlesex sessions, or any other court where any of the judges preside. (*R.* v. *Wartnaby*, 2 *Ad. & Ell.* 435; *R.* v.

At the defendant's instance.

2. *What Proceedings removable by, &c.*

Duchess of Kingston, Cowp. 283; *Anon.* 1 *Salk.* 144; 1 *Sess. Ca.* 314; *Burr.* 877, 1202; 1 *Ken. Rep.* 135; 1 *Chit. C. L.* 379.)

But they will grant the writ where they are satisfied by affidavit that any difficult point of law is likely to arise at the trial more fit to be discussed by a superior tribunal. (*R.* v. *Moule*, 5 *Ad. & Ell.* 539; *R.* v. *Morton*, 1 *Dowl. N. S.* 543.) And in a recent case the Court removed an indictment by *certiorari*, at the instance of the defendant, from the Central Criminal Court, on the suggestion that it involved points of law arising out of proceedings in Chancery relative to matters of account. (*R.* v. *Wartnaby*, 2 *Adol. & Ell.* 435; and see *R.* v. *Josephs*, 8 *Dowl.* 128; but see *R.* v. *Morton*, *supra.*)

Also if it be clearly shown by affidavit that there is a probability of partiality or unfairness in the trial, the *certiorari* will be granted. (*R.* v. *Lewis*, 2 *Stra.* 704; *R.* v. *Fawle*, 2 *Ld. Raym.* 1452; *R.* v. *Waddington*, 1 *East*, 167; *R.* v. *Penpraze*, 4 *B. & Ad.* 575; 1 *Nev. & M.* 312; *R.* v. *Hunt*, 3 *B. & Ald.* 444; *R.* v. *Holden*, 2 *Nev. & M.* 167; 5 *B. & Ad.* 347; *Rohan* v. *Trevor*, 4 *Jur.* 292; see also *R.* v. *Fellows*, *supra.*) But a very strong case must be made out. (*Id.*) It is not sufficient ground for the issuing of the writ that prejudices existed against the defendant, unless there was some prejudice in the court below. (*R.* v. *Matthews*, 1 *Chit. Rep.* 751, n.; and see *R.* v. *Mead*, 3 *D. & R.* 301; *R.* v. *Jacobs*, 3 *Jur.* 999.) In a recent case the Court refused to grant the writ to remove an indictment from the quarter sessions, on the ground that the chairman of the court was intimate with the father of the prosecutrix. (*Reg.* v. *Renshaw*, 5 *Jur.* 801.) If the prosecutor's attorney be under-sheriff, and attended the grand jury at the time of finding the bill, or the like, the writ will be granted. (*R.* v. *Webb*, 2 *Stra.* 1068; *Reg.* v. *Knatchbull*, 1 *Salk.* 150.)

If the prosecution appear to rest on slight foundation, or it be doubtful whether in point of law it be sustainable, and the defendant's general character be good; (*R.* v. *Wells*, 1 *Stra.* 549; *Nehuff's case*, 1 *Salk.* 151; *Bac. Abr. Certiorari, A.*;) or if the prosecution seem to originate in malice; (1 *Barnard.* 41; *Bac. Abr. Certiorari, A.*;) or where there has been vexatious delay, and by reason of the absence of the judges a trial has not been obtained; (*R.* v. *Morgan*, 2 *Stra.* 1049; *R.* v. *Ferguson*, *Rep. temp. Hardw.* 370;) the writ will in general be allowed. So it will be allowed if the prosecutor put the defendant to unnecessary delay and expense, and harass him by continuing proceedings, without bringing the matter to trial. (2 *Stra.* 1049; *Com. Dig. Certiorari, D.*)

On an indictment for a nuisance, where it is necessary to the defendant to have a view of the premises, a *certiorari* will be granted for the purpose, upon affidavit that he cannot otherwise obtain it. (1 *Barnard.* 214; 1 *Sess. Cas.* 180.)

Where the defendant was a public officer, (a deputy register,) and his personal attendance was daily necessary, the Court granted a *certiorari* to remove an indictment from the Old Bailey to Gloucester, where the defendant resided; (1 *Chit. Rep.* 571, n.)

The writ will not, it seems, in any case be granted for the changing the place of trial, where the indictment arises in a town which is a county of itself, for in such instances a particular course of proceeding is directed by the 38 Geo. III. c. 52, in order to have a trial by a jury of the county at large. (*R.* v. *Holden*, 2 *Nev. & M.* 167; 5 *B. & Adol.* 352, 353, S. C.)

Where there are several defendants, it was considered in one case, under very peculiar circumstances, that all should concur in the application on their or one of their behalves. (*R.* v. *Hunt and others*, 3 *B. & Ald.* 444.) But this must not be considered as a general rule. (See *post*, 565.)

Convictions and orders, &c.

Convictions and Orders, &c.]—Convictions, and orders of justices at or out of sessions, and other summary judicial proceedings, may be removed into the Court of Queen's Bench by this writ of *certiorari*, in order that the same may be quashed for any defect apparent on the face of them. But the defect must be so apparent, otherwise the writ will not be granted. Nor will it be granted if on the face of the conviction or order it appears that the magistrates had jurisdiction, and that they duly exercised it. The Court or judge will not enter into any examination or discussion of the facts or reasons upon

which the conviction or order was made, (*R.* v. *Justices of Cashiobury*, 3 *D. & Ry.* 35; *R.* v. *Justices of Monmouthshire*, 8 *B. & Cres.* 137; 2 *M. & R.* 172, S. C.; *Anon.*, 1 *B. & Adol.* 382; *R.* v. *St. James, Westminster*, 2 *B. & Ad.* 241; *R.* v. *Justices of Cheshire*, 8 *A. & Ell.* 398; *R.* v. *Abergele*, 5 *Ad. & Ell.* 795; *post*, 574,) provided the justices had jurisdiction to make it. (*Ante*, 555.)

2. *What Proceedings removable by, &c.*

Even although the conviction or order be a nullity, yet it seems a *certiorari* may be awarded to remove it, in order to quash it. (*Reg.* v. *Yorkshire, W. R., Js.*, 2 *Nev. & P.* 457; 7 *Ad. & Ell.* 583, S. C.)

A *certiorari* will not be granted to bring up the inquisition of a compensation jury unless defects in the inquisition be positively sworn to. Thus where a statute directed that a railway company should not take lands unless set out in a schedule to the act, or certified by justices to have been omitted by mistake, it was held not sufficient to show that lands which were the subject of the inquisition were not in the schedule, without negativing the fact of the certificate. (*Reg.* v. *Manchester and Leeds Railway Company*, 8 *Ad. & E.* 413.)

By a local act trustees were authorised to take lands for the improvement of a harbour; and in case of disagreement with the landowner as to the price to be paid him, or of his refusal to treat, to direct a sheriff to summon a jury by whom the price was to be assessed. If the jury gave a greater sum than that offered by the trustees, or the same sum, they were to pay all the costs; if a less sum, the costs to be paid equally by both parties; and in the former event, to be recovered by a distress warrant from a magistrate: it was held, that it belonged to the trustees to have the inquisition of the jury properly drawn up, and that therefore they could not object to the sum awarded by it, or have it brought up by *certiorari* to quash it on the ground that it did not state the disagreement or the refusal to treat, so as to show that the jury had jurisdiction, and that it did not state the proportion of the sum assessed to the sum offered, so as to ascertain which party was to pay the costs. (*Reg.* v. *Swansea Harbour Trustees*, 1 *Per. & D.* 512; 8 *Ad. & E.* 413, S. C.)

Discretionary power to grant.

The Court or judge has in all cases a discretionary power to grant the writ or not. (*R.* v. *Bass*, 5 *T. R.* 252; see *R.* v. *Manchester and Leeds Railway Company*, 8 *A. & E.* 413.) It will not in general be granted unless it be shown that some injustice has been or will be done in the inferior jurisdiction. (*R.* v. *Bass*, 5 *T. R.* 252.) *Et per* Lord *Kenyon*, "A *certiorari* is not to be granted *ex debito justitiæ*, but the application is made to the sound discretion of the Court, which will not be well exercised if they do not give an opportunity to the party applying for the writ to litigate any probable cause." *Et per Ashurst*, J., "If it had appeared that the justices had exceeded their jurisdiction, the Court would have granted a *certiorari*, in order that the conviction might be quashed, even though no objection were made to the want of jurisdiction below." (*Id.*) In general a mere informality in a conviction or order, having no reference to the merits of the case, ought not of itself to be the inducement for removing it, but that inducement ought to be of some substantial defect in the justice and legality of the proceeding itself. (See *R.* v. *Justices of Denbighshire*, 1 *B. & Ad.* 616.) The conduct of the party applying for the writ may be frequently taken into consideration. (*R.* v. *South Holland Drainage Committee*, 8 *A. & E.* 429.)

When granted pending or after an appeal.

Pending an appeal, a *certiorari* will rarely be granted; and if granted, it may be quashed. (*R.* v. *Sparrow*, 2 *T. R.* 196, n.)

A rule was made in the Court of Queen's Bench, E. 1 Anne, *Reg. Generalis*, that no *certiorari* should be granted to remove orders of justices, from which the law has given an appeal to the sessions, before the matter be determined on the appeal, because it hinders the privilege of appealing; and if any order be removed before appeal, it shall be sent down again; but if the time of appeal be expired, the case is not within the rule. By *Holt*, C. J. But afterwards, M. 4 Anne, in the case of *Shellington*, it was held that advantage must be taken of this rule upon the motion to file the order; for that after it is filed, it is too late. (*R.* v. *Shellington*, 1 *Salk.* 147.)

But in the case of the borough of Warwick, (*R.* v. *Warwick*, 2 *Str.* 991,) there was an appeal from a poor-rate, and the sessions made an order that the churchwardens should produce the books at an adjourned day; before which a *certiorari* was brought to remove that order: and it was held to lie, though

2. *What Proceedings removable by, &c.*

the appeal was depending, else the order must be obeyed before the validity of it can be determined. It was also held that an appointment of overseers may be removed before an appeal to the sessions; for the rule laid down in 1 *Salk* 147, extends only to the case where there is a limited time for appealing, as to the *next* quarter sessions; but the statute of 43 Eliz. c. 2, is not so restrained, and, consequently, it can never be said that the time for appealing is out; and if the appeal from an appointment is lodged, there can be no *certiorari* till the sessions have made a determination; and a *certiorari* brought, pending such appeal, shall be superseded. After the appeal has been determined and the conviction confirmed, then indeed it may be removed as in other cases; (*R.* v. *Jukes*, 8 *T. R.* 625;) but if the conviction has been quashed, it cannot be removed, unless the sessions have merely quashed it subject to a case for the opinion of the Court; for when quashed, it does not appear on the face of the order of sessions but that they quashed it on the merits. If indeed a case be granted, then the order of sessions and case may be removed by that writ, and the opinion of the Court taken upon them; and if the Court quash the order, it will have the effect of setting up the conviction, which may then be enforced. (See *R.* v. *Allen*, 15 *East*, 333; 1 *Arch. J. P.* 212.) Where an appeal against an order of removal had been tried with the acquiescence of the appellants and the respondents, and the order quashed, a *certiorari* to remove the proceedings for the purpose of quashing the order of sessions was refused, although the respondents received no notice of trial, as required by a rule of court of the sessions, and were consequently wholly unprepared for the trial. (*R.* v. *Yorkshire, E. R. Js.*, 3 *Nev. & M.* 93; 5 *B. & Ad.* 1003, S. C.)

If the sessions upon appeal quash or confirm an order of justices, and both orders are brought before the Court of Queen's Bench by *certiorari*, then, if the order of justices be bad upon the face of it, and the order of sessions confirm it, the Court will quash both orders; if the order of sessions quash it, the Court will intend that it was quashed for defect of form, and will confirm the order of sessions; but if the order of justices be good upon the face of it, then, if the sessions confirm it, the Court of course will confirm the order of sessions; or if the sessions quash it, the Court will intend that it was quashed upon the merits, and confirm the order of sessions. (*South Cadbury* v. *Braddon*, 2 *Salk.* 607; *Set. & Rem.* 172; 1 *Arch. J. P.* 213.)

An order of sessions confirming a rate was removed by *certiorari* into the Court of Queen's Bench; that Court quashed the order of sessions. A subsequent rate having been made by the sessions, open to the same objection, pending the argument on the above case, but against which no appeal was made: it was held, that as the objection was made express matter for an appeal to the sessions, the appellants were not entitled to have the rate quashed on *certiorari*, it being good upon the face of it. (*Reg.* v. *Middlesex, Js.*, 1 *Per. & D.* 102; 9 *Ad. & Ell.* 540, S. C.)

As to the removal of orders of removal, and orders for the relief of children by parents, by *certiorari*, for the purpose of quashing them, see title "*Poor*," Vol. IV.

III. Within what time the Writ must be applied for.

Indictments, &c.

Indictments, &c.]—A *certiorari* may remove a record that shall come within its description, before the time of its return, though there were no such record *in esse* at the time of its *teste*, nor at the time when it was first delivered to the Court below. (2 *Hawk. P. C.* c. 27, s. 23.) And it seems that a *certiorari* may also remove an indictment which is discontinued below. (*Ibid.* s. 74.)

In all cases the application should be made time enough for the trial to take place at the next holding of the Court in which it is the object to have it heard. (*R.* v. *Perkins*, 1 *Chit. C. L.* 2d edit, 381.)

In misdemeanors must be before jury sworn.

By stat. 60 Geo. III. c. 4, s. 3, 4, 5, in cases of misdemeanor the *certiorari* must be delivered before the jury are sworn; but by sect. 4, it may be applied for and issued before the indictment has been found, in the like cases, in the same manner, and upon the same terms and conditions as if such writ of *certiorari* had been applied for after such indictment had been found.

3. *Time of applying for.*

In prosecutions by indictments and informations in the Crown Office, the application for the writ should regularly be made before issue joined. (2 *Hawk.* c. 27, s. 10, 30; *R.* v. *Roupel, Cowp.* 369, 458; *R.* v. *Hube*, 5 *T. R.* 542)

In prosecutions in Crown Office, before issue joined.

The writ will never be granted to remove an indictment after conviction, unless for some special cause; as where the judge below is doubtful what judgment to give. (2 *Hawk.* c. 27, s. 31.)

Not after conviction.

In *R.* v. *D. Jackson*, (6 *T. R.* 145,) the defendant had been convicted at the quarter sessions upon an indictment for extortion, and then removed the indictment between verdict and judgment, and obtained a rule calling upon the prosecutor to show cause why judgment should not be arrested for some objections to the indictment. And Lord *Kenyon* said, that the removing of proceedings in this stage from inferior jurisdictions ought to be discouraged; that in cases where the punishment is discretionary, and this Court should be of opinion, after hearing the case argued, that the judgment ought not to be arrested, a *procedendo* must be awarded, and the party sent back again to the inferior jurisdiction, to receive judgment; that he thought the Court should adopt the same mode in this instance; and that the defendant might bring a writ of error after judgment, if the record were erroneous. This decision seems to have been confined to cases in which the judgment was *discretionary;* but if the verdict should be at the Midsummer sessions, after Trinity Term, and the defendant come in, as he must, to receive judgment at the ensuing Michaelmas sessions, and the judgment be not discretionary, but definite by law, it is manifest that it might be a vexatious case, if a *certiorari* could not be issued between the verdict and judgment, inasmuch as it might happen, where imprisonment for a month, or other certain period, was the legal penalty, that before the *certiorari* could be sued out, the defendant might have suffered the greater portion of the judgment. (*Observations of Mr. King, editor of the 22d edition of Burn's Justice.*) And in the above case of *R.* v. *Seton*, the *certiorari* which had issued before verdict was quashed, *quia improvidè emanavit.*

In *R.* v. *Oxfordshire*, (13 *East*, 411,) the defendants were indicted at the assizes, and found guilty of the non-repair of a public bridge. And afterwards a motion was made in the Court of Queen's Bench for a *certiorari* to remove thither the indictment and proceedings, for the purpose of moving for a new trial. But it was resolved by the Court that they had not the power of entering into the merits of verdicts, and granting new trials in proceedings before inferior jurisdictions; and they refused the *certiorari.* (And see *R.* v. *Pennegoes Machynlleth*, 1 *B. & C.* 142; 2 *D. & R.* 209; 3 *D. & R.* 388, S. C.; *R.* v. *Nicholls*, 2 *Stra.* 1227; *R.* v. *Whiston*, 6 *Jur.* 1039.)

Even where a defendant, in an indictment for a misdemeanor, surreptitiously obtained an acquittal by not complying with the practice of the sessions in giving notice of trial and bringing on the indictment for trial after disposing of the felonies, the Court of Queen's Bench would not grant a *certiorari* to remove the indictment, in order to set aside the verdict. (*Reg.* v. *Unwin*, 7 *Dowl.* 578.)

Where defendant has confessed the charge.

In *R.* v. *Gwynne*, (2 *Burr.* 749,) the Court (on a defended motion) granted a *procedendo*, at the instance of the defendants, upon an indictment for an assault at the quarter sessions at Brecon, removed into the Queen's Bench by *certiorari*, because the *certiorari* had not issued till after the defendants had confessed the assault below; though the conviction was not after trial, and though several of the justices were sworn to be near relations of Mr. Gwynne, one of the defendants,—namely, his father, two brothers, and an uncle.

Where a special verdict.

Where there has been a *special verdict*, even at the Old Bailey, it may be removed in order to be argued and more solemnly decided in the superior Court. (2 *Hawk.* c. 27, s. 31; *Bac. Ab. Certiorari*, A.) But in the case of *R.* v. *Nichols*, (13 *East*, 412, *notis*,) which was the case of an indictment for a conspiracy, *Lee*, C. J., said he knew no instance of a special verdict from Hicks's Hall removed into the Queen's Bench, and that if a conviction were removed thither by *certiorari*, the Court would not give judgment upon it. It seems, however, that this is only so where the fine is uncertain. (*Id.*)

If the application be neglected until too late, the only course left to the

3. *Time of applying for.*

party is a writ of error, under which, however, defects only apparent on the face of the indictment can be taken advantage of. (*R.* v. *Seton*, 7 *T. R.* 373; *R.* v. *Pennegoes*, 1 *B. & Cres.* 142; 2 *D. & R.* 209, S. C.)

Railway inquisition.

A *certiorari* to remove an inquisition under a railway act may be applied for after judgment. (*R.* v. *Manchester, &c. Railway Co.*, 1 *P. & D.* 164.)

Convictions, orders, &c.

Convictions, Orders, &c.]—In the case of convictions, orders, and summary proceedings before magistrates, the proceedings may be removed by *certiorari* after judgment, because they can only be removed by *certiorari*. (*R.* v. *Seton*, 7 *T. R.* 373; *R.* v. *Jackson*, 6 *T. R.* 145.)

Must be in six months after conviction.

By 13 Geo. II. c. 18, s. 5, it is enacted, "that no writ of *certiorari* shall be granted, issued forth, or allowed, to remove any *conviction, judgment, order, or other proceedings* had or made by or before any justice or justices of the peace of any county, city, borough, town corporate or liberty, or the respective general or quarter sessions thereof, unless such *certiorari* be moved or applied for within *six calendar months* next after such conviction, judgment, order, or other proceedings shall be so had or made, and unless it be duly proved upon oath that the said party or parties suing forth the same hath or have given *six days' notice thereof in writing* to the justice or justices, or to two of them, (if so many there be,) by and before whom such conviction, judgment, order, or other proceedings shall be so had or made, to the end that such justice or justices, or the parties therein concerned, may show cause, if he or they shall so think fit, against the issuing or granting such *certiorari*."

The term "other proceedings" in this enactment, means other proceedings *ejusdem generis*, and therefore does not extend to indictments. (See *R.* v. *James*, 1 *East*, 303, n.) It does not extend to an application by the crown or prosecutor. (*Id.*; and see *R.* v. *Farewell*, 2 *Stra.* 1209; *Paley on Conv.* 215; *R.* v. *Berkeley*, 1 *Ld. Ken.* 80.)

The six calendar months must be computed from the date of the conviction or order. (*R.* v. *Boughey*, 4 *T. R.* 281.) And the writ to remove an order of sessions, subject to a case to be stated, must be applied for within six calendar months after the order made, and not within six months after settling the case; and this whatever may have been the cause of the delay. (*R.* v. *Bloxam*, 3 *N. & M.* 385; 1 *Ad. & Ell.* 386, S. C.; 1 *Chit. Stat.* 133, n. *c.*) In strictness, cases ought to be settled *sedente curiâ*. (*R.* v. *Sussex*, 1 *M. & Sel.* 631, 734; *R.* v. *Kaye*, 1 *D. & R.* 436.) And so as to an order of sessions. (*Lofft*, 544.) But the writ to remove an order for stopping a highway, may be applied for within six months after such order has been confirmed at sessions, though more than six calendar months have elapsed since the order was made. (*R.* v. *Middlesex Js.*, 5 *Ad. & Ell.* 626.)

When the sessions commenced on the 5th April, and an order of sessions was made on the 7th April, an application made at a judge's chambers on the 3d October, and allowed on or before the 7th October, for a *certiorari* to remove an order of removal, was held within sufficient time. (*R.* v. *Abergele (Inhabitants)*, 5 *Ad. & Ell.* 795.)

Pending or after an appeal.

As to the applying for the writ pending or after an appeal, see *ante*, 559.

IV. Mode of obtaining the Writ; Notice of Application and Recognizance to be entered into.

Indictments, &c.

Indictments, Presentments, &c.]—The mode of applying for the writ of *certiorari* to remove an indictment or presentment is regulated by several legislative provisions.

In term time grantable only on motion.

By stat. 5 & 6 W. & M. c. 11, (made perpetual by statute 8 & 9 W. & M. c. 33,) after reciting, in sect. 1, that abuses had existed in the removal of indictments by *certiorari*, sect. 2 enacts, "that in term time no writ of *certiorari* whatsoever, at the prosecution of any party indicted, be hereafter granted, awarded, or directed out of the said Court of King's Bench, to remove any such indictment or presentment of trespass or misdemeanor, before trial had, from before the said justices in the said courts of general or quarter sessions

of the peace, unless such *certiorari* shall be granted or awarded upon motion of counsel, and by rule of Court made for the granting thereof, before the judge or judges of the said Court of King's Bench sitting in open Court, and that all the parties indicted, prosecuting such *certiorari*, before the allowance thereof, shall find two sufficient manucaptors, who shall enter into a recognizance before one or more justices of the peace of the county or place, in the sum of twenty pounds, [see the 5 & 6 Will. IV. c. 33, s. 2, *infra*,] with condition at the return of such writ to appear and plead to the said indictment or presentment in the said Court of King's Bench, and at his and their own costs and charges to cause and procure the issue that shall be joined upon the said indictment or presentment, or any plea relating thereunto, to be tried at the next assizes to be held for the county wherein the said indictment or presentment was found, after such *certiorari* shall be returnable, if not in the cities of London, Westminster, or county of Middlesex; and if in the said cities or county, then to cause or procure it to be tried the next term after, wherein such *certiorari* shall be granted, or at the sitting after the said term, if the Court of King's Bench shall not appoint any other time for the trial thereof; and if any other time shall be appointed by the Court, then at such other time, and to give due notice of such trial to the prosecutor, or his clerk in Court; and that the said recognizance and recognizances, taken as aforesaid, shall be certified into the said Court of King's Bench, with the said *certiorari* and indictment, to be there filed, and the name of the prosecutor (if he be the party grieved or injured) or some public officer to be indorsed on the back of the said indictment; and if the person prosecuting such *certiorari*, being the defendant, shall not, before allowance thereof, procure such manucaptors to be bound in a recognizance as aforesaid, the justices of the peace may and shall proceed to trial of the said indictment at the said sessions, notwithstanding such writ of *certiorari* so delivered."

4. *Mode of obtaining it.*

Recognizance to be given for trying the issue next assizes.

Except in London and Westminster.

Certiorari granted without recognizance void.

Sect. 3, as to costs, will be found *post*, 575.

Sect. 4. Provided always, "that in any of the vacations writs of *certiorari* may be granted by any of the justices of their Majesties' Court of King's Bench, [or since 1 & 2 Vict. c. 45, s. 1, any judge of either of the superior courts,] whose names shall be indorsed on the said writ, and also the name of such person at whose instance the same is granted; and that the party or parties indicted, prosecuting such *certiorari*, shall, before the allowance of such writ or writs of *certiorari*, find such sureties, in such sum and with such conditions as are before mentioned and specified in this present act."

How grantable in vacation.

The like provisions are enacted by sect. 5, concerning the removal of indictments by *certiorari* within the counties of Chester, Lancaster, and Durham.

And by statute 5 & 6 Will. IV. c. 33, s. 2, after reciting that "it is expedient to extend the powers of an act passed in the fifth year of the reign of King William the Third and Queen Mary, intituled '*An Act to prevent Delays of Proceedings at the Quarter Sessions of the Peace*,'" it is enacted, "That instead of the recognizance now by law required to be entered into before the allowance of a writ of certiorari, every person indicted or presented in any court of session, assize, oyer and terminer, gaol delivery, or any other court, who shall obtain a writ of certiorari for removing any indictment or presentment whatever into the Court of King's Bench, (not being in custody for want of bail to answer such indictment or presentment,) shall before the allowance of such writ, enter into a recognizance before one of his Majesty's justices of the Court of King's Bench, or before a justice of the peace of the county or place in which the offence is charged to have been committed, or in which such person shall reside, in such sum and with such sureties as the said Court of King's Bench, or one of his Majesty's justices of the said Court, shall by indorsement on the said writ order and direct; which recognizance shall contain the same conditions as are now by the said act and another act passed in the eighth and ninth year of the reign of King William the Third, intituled '*An Act to make perpetual and more effectual an Act*' intituled '*An Act to prevent Delays at the Quarter Sessions of the Peace*,' required in cases of indictments removed from the general or quarter ses-

Further provision as to the recognizance to be entered into.

c. 33.

4. *Mode of obtaining it.*

sions of the peace; and thereupon all the clauses and provisions contained in the said several acts with respect to costs or otherwise shall extend to such last-mentioned recognizances; and every person being in custody for want of bail to answer the charge contained in such indictment or presentment shall be detained in custody until the like recognizances as are hereinbefore directed to be entered into (previous to the allowance of such writ of *certiorari*) shall have been entered into, or until such person be discharged by due course of law."

Affidavit to support application.

The application for the certiorari, whether to a court or judge, except when made by the attorney-general, should be supported by an affidavit stating the grounds for it, and as to what grounds are sufficient see *ante*, 557; *R.* v. *Inhabitants of Clace*, 4 *Burr.* 2458; *R.* v. *Stannard*, 4 *T. R.* 161; *R.* v. *Burgess*, 1 *Ken. Rep.* 531. In a recent case it was held that a defendant applying to remove an indictment from sessions by *certiorari*, on account of the probability that difficult points of law will arise, must state in his affidavit specific grounds on which legal difficulties will occur; and that it was not sufficient to show that the obstruction complained of by the indictment consists of buildings of great value, which have stood thirty or forty years. (*R.* v. *Joule*, 5 *Ad. & Ell.* 539; *Reg.* v. *Morton*, 1 *Dowl. N. S.* 543.) An affidavit for a *certiorari* to remove an inquisition taken to assess compensation under a railway act, should set out an exact copy of the inquisition, or account for the omission. It should also distinctly set out particular facts, sufficient to raise a question of law, and a presumption of error in the inquisition: an affidavit therefore which, after reciting that the inquisition stated certain lands were authorised to be taken under the act, added generally, "which deponent asserts is not the fact," is insufficient. (*Reg.* v. *Manchester and Leeds Railway Co.*, 3 *Nev. & Per.* 439.) Corroborating affidavits may be read after a rule has been granted, but not affidavits containing new matter. (*R.* v. *Berkley*, 1 *Ken.* 81.) The affidavit should be entitled only, "In the Queen's Bench," and not in the name of the prosecution in the court below. (*Ex parte Nohro*, 1 *B. & Cres.* 267; *sed vide R.* v. *Lewis*, 2 *Stra.* 704.) But the affidavits in support of an application to quash a certiorari after the removal of the cause to the Court above ought to be entitled in the cause, though before it was so removed they ought to be entitled in the Queen's Bench merely. (*Reg.* v. *Jones*, 8 *Dowl.* 80.) Where a party has once failed on account of the insufficiency of the affidavit to obtain a rule for a certiorari, the Court will not in general allow him to renew the application on amended affidavits, especially if he appears to have suffered no injury, and to have assented to the proceedings below. (*Reg.* v. *Manchester and Leeds Railway Company*, 1 *Per. & D.* 164; 8 *Ad. & E.* 413, S. C.)

The rule or order.

On an application to the Court for the writ to remove an indictment for misdemeanor, the rule is absolute in the first instance, but in cases of felony it is nisi only. (*Reg.* v. *Spencer*, 8 *Dowl.* 127.) On an application to a judge, it must be on a summons to show cause. To remove an order of sessions where no case has been stated, the rule, or judge's order or fiat in vacation, is nisi. (*R.* v. *Inhabitants of Chipping Sodbury*, 3 *Nev. & M.* 105.) Where a case has been stated, it seems that the rule nisi is obtained on counsel's signature only. To remove a record from an inferior jurisdiction, to have execution, the rule is nisi only. (*Pawsey* v. *Gooday*, 3 *Dowl.* 605.) To remove a conviction or order of justices, the rule is nisi only. The judge's signature must be placed to his *fiat*. (See *post*, 568.) On the production of the rule or fiat, and entering into the requisite recognizance, when the application is made by a party indicted, the writ is made out and delivered to the party applying for it.

Imposing terms on defendant.

In some cases terms will be imposed upon a defendant on granting him a *certiorari*. In one case, where the writ was applied for to remove an indictment at the Old Bailey for cheating, the Court imposed the condition of the defendant's undertaking to try it the same term, which was a benefit to the prosecutor, who by the practice at the Old Bailey sessions could not have tried it so soon. (*R.* v. *Nehuff*, 1 *Salk.* 150.) Where one defendant had removed an indictment by *certiorari*, the Court would not compel him

to submit to terms as to the time of proceeding to trial, although he may have been the only defendant who has entered into the proper recognizances, and great delay may be the result of not so interfering. (*Rex* v. *Hunt*, 6 *Dowl.* 5.)

4. *Mode of obtaining it.*

The recognizance to be entered into.

If the application be made at the instance of the prosecutor, no recognizance, as required by the above statutes, is necessary, for they extend only to applications "by the party indicted." (See 2 *Hawk.* c. 27, s. 52; *R.* v. *Battams*, 1 *East*, 305; and *R.* v. *Spencer*, 9 *Ad. & Ell.* 485; decided on the 5 Geo. II. c. 19, s. 2, *post*, 566.) But if the application be made by the party indicted, then this recognizance must be entered into before the certiorari is allowed. (1 *Salk.* 149; *Com. Dig. Certiorari*, B.) If several persons be included in the same indictment, and some of them find sureties, and the others not, it has been said that the proceedings as to the first will be valid; (2 *Hawk.* c. 27, s. 50; *Com. Dig. Certiorari*, B.;) but according to a more recent case, a *certiorari* obtained by one of several defendants, removes the indictment as to all, and the previous recognizances of all are discharged, though the parties not applying for the *certiorari* do not give any fresh security. And on an application being made, under such circumstances, for a *procedendo*, unless the defendants not suing out the *certiorari* would enter into recognizances, the Court refused even a rule to show cause. (*Rex* v. *Boxall*, 4 *Ad. & Ell.* 513; and see *Keat* v. *Goldstein*, 7 *B. & Cres.* 525; 1 *M. & Ry.* 305, S. C.; *R.* v. *Hunt*, 6 *Dowl.* 5.) It seems that a married woman need not enter into the recognizance where she is indicted with her husband. (2 *Hale*, 213.) The recognizance will not be forfeited unless the prosecutor gives rules according to the course of the court. (2 *Hawk.* c. 27, s. 58.) The recognizance, as we have seen by sect. 2, must be certified to the Court of Queen's Bench, together with the *certiorari* and indictment.

Convictions, orders, and summary proceedings.

Convictions, Orders, &c.]—We have already seen, that by the 13 Geo. II. c. 18, s. 5, *ante*, 562, no writ of *certiorari* shall be granted or issued to remove any conviction, judgment, order, or other proceeding had or made by or before any justice of the peace, or general or quarter sessions, unless it be duly proved upon oath that the party or parties suing for the same hath or have given six days' notice thereof in writing to the justice or justices, or to two of them, (if so many there be,) by and before whom such conviction, judgment, order, or other proceeding shall be so had or made, to the end that such justice or justices, or the parties therein concerned, may show cause, if he or they shall so think fit, against the issuing or granting such *certiorari*.

Notice of application must be given.

This enactment does not bind the crown, (see *ante*, 554,) nor does it extend to indictments. (*R.* v. *Battams*, 1 *East*, 298.)

The circumstance of an order of sessions having been made, subject to a case for the opinion of the Court of Queen's Bench, will not dispense with the six days' notice. (*R.* v. *Sussex*, 1 *M. & Sel.* 631.)

By whom notice to be given.

The notice must be given by the party at whose instance the *certiorari* is to be applied for. The writ could not be issued at the instance of any other party than the one who has given the notice, although the latter avowedly drops the proceeding, and although it is too late to give a fresh notice. (*R.* v. *Justices of Kent*, 3 *B. & Adol.* 250.) The notice must state distinctly the name of the party applying for the writ. (*R.* v. *Lancashire*, 4 *B. & Ald.* 289.) *Et per Curiam*—"The notice should be given by the party suing out the writ, and that circumstance should appear upon the face of the notice itself, for the object of it, stated by the statute, is to enable the justices to show cause against the granting the *certiorari*, and they may show for cause that the party suing out the writ was a stranger to the county, and not interested in the order. The justices therefore ought to have their attention called to the name of the party by the notice itself." (*Reg.* v. *Justices of Shrewsbury*, 9 *Dowl.* 501; S. C. as *Reg.* v. *How*, 11 *Ad. & Ell.* 159.) But a notice signed in the name of a solicitor, who describes himself "solicitor for the present churchwardens and overseers of Market Harborough," is sufficient. (*Reg.* v. *Solly*, 9 *Dowl.* 115.) A notice "on behalf of the churchwardens and overseers of S.," if signed only by *one* churchwarden, is not sufficient. (*R.* v. *Cambridgeshire*, 3 *B. & Adol.* 887.) So a notice of motion for a *certiorari* to remove an order

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of quarter sessions, made on appeal, which set forth the names of the appellant and of the respondents, and was subscribed by "J. B. attorney for the respondents," was held sufficient, though it did not expressly state that the respondents were the parties suing forth the writ. (*Reg.* v. *Justices of Wilts*, 9 *Dowl.* 524.) So a notice given on behalf of a parish, signed by the attorney for the parish, is sufficient; (*Rex* v. *Inhabitants of Abergele*, 5 *Ad. & Ell.* 795;) and a notice for a *certiorari* to remove an order relating to a borough, signed by "A. and B., solicitors for C., a ratepayer of the township of M., within and part of the said borough," is *primâ facie* proof of notice from the party suing forth the writ, without any affidavit by C. that the solicitors acted by his authority. (*Reg.* v. *Justices of Lancashire*, 3 *Per. & D.* 86.)

To whom notice to be given.

The notice must be given to the justice or justices, or to two of them (if so many there be) by and before whom the conviction, judgment, order, or other proceding was had. Service on the parties interested in supporting the proceedings merely, will not suffice. (*R.* v. *Spackman*, 9 *Dowl.* 1060.) If two justices convict a man under a statute which gives one justice a power to convict singly, yet the notice of the application should be served on both justices. (*R.* v. *Baldwin*, 1 *Gude's Prac.* 222.) So it is not sufficient to serve the notice on one justice present at the sessions making the order, and on another justice of the same county not present. (*Reg.* v. *Rattislaw*, 5 *Dowl.* 539.)

Time of service.

The six days for the service of the notice must be reckoned exclusively of one day and inclusively of the rest. And this is the general rule of computation in matters of practice, independently of the rule of Court, Hil. 2 Will. IV. 8. (*R.* v. *Goodenough and others*, 2 *Adol. & El.* 463; *Rex* v. *Justices of Cumberland*, 4 *N. & M.* 378; *post*, "*Time*," Vol. VI.) A notice of motion for a *certiorari* "on the first day of next term, *or so soon after as I can be heard*," is irregular, if served on the first day of that term, though the party does not, in fact, move till after the expiration of six days: *Denman*, C. J. *dubitante*, (*In the matter of Flounders, Esq.* 4 *B. & Adol.* 865; 1 *Nev. & M.* 592, S. C.)

Objection to notice when may be taken.

It is not necessarily too late to object to the service of the notice after the writ has issued, and the Court or a judge may supersede the writ, although the consequence may be, that if it be quashed, it will be too late to sue out a fresh one, and it is competent for the parties in an appeal, to object to the notice to justices previous to obtaining a *certiorari*. (*Rex* v. *Rattislaw*, 5 *Dowl.* 539.) So the sufficiency of the notice is still open to objection, although the rule for certiorari has been enlarged by consent, and the justices have appeared to show cause. (*Reg.* v. *How*, 11 *Ad. & Ell.* 159.)

Affidavit of service of notice, &c.

In support of the motion there must be an affidavit of the service of the six days' notice, which should not be entitled in any cause. (*Exp. Nohro*, 1 *B. & Crcs.* 267.) There must also be an affidavit identifying the party applying for the writ with the party who gave the notice; and it must also appear, affirmatively, on affidavit, that the justices to whom notice was given were the justices who made the conviction or order. The Court will not infer the identity from the mere coincidence of names and descriptions in the order and notice, and affidavit of service, or from other affidavits. (*Reg.* v. *Justices of Shrewsbury*, 9 *Dowl.* 501; *Reg.* v. *How*, 11 *Ad. & Ell.* 159, S. C.) An affidavit that the notice of motion was served on three justices, (naming them,) and that they were present at the trial and hearing of the appeal, has been considered sufficient. (*Reg.* v. *Justices of Wilts*, 9 *Dowl.* 524.)

A recognizance must be entered into before a *certiorari* granted to the defendant,

Stat. 5 Geo. II. c. 19, sect. 1, empowers justices of the peace in sessions to amend judgments, convictions, or orders on appeals for defects in form. (See "*Amendment*," Vol. I. p. 146.)

And by sect. 2, reciting that "divers writs of *certiorari* have been procured to remove such judgments or orders into his majesty's Court of King's Bench at Westminster, in hopes thereby to discourage and weary out the parties concerned in such judgments or orders by great delays and expenses;" enacts, "that no *certiorari* shall be allowed to remove any such judgment or order, unless the party or parties prosecuting such *certiorari*, before the allowance thereof, shall enter into a recognizance with sufficient sureties before one

or more justices of the peace of the county or place, or before the justices at their general quarter sessions or general sessions where such judgment or order shall have been given or made, or before any one of his majesty's justices of the said Court of King's Bench, in the sum of 50*l.*, with condition to prosecute the same at his or their own costs and charges with effect, without any wilful or affected delay, and to pay the party or parties in whose favour and for whose benefit such judgment or order was given or made, within one month after the said judgment or order shall be confirmed, their full costs and charges, to be taxed according to the course of the court where such judgments or orders shall be confirmed; and in case the party or parties prosecuting such *certiorari* shall not enter into such recognizance, or shall not perform the conditions aforesaid, it shall and may be lawful for the said justices to proceed and make such further order or orders for the benefit of the party or parties for whom such judgment shall be given, in such manner as if no *certiorari* had been granted."

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otherwise *certiorari* of no effect.

Sect. 3. "The recognizance and recognizances to be taken as aforesaid shall be certified into the Court of King's Bench at Westminster, and there filed with the *certiorari* and order or judgment removed thereby; and if the said order or judgment shall be confirmed by the said court, the persons entitled to such costs for the recovery thereof, within ten days after demand made of the person or persons who ought to pay the said costs, upon oath made of the making such demand and refusal of payment thereof, shall have an attachment granted against him or them by the said court for such contempt, and the said recognizance so given, upon the allowing of such *certiorari*, shall not be discharged, until the costs shall be paid and the order so confirmed shall be complied with and obeyed."

Recognizance must be certified.

Costs.

This enactment applies to convictions, although it mentions only judgments and orders. (See *Paley on Conv.* 221.)

In what cases recognizance necessary.

It applies only to cases where there is an appeal to the sessions. A rule called upon the prosecutor of a *certiorari*, issued to remove an order of sessions, confirming, without appeal, an order of justices made pursuant to 55 Geo. III. c. 68, s. 2, for stopping up a footpath, to show cause why it should not be quashed, the recognizances required not having been entered into previous to the writ being issued, although they were entered into after the allowance: it was held that the statute did not apply to such a case. (*Reg.* v. *Jones*, 9 *Dowl. P. C.* 504; and see *R.* v. *Dunn*, 8 *T. R.* 218, *n.*) And in such a case the application must be to quash the allowance, and not the writ itself; and the court refused to mould the rule so as to quash the allowance. (*Ib.*)

It does not apply to a writ of *certiorari* sued out by the prosecutor. (*R.* v. *Spencer*, 9 *Ad. & Ell.* 485.)

The enactment is not complied with by the party and his sureties entering into a recognizance in 25*l.* each, but it must be in the entire sum of 50*l.* (*R.* v. *Dunn*, 8 *T. R.* 217.) The two sureties must be in addition to the party suing out the *certiorari*, who must join in the recognizance. (*R.* v. *Boughey*, 4 *T. R.* 281; *sed vide Paley on Conv.* 222.) Where a parish prosecutes the *certiorari* to remove an order of sessions, the recognizance must be entered into by some one inhabitant on behalf of the rest of the parish, with two sureties. (*R.* v. *Abergele*, 1 *N. & P.* 235.)

What recognizance sufficient.

The *certiorari* will not be allowed until bail is indorsed on the writ. (*R.* v. *Bothill*, 1 *Salk.* 149.)

Other matters as to.

If the writ be regularly issued, the court will not proceed upon it till it has been regularly returned. And the party suing out the writ has no right to call upon the magistrate to allow and return it, until he has entered into a proper recognizance, as the statute requires. (*R.* v. *Dunn*, 8 *T. R.* 219.)

If the order is sent down to the sessions to be restated, and new evidence is introduced, it is another order, and the recognizance will be discharged. (*R.* v. *Hitcham*, *Burr.* 501, 687.)

If a *certiorari* has been applied for in time, but the allowance of it is quashed for a defect in the recognizance, the Court, under circumstances, will send the writ down again to be properly allowed. (*R.* v. *Abergele* (*Inhabts.*), 5 *Ad. & Ell.* 795.)

V. Form and Requisites of Writ, and Delivery of.

Form and requisites of writ.

The writ must not materially vary in its description of the record which it is intended to remove. (2 *Hawk.* c. 27, s. 75.) If, therefore, it profess to remove an indictment only, it will not be effectual to remove the whole record after conviction. (*Id.*; *R.* v. *Dixon*, 2 *Ld. Raym.* 971.) And even more formal objections have sometimes been holden to be material. (*Odell* v. *Moreton*, *Cro. Jac.* 254; *Noell* v. *Nelson*, 1 *Sid.* 448; 1 *Rol.* 754; *Hale*, 214; *Anon.* 1 *Salk.* 145.) Thus if it describe the indictment to be taken before seven justices, when the proceeding itself mentions eight (*Odell* v. *Moreton*, *Cro. Jac.* 254; and see other instances, 1 *Chit. C. L.* 387.) A material variance in the names or additions will also prejudice, as if the wrong name be inserted: (*Giggur's case*, 1 *Salk.* 261; *Mason* v. *Fox*, *Cro. Jac.* 633; *Anon.* 3 *Salk.* 80; 2 *Hawk.* c. 27, s. 81; 1 *Chit. C. L.* 387:) but if the mistake be only in the spelling, and the sound remains unaltered, it will not be material. (*Shelbery* v. *Bussard*, *Cro. Eliz.* 172; 2 *Hawk.* c. 27, s. 81.) If more defendants be named than appear on the record, the variance will be fatal. (*Anon.* 1 *Stra.* 116; 2 *Hawk.* c. 27, s. 81.) But on motion to quash documents brought up by *certiorari*, the Court will not entertain the objection, that the documents appear by the return to have been misdescribed in the writ. (*Reg.* v. *Fordham* (*Inhabts.*), 11 *Ad & Ell.* 73.)

Where it is intended to remove the record after verdict, it must be expressly framed for that purpose, or it will be invalid. (*Reg.* v. *Potter*, 2 *Ld. Raym.* 938; 6 *Mod.* 17, S.C.; *Reg.* v. *Dixon*, 2 *Ld. Raym.* 971; 13 *East*, 417.) The defendant must have a day given him in the superior court when an indictment after verdict is removed. (*Reg.* v. *Dixon*, 2 *Ld. Raym.* 971; 6 *Mod.* 61, S.C.; 2 *Hawk.* c. 27, s. 81.)

Direction of.

The writ ought to be directed to the judge or magistrates of the inferior court, before whom the proceedings were originally taken. (*Sir T. Buddolf* v. *Sir C. Clerk*, 3 *Keb.* 13; 2 *Hawk.* c. 27, s. 38.) In some cases, however, it may be directed to the proper officer known to have the actual custody of the record. (*Dyer*, 163; 2 *Hawk.* c. 27, s. 38.) If the person who ought to certify the record, as a justice of the peace, &c., happen to die while it remains in his custody, the *certiorari* may be directed to his personal representatives, who must certify. (2 *Keb.* 750; 2 *Hawk.* c. 27, s. 39.) It may be directed to a justice of assize to certify a record of assize taken before his companion in his absence. (2 *Hawk.* c. 27, s. 39.) When the *certiorari* is intended to remove an indictment or recognizance, or other matter, from the sessions, it is directed either to the justices generally, or to some of them in particular, and not to the *custos rotulorum*; though it seems that it may be returned by him, especially if he style himself a justice of the peace. (2 *Hawk.* c. 27, s. 40.) And a *certiorari* to remove an order made by two justices, may be directed to the sessions, and by them returned to the superior jurisdiction. (*R.* v. *Inhabitants of Warminster*, 1 *Stra.* 470.) To remove an indictment from the *cinque ports*, the writ is directed to the "mayor and jurats;" and to remove one from an assize in a county palatine, to the "chancellor of such county," who sends for it to the justices of assize. (2 *Hawk.* c. 27, s. 41.) In a recent case, a rule to show cause why a *certiorari* should not be issued to remove an inquisition under a railway act, was held properly directed to the clerk of the company, although the inquisition was out of their custody. (*R.* v. *Manchester, &c. Railway Co.*, 1 *P. & D.* 161.)

If by mistake it be directed to the wrong person, it has been holden that no other party can take any advantage of the error, if after the proceedings are duly returned by the parties to whom it was directed. (*Daniel* v. *Phillips*, 4 *T R.* 499; *Bac. Ab. Certiorari.*)

Signature of judge.

The writ must, when it removes any indictment, or when the defendant is in actual custody, be signed by one of the judges. (1 & 2 *Ph. & M.* c. 13, s. 7; 1 & 2 Vict. c. 45, s. 1.) But in other cases there is no necessity for the judge to sign the writ, but only the fiat by which it is ordered to issue. (*R.* v. *White*, 1 *Salk.* 150; 3 *Salk.* 80; 2 *Hawk.* c. 27, ss. 37, 40.)

If it be taken out in vacation and tested, as it may be, of the preceding term, the fiat must be signed some time before the essoin day of the subsequent term, or the whole will be irregular, and the court will award a procedendo. (*R.* v. *White*, 1 *Salk.* 150; 2 *Hawk.* c. 27, s. 37.) 5. *Delivery of.*

The writ is always indorsed at whose instance it was issued, and when in term, the words "by rule of court" are added. (5 & 6 *Will. & M.* c. 11, ss. 2, 4.) Indorsement at whose instance granted.

When the *certiorari* is to remove an indictment or recognizance, or other proceeding at the sessions, it should be delivered to the chairman in open court, though if it appear that it any how came to the knowledge of the justices, it must be obeyed by them. (2 *Hawk.* c. 27, s. 57; *R.* v. *Battams*, 1 *East*, 299.) In practice on indictments not at the quarter sessions, it is delivered to the clerk of the peace or clerk of assize. (1 *Chit. C. L.* 390.) Delivery of writ.

The 21 Jac. I. c. 8, s. 8, requires that writs of *certiorari* for the removal of an indictment for a riot, forcible entry, or assault and battery, at the quarter sessions, shall be delivered at the quarter sessions in *open* court.

If it be to remove a conviction or order made by magistrates out of sessions, it must be delivered to them individually.

A party indicted at sessions for obstructing a highway, obtained a *certiorari*, but without informing the prosecutor that he had done so, gave notice of trial at a subsequent sessions. The prosecutor attended with his witnesses, and on the last day of the sessions, before the case was called on, the defendant lodged his *certiorari*. The Court, under all the circumstances, quashed the *certiorari*, and ordered a *procedendo*. (*R.* v. *Higgins*, 5 *Ad. & Ell.* 554.)

The writ is of no effect, unless delivered before the time for its return is expired; and see further *infra*, as to the effect of the writ before delivery.

VI. Effect of the Writ.

The effect of the writ is to remove all proceedings of the nature described therein, which have taken place between the teste and return, although the proceedings originated after the teste. The inferior court or justices below are bound to obey the writ after production of it, and notice to them in fact of such production when sitting in their judicial capacity; and after that, all further proceedings before them on the matter are erroneous, and *coram non judice*. (*R.* v. *Battams*, 1 *East*, 298; *Cross* v. *Smith*, 1 *Salk.* 148; 2 *Ld. Raym.* 836, S. C.; 2 *Hawk.* c. 27, s. 57.) Removes all between teste and return. Subsequent proceedings void.

But it hath been adjudged, that if a *certiorari* for the removal of an indictment before justices of the peace be not delivered before the jury be sworn for the trial of it, the justices may proceed. (2 *Hawk.* c. 27, s. 62; *R.* v. *North*, 1 *Salk.* 144.) Except where jury sworn.

And the justices may set a fine to complete their judgment after a *certiorari* delivered. (*R.* v. *Elwell*, 2 *Ld. Raym.* 1515; 2 *Stra.* 794, S. C.) And after judgment.

It operates as a *supersedeas* only from the time of its being actually delivered, and not from the time of its being issued (*R.* v. *Inhabitants of Seton*, 7 *T. R.* 373); and it will altogether lose its effect if not delivered before its return. (*Id.*; 2 *Hawk.* c. 27, s. 59.) Or where not delivered before return.

But it cannot operate as a *supersedeas* until the defendant has complied with the directions of the statutes, *ante*, 563. (2 *Hawk.* c. 27, s. 59.) Or where forms not complied with.

It is however said, that if a *supersedeas* come out of a superior court to the justices, they ought to surcease, although the *supersedeas* be awarded against law; for they are not to dispute the command of a superior court, which is a warrant to them. (*Cromp.* 129.) Where awarded against law.

If an indictment be removed after issue joined, and afterwards remanded, the inferior courts may proceed to trial upon it in the same way as if the writ had never been awarded. (2 *Hawk.* c. 27, s. 61.) Where indictment remanded.

But if they go on after the due delivery of the writ, where such conduct is illegal, they may be punished by attachment for contempt of the superior jurisdiction. (*Id.* s. 62; 1 *Salk.* 148.) Attachment for proceeding.

A *certiorari*, when it so requires it, removes the record itself out of the inferior court; (*post*, 570;) and, therefore, if it remove the record against a Removes record itself.

6. *Effect of the Writ.*

principal, the accessary cannot there be tried. (2 *Hawk.* c. 29, s. 54; 1 *C. M. & R.* 18, note.)

Removes the original order of sessions, and not a subsequent one.

If an order of sessions be removed by certiorari, and the case be sent back to the sessions to be restated, and they make a new order, the certiorari does not operate to remove such new order. The party wishing to contest such new order must obtain a fresh certiorari. (*R.* v. *Bloxham*, 3 *Nev. & M.* 385; 1 *Ad. & Ell.* 586, S. C.)

When person of defendant removed.

If the defendant be convicted of a capital offence, the person of the defendant must be removed by *habeas corpus*, in order to be present in Court, if he will move in arrest of judgment. And herein the case of a conviction differs from that of a special verdict, where the presumption of innocence may be supposed to continue, and therefore the personal presence of the defendant in that case is not necessary at the argument of it. (*R.* v. *Spragg*, 2 *Burr.* 930; *ante*, 561.)

How far it supersedes a recognizance.

It hath been holden that a *certiorari* for the removal of a recognizance for the good behaviour, or an appearance at sessions, will supersede the obligation of it; but this would be highly inconvenient, and the contrary seems to be supported by the better authority. (2 *Hawk.* c. 27, s. 65.)

A *certiorari* removing an indictment from the Old Bailey to the Queen's Bench, will discharge a recognizance if a prisoner have been admitted to bail on a charge of perjury. (*R.* v. *Richardson*, 2 *Leach, C. C.* 560.) But it is otherwise if the prisoner be in actual custody. (*Id.*)

When a *certiorari* is granted in order that the trial may be had in another county, it becomes necessary that the defendant should enter into fresh recognizances, in order to secure his attendance to take his trial (See *R.* v. *Hunt*, 2 *Chit. Rep.* 135.) Where a defendant indicted at the quarter sessions for a conspiracy, had entered into sufficient recognizances to take his trial, it was held that the Court of Queen's Bench, on a removal by *certiorari*, might discharge them on motion, and compel him to enter into better securities. (*R.* v. *Hooper*, 1 *Chit. Rep.* 491.)

VII. Return to the Writ.

What to be returned.

The *certiorari* may be sometimes to remove and send up the record itself, and sometimes only the tenor or copy of the record, (as the words therein be,) and it must be obeyed accordingly or it will be bad. (2 *Dalt.* c. 195; 2 *Hawk.* c. 27, s. 76.) The return of a copy of the record will not do where the *certiorari* is to remove and send up the record. (*Palmer* v. *Forsyth*, 4 *B. & Cres.* 401; 6 *D. & R.* 497, S. C.)

But upon a *certiorari* to remove a conviction by a justice of the peace, a return that the record is returned to the sessions, and that a copy is annexed to the writ, if true, is sufficient; and justices ought in all cases to return convictions to the sessions, whether an appeal lies or not. (*R.* v. *Eaton*, 2 *T. R.* 285.)

And a return of the tenor of an indictment from London, is good by the Charter of London. (*Anon.* 1 *Keb.* 252.)

And whenever the purport of the writ is not to proceed upon the record to be removed, but only to try an issue of *nul tiel record*, it is sufficient to certify the tenor of the record, whatever the language of the writ may be. (*Sir T. Biddolf* v. *Sir C. Clerk*, 3 *Keb.* 13; 2 *Hawk.* c. 27, s. 71.)

If the *certiorari* be to remove a conviction, it is sufficient to return the conviction in due form, without returning also the examinations and affidavits taken in the proceedings. (*Anon. Lofft.* 348; *Paley, Conv.* 228.)

A conviction may also be returned in a more formal shape than that in which it was at first drawn up, and of which a copy had been delivered to the party convicted, provided the conviction returned be warranted by the facts. (*R.* v. *Baker*, 1 *East*, 186.) But a different rule prevails as to orders, (*R.* v. *Cheshire Justices*, 5 *B. & Adol.* 139,) and warrants of commitment, (*Hutchinson* v. *Lowndes*, 4 *B. & Adol.* 118,) and other proceedings.

A *certiorari* was obtained to bring up all orders of sessions made in the case, with all things touching the same. The sessions returned the orders,

with the notice of grounds of appeal and other papers relating to the appeal, and it was moved to quash the order upon the return and on affidavits. It was held, that the return was irregular in setting out more than the order of sessions, and that the Court could not look to the other matters in the return and affidavits, and the return was therefore quashed. But as a new return, if properly made, would not support a motion to quash the order of sessions, the Court discharged the rule without quashing the return. (*Reg.* v. *Abergele* (*Inhabitants*), 8 *Ad. & Ell.* 394.)

7. *Return to the Writ.*

But in general if any thing be inserted in the return by way of explanation or otherwise, which is not commanded, it will not vitiate, but be rejected as surplusage. (*Inter Inhabitants of Weston Rivers* and *St. Peter's, Marlborough*, 2 *Salk.* 493; *Bac. Abr. Certiorari*, II.)

Who to make return.

The return should be made by the party to whom it is directed; a return by the deputy of that party, or any other person will not do. (*Ashley's case*, 2 *Salk.* 479; 2 *Hawk.* c. 27, s. 66; 1 *Chit. C. L.* 392.)

And although the *custos rotulorum* keep the records, yet must the justices to whom it is directed return the *certiorari*; and, therefore, if it be directed to the justices of the peace, and the clerk of the peace only return it, nothing is thereby removed. (*Id.* s. 71.)

If the *certiorari* be to remove an indictment or other matter from the sessions, it is returned by the chairman.

Upon a *certiorari* to remove an indictment of a riot, or forcible entry, or the like, the return must have these words, *as also to hear and determine divers felonies, &c.* according to the commission; for if the return mention only that they are justices of the peace without such words, the return is insufficient. (*Dalt.* c. 195.)

Form of return, and transmitting of.

The usual mode of making the return, when the *certiorari* is to remove an indictment, is to indorse on the back of the writ, "the execution of this writ appears in a certain schedule hereunto annexed,—The answer of J. P. Esquire, and the justices assigned to keep the peace in and for the county of ——," and then to write the schedule on a distinct piece of parchment, and the chairman of the sessions should seal it. (*R.* v. *Dickenson*, 1 *Saund.* 134.) The words "humbly certify," &c. are unnecessary and improper. (*Carth.* 223.)

The same mode may also be adopted in making the return of a conviction or order, or other proceeding, excepting that the convicting justices, instead of the chairman, should seal the schedule. But the return may be and frequently is made, in the case of a conviction or order, without a schedule.

Annex to the writ a record of the indictment and caption of, (if the writ be to remove an indictment,) or the conviction or order, or other matter on parchment, (if it be to remove them,) and transmit them, and the return and the recognizance, (if any,) to the Crown Office of the Court of Queen's Bench.

The schedule must be made on parchment. It may be quashed if made on paper. (1 *Barnard*, 113.)

On a *certiorari* to remove an indictment, if the words "the jurors of our lady the Queen upon their oath present," be omitted in the return, it will be valid. (*Carth.* 323.) It must be expressed in the *caption* of the indictment that the offence was presented by *twelve* jurors, otherwise it will be bad. (*Faulkner's case*, 1 *Saund.* 248, n.)

A refusal to return an indictment until payment of certain fees should be accompanied by a statement of the amount due, though fixed by act of parliament. (*Newton* v. *Bayley*, 4 *Jur.* 192.)

The return must be under the seal of the inferior Court, to whom it is directed; and if they have no proper seal, under any other seal they may think fit to employ. (*Butcher's case*, 2 *Cro. Eliz.* 821; 2 *Hawk.* c. 27, ss. 65, 70.)

Also if directed to justices of the peace out of sessions they should put their seals to the return. A return to a *certiorari* was sent back to the justices by the Court to be amended, because they did not put their seals to it, or describe themselves as justices of London. (*R.* v. *Kenyon*, 9 *D. & R.* 691; 6 *B. & Cres.* 640.)

And where a *certiorari* was directed to the justices of the peace, and also to the clerk of the peace, and the return was signed by the clerk of the peace,

7. *Return to the Writ.*

but was not sealed, the Court sent back the return to be amended. (*Rex* v. *Macnamara*, 1 *Alcock & Napier*, 61. (*Irish.*)

Quashing return.

If the return be defective the Court may quash it. See the case of *R.* v. *Abergele*, *ante*, 570, in which the Court quashed the return.

Amendment of.

But in general a defect, if not of a substantial kind, will be allowed to be amended by a side-bar rule. (*R.* v. *Atkinson*, 4 *East*, 175, n.; 1 *Saund.* 249, n. S. C.)

Enforcing return.

The return may be enforced by a side-bar rule, commanding a return after six days' notice; but if this side-bar rule be obtained without sufficient ground, the defendant may move to have that rule discharged. (*R.* v. *Battams*, 1 *East*, 299.)

After this side bar rule and notice, in general the inferior jurisdiction are bound to make return, even though it should appear that the writ was improperly granted, for it rests entirely with the Court of Queen's Bench to recall its own process. *R.* v. *Battams*, 1 *East*, 306; *R. Hube*, 5 *T. R.* 543; 13 *East*, 416, n.)

A clerk of the peace cannot refuse to transmit the records in his custody on account of the fees due to him, for he has no lien upon them to justify his detainer; (1 *Leach*, 201;) for his fees his remedy is by action; for his charges of bringing the defendant up, the defendant may be remanded. (*Anon.* 1 *Stra.* 308; *White* v. *Haugh*, 2 *Stra.* 1202.)

If the return be still withheld, an *alias*, then a *pluries*, or a *causum nobis significes*, will be awarded, and then an attachment. (*Cromp.* 116; *Fitz. N. B.* 245.)

False return.

If the person to whom a *certiorari* is directed do make a false return, yet the Court will not stay filing it on affidavit of its being false, except in public cases, as in cases of commissioners of sewers, or for not repairing highways, or for some such special causes; because the remedy for a false return is either an action on the case at the suit of the party grieved, or an information at the suit of the Queen. (*Dalt.* c. 195; see "*Justices*," Vol. III. p. 579.)

VIII. Quashing the Writ, &c.

Quashing the writ, &c.

If the writ appear to have been improperly directed or granted, it will be quashed, *quia improvide emanavit*, upon cause being shown to the jurisdiction from whence it was awarded. (*R.* v. *Inhabitants of Seton*, 7 *T. R.* 373; *R.* v. *Sharrow*, 2 *T. R.* 196, n.)

And if the return has been filed the Court will order the writ to be quashed after a return to a *certiorari* and the return taken off the file, and award a *procedendo*. (*R.* v. *Wakefield*, 1 *Burr.* 489; 2 *Ken.* 164, S. C.; 2 *Hawk.* c. 27, s. 63.)

And an order to quash the writ and have the return taken off the file might be obtained on motion previous to a motion for a *procedendo*. (4 *Burr.* 2456; *R.* v. *Micklethwayte*, *id.* 2522.)

If in consequence of an error in the return the record is not removed, they will either quash the writ and order a new one; (1 *Salk.* 147; 2 *Stra.* 1228; *Hawk.* b. 2, c. 27, s. 82; *Williams*, J., *Certiorari*, X.;) or they will allow the Court below to proceed, and take such order for the defendant's appearance before either tribunal, as the circumstances of the case may require. (2 *Keb.* 142; *Hawk.* b. 2, c. 27, s. 82; *Williams*, J., *Certiorari*, X.)

Or if the writ be issued too late for the trial to take place at the next holding of the Court into which the prosecution was removed, the Court will quash the writ, and order a *procedendo* (See 1 *Chit. C. L.* 381, note (c).)

If not returned at all the Court will grant a *supersedeas*.

If the party who obtained the *certiorari* did so for delay, and that can be established by his admission or otherwise, the Court will quash it. (*Sanders* v. *Sheil*, 3 *Dowl.* 90; and see *R.* v. *Higgins*, 5 *A. & E.* 554; *ante*, 569; where the writ was quashed where it was delivered purposely late.)

If the proceedings have been removed at the defendant's instance, and he has entered into a recognizance, and that recognizance has been forfeited, the Court will not in general hear any application to the writ. (2 *Hawk.* c. 27, s. 55.)

Affidavits in support of an application to quash a *certiorari*, bringing up an order of justices for stopping up a road, must be entitled in the names of the parties in the proceeding, and not merely "In the Queen's Bench." (*Reg.* v. *Jones*, 8 *Dowl.* 80.)

8. *Quashing the Writ.*

IX. Proceedings after Removal.

On the Removal of an Indictment.]—As soon as the writ is returned to the Crown Office, the prosecutor's attorney makes out a *venire* for the defendant to appear; upon which the solicitor gets him *summoned* by the sheriff, and upon the return of it, the defendant usually appears, when he is entitled to an imparlance to the following term: but if he does not then appear, the prosecutor's attorney, upon the production of the sheriff's return to the *venire*, makes out a *distringas*, upon which 40*s.* issues are levied on the defendant's effects; and if there is no appearance on the return of that, on the affidavit of the writ having issued and being returned as above, the Court will award an *alias*; and after that a *pluries*, &c., enlarging the issues on every writ until the defendant appears, when they will compel him to pay the costs of the writs of *distringas* out of the issues levied. But if the sheriff returns the *venire non est inventus*, then, upon the production of such return, the prosecutor's attorney sues out a *capias* for the sheriff to take the defendant into custody, which he will do; whereupon the defendant, to procure his enlargement, must enter an appearance, upon which he will be discharged by *supersedeas*. If the defendant be taken on a warrant, which a judge may grant on the return of the *venire*, the defendant must then put in bail before he is discharged. (*Hand. Prac.* 42, 43; 1 *Chit. C. L.* 396, 397.)

Compelling defendant's appearance after removal of an indictment.

If the bail in the recognizance are exceptionable, the prosecutor's attorney may compel the defendant to add sufficient bail, by taking out and serving on the defendant's attorney a judge's summons for a *procedendo*, unless better bail be put in. (*Hand's Prac.* 39; 1 *Chit. Rep.* 491.) But the Court or judge will not, after the defendant has been admitted to bail, increase such bail on an affidavit of aggravating facts. (*R.* v. *Salter*, 2 *Chit. Rep.* 109.) If he do not find sufficient sureties, then, upon the attendance of the summons, the judge will order the *procedendo* to issue, and by which the indictment and proceedings will be sent back to the court in which the prosecution was begun (*Hand's Prac.* 39); and if the indictment were removed after issue joined, the inferior court is to proceed to trial as if no *certiorari* had been issued. (*Hawk.* b. 2, c. 27, s. 61.)

Compelling better bail.

If the defendant at the time of removing a conviction by *certiorari* be under commitment, the Court, upon the return being filed, may bail him till the validity of the conviction be determined. (*R.* v. *Reader*, 1 *Stra.* 531.) But in a case of commitment under the Vagrant Act, 17 Geo. II. c. 5 (now repealed), the Court having refused a *certiorari* on the ground of an appeal depending at the sessions, rejected the defendant's application to be out on bail till the appeal should be decided. (2 *T. R.* 196; *Paley on Conv.* 230.)

Bailing defendant when under a commitment.

The prosecutor's attorney may compel the defendant to proceed to trial, according to the terms of his recognizance, by taking out and serving on the defendant's attorney a *side-bar rule* to estreat the recognizance, unless he appears and pleads within the term, and proceeds to trial at the sitting of nisi prius after the term, if in town, and in the country at the next assizes (*Hand's Prac.* 40); and unless the prosecutor, by obtaining and serving the usual rules, compels the defendant to proceed to trial, the recognizance will not be considered as forfeited (*Hawk.* b. 2, c. 27, s. 54); and if the cause be not tried on account of a defect of jurors, and the prosecutor will not pray a tales, the defendant is not liable to costs. (*Stra.* 937.)

Compelling defendant to proceed to trial.

In a case where the defendant being taken up on the 8th of June, upon an indictment for a libel, entered into a recognizance to appear and plead within the first eight days of Trinity term, and to try the cause at the sittings after that term; the defendant pleaded not guilty, but did not give notices of trial, or make up the record either for the sittings after Trinity or Michaelmas term,

9. *Proceedings after Removal.*

nor were the recognizances respited; the prosecutors gave notice of trial after Trinity and Michaelmas term, but the causes were not tried; the defendant was ready and willing to take his trial. On both these occasions the recognizances were estreated in Hilary term without any notice to the defendant, or any motion by the prosecutor; it was held that this estreat was regular. (*R.* v. *Clark*, 5 *B. & Ald.* 728.)

When the recognizance has been forfeited, the Court will not hear any motion to quash the indictment. (*Hawk.* b. 2, c. 27, s. 35.)

On removal of indictment for felony, sometimes defendant may plead by attorney.

On an indictment for felony, removed by *certiorari*, the Court of Queen's Bench, under special circumstances, will order that the defendant shall be at liberty to plead by attorney, and that he and the prosecutor shall be restrained from bringing error, on account of pleas so pleaded instead of being pleaded in person. (*R.* v. *Penprase*, 1 *Nev. & M.* 312; 4 *B. & Adol.* 573, S. C.) As to the rules to plead, see 6 *East*, 583.

When allowed to defendant as a pauper.

Where the defendant, at the period when the indictment is removed, was a prisoner in a debtor's prison, the Court will, under the circumstances, and on the usual affidavit, allow him to sue *in formâ pauperis*. (*Ex parte Nicholson*, 4 *Jur.* 506.)

Of amendments.

The Court above cannot alter or in any way amend the indictment, unless by virtue of the 9 Geo. IV. c. 15, *ante*, 147, because they have not the concurrence of the jurors by whom it was presented (1 *Chit. C. L.* 297); and, therefore, however long it may appear, they cannot strike out a count from the record. (2 *Stra.* 1026; *Com. Dig. Amendment*, 2, c. 1.) But they may make an alteration in the caption, for that is a mere history of the prior stages of the cause, and is therefore liable to be corrected. (4 *East*, 175; *id.* note b; 1 *Saund.* 249, note 1.)

Striking out count, &c.

Proceedings to trial.

All the subsequent process, after plea to the trial, is exactly the same as if the cause had originally been commenced in the court to which the *certiorari* has removed it. (*Hand's Prac.* 40, 43, 49; *Hawk.* b. 2, c. 27, s. 83.) If the proceedings be removed from the assizes, the place of trial will be the same, only on the civil instead of the criminal side of the hall, where they are holden. (5 *T. R.* 628.)

Two presentments before commissioners of sewers, the one as to *I.* Wall, and the other as to *P.* Wall, were removed by *certiorari*, and, on issues joined, were to be tried at the nisi prius side of the assizes. The defendant entered his two records, *I.* Wall first in the cause list, and *P.* Wall second in the cause list. After that, the prosecutor entered his two records, *P.* Wall third in the list, and *I.* Wall fourth: held, that the prosecutor had not the right of having the cases tried on his records, and that they should be tried in the order in which they were entered. (*R.* v. *Leigh*, 7 *Car. & Pay.* 813.)

After trial.

The proceedings from the trial to the defendant's coming up for judgment are the same as upon informations for misdemeanors (*Hand's Prac.* 43, 44), except that the notice of the motion for the judgment of the Court is given to the bail as well as to the defendant, and sometimes the prosecutor is entitled to costs, and as to which, see *post*, 575.

Proceedings may be conducted by another prosecutor.

It seems that after an indictment is removed by *certiorari* and abandoned by the original prosecutor, the proceedings may be continued by another party. (*R.* v. *Wood*, 3 *B. & Adol.* 657.) An indictment for a nuisance in keeping a common gaming-house was preferred by a private prosecutor, who, after removing it by *certiorari*, proceeded no further. Another party then caused a *venire* to be issued, and other steps taken for bringing the case to trial, though desired by the original prosecutor to forbear. On motion by the latter for a stay of proceedings (he alleging that the offence had been discontinued), the Court of Queen's Bench refused to interfere, the prosecution being for a public nuisance. (*Id.*)

After a removal of conviction or order.

On the Removal of a Conviction or Order, &c.]—With respect to what may be discussed on the hearing of the case, to quash the conviction or order, we have already seen that a *certiorari* will not be granted to remove a conviction or order, unless it be for some defect apparent on the face of it, and that if the justices have jurisdiction, the court or judge will not enter into any exami-

nation of the facts or reasons upon which the conviction or order is founded, unless in the case of an order of sessions made subject to a special case. (*Ante*, 555, 558.)

9. *Proceedings after Removal.*

Court cannot judge of evidence given in courts below.

In the case of *R.* v. *Reason* (6 *T. R.* 375), it was determined that if justices acquit a defendant against whom an information is laid before them for a penalty, the Court of Queen's Bench cannot reverse the judgment, though the justices state (on the return of a *certiorari*) evidence, which *primâ facie* is sufficient to convict, and no contradictory or explanatory evidence. And the Court said, that the evidence given was entirely and exclusively for the consideration of the justices below, who were placed in the situation of a jury; and as they had acquitted the defendant, this Court could not substitute themselves in the place of the justices acting as jurymen, and convict him; that they could not judge of the credit due to the witnesses whom they did not hear examined; that they could only look to the form of the conviction, and see that the party, if convicted, had been convicted by legal evidence; and they must consider on this return, that the magistrates had determined on the facts, and not on the law of the case as distinguished from the facts. (See the cases, *ante*, 558, 559.)

And touching the distinction between a conviction removed by *certiorari* and one brought before a Court upon an appeal; on an appeal, the whole case is gone into, and evidence is to be given to support the conviction; but when the conviction is removed by *certiorari*, the facts cannot be made the subject of inquiry (*R.* v. *Jukes*, 8 *T. R.* 542), at least for the purpose of questioning the conclusion at which the justices arrived.

The Court, on the legality of a conviction, cannot take cognizance of any fact contained in the *certiorari* by which the conviction is removed, for the Court cannot take notice of any fact which does not appear upon the face of the conviction itself. (*R.* v. *Liston*, 5 *T. R.* 338.)

except where no jurisdiction.

But it seems that on the question of *jurisdiction* to make a conviction or order, the Court may look into the facts and receive affidavits. Therefore, on a return to a *certiorari* for bringing up an order of magistrates, made in a matter over which an act of parliament had given them original and final jurisdiction as to the merits, affidavits are admissible to show that the charge made before the magistrates was one over which they had no jurisdiction; but when a sufficient charge, appearing on the face of the information to be within their jurisdiction, is brought before them, they act within their jurisdiction in commencing the inquiry, and affidavits are not admissible to show that they came to a wrong conclusion. (*Reg.* v. *Bolton*, 1 *Ad. & Ell. N. S.* 66; 4 *P. & D.* 679, S.C.) Nor, if the justices return the evidence, will the Court review their judgment thereupon. (*Id.*; and see *R.* v. *Inhabitants of Abergele*, 5 *Ad. & Ell.* 795.)

The test of jurisdiction under this rule is, whether or not the justices had power to enter upon the inquiry, not whether their conclusions, in the course of it, were true or not. (*Id.*)

Course to adopt when an order of sessions quashing a conviction for defect in form, is quashed on certiorari in Q. B.

In a case where the sessions on an appeal quashed a conviction on the 39 & 40 Geo. III. c. 106, s. 4, for a defect in form, without hearing the merits, and their order was removed by *certiorari* into Queen's Bench, that Court, being of opinion that there was no defect in the form, quashed the order, and sent back the case to the sessions to enter continuances and hear the appeal on the merits. (*R.* v. *Ridgway*, 5 *B. & Ald.* 527; 1 *D. & R.* 132, S.C.; see also the case of *R.* v. *Eaton*, 1 *T. R.* 89, and *ante*, title "*Appeal.*")

Sending back record.

It is a general rule that if a record, removed by *certiorari*, be once filed in the Queen's Bench, it cannot be sent back or remanded; but that rule is not inflexible, and if there would be a failure of justice, as if the Court of Queen's Bench, on the removal of a conviction, would not have jurisdiction to imprison the defendant in the event of his not paying the penalty in which he was convicted, then the Court, on confirming the conviction, would award a *procedendo*, in order that the justices might enforce it by warrant of distress or otherwise. (*R.* v. *Neville*, 2 *B. & Adol.* 299; see 2 *Hawk.* c. 27, s. 68.)

Costs, after Removal by.

Prosecutor to be paid in some cases his costs after removal of indictment.

After Removal of Indictments.]—By 5 & 6 Will. & M. c. 11, s. 3, if the "defendant prosecuting such writ of *certiorari* (see the other sections of the act, *ante*, 562,) be convicted of the offence for which he was indicted, that then the said Court of King's Bench shall give reasonable costs to the prosecutor, if he be the party grieved or injured, or be a justice of the peace, mayor, bailiff, constable, headborough, tithingman, churchwarden, or overseer of the poor, or other civil officer, who shall prosecute upon the account of any fact committed or done, that concerned him or them, as officer or officers to prosecute or present, which costs shall be taxed according to the course of the said Court, and that the prosecutor for the recovery of such costs shall, within ten days after demand made of the defendant, and refusal of payment upon oath, have an attachment granted against the defendant by the said Court for such his contempt; and that the said recognizance shall not be discharged till the costs so taxed shall be paid."

Statute a remedial one.

This statute is a remedial one. (See per Lord *Ellenborough*, C. J. in *R.* v. *Taunton St. Mary*, 3 *M. & Selw.* 465; and per Lord *Kenyon*, C. J. in *R.* v. *Kettlewonth*, 5 *T. R.* 33.)

What offences within the act.

The act extends to the costs of the prosecution of an offence, whether it be a nonfeasance or a malfeasance. (*R.* v. *Inhabitants of Taunton, St. Mary*, 3 *M. & Sel.* 471.)

Who a prosecutor within the act.

A merely nominal prosecutor is not within the act, and consequently not entitled to costs. (*Reg.* v. *Inhabitants of Bernard Castle*, 5 *Jur.* 799.) Therefore where the expenses of an indictment for a misdemeanor were defrayed by subscription, and the nominal prosecutors incurred no expense, they were held not within the act. (*R.* v. *Cook*, 1 *Man. & Ry.* 526.) So where an indictment for a libel on the governor of a parish workhouse was preferred by the direction of the select vestry of the parish, it was held that the libelled party was not a prosecutor as a party grieved within the act. (*R. on prosecution of Brindley* v. *Dewhurst*, 5 *B. & Adol.* 105; 2 *Nev. & M.* 253, S. C.) So in *R.* v. *Edwards*, (5 *B. & Ad* 407,) the indictment was for an assault on a watchman or constable within the borough of *Derby*. The prosecution had been carried on by certain paving and lighting commissioners, acting under a local act for that borough, and the Court were of opinion that the nominal prosecutor was not a party grieved within the meaning of the statute, nor were the commissioners public officers prosecuting as such.

His name need not be indorsed on indictment.

In *R.* v. *Smith*, (1 *Burr.* 54,) it was moved that before the recognizance should be discharged the prosecutor should have his costs. The objection was that no name of any person, as being the party grieved or injured, or a public civil officer, was indorsed upon the indictment. But by the Court, "It is enough, if it be proved that the prosecutor was such officer, and here it is proved by affidavit." And it was ruled that the prosecutor should have his costs before the recognizance should be discharged."

Who a party aggrieved within the act.

As to when the prosecutor is a party grieved within the meaning of the act, it has been held that persons dwelling near to a steam-engine, the smoke of which affected themselves, their furniture and dwelling-houses, and was very offensive and injurious, were parties grieved. (*R.* v. *Dewsnap*, 16 *East*, 194.) And Lord *Ellenborough* there observed, "that although a nuisance may be public, yet there may be a special grievance arising out of the common cause of injury, which presses more upon particular individuals than upon others not so immediately within the influence of it." So the prosecutor of an indictment for stopping up an ancient and common footway, which he had used for some years, and had since been obliged to take a more circuitous route, was held to be a *party grieved* within the act. (*R.* v. *Williamson*, 7 *T. R.* 32; and see *R.* v. *Taunton St. Mary*, 3 *M. & Sel.* 465.) But where the prosecutor of an indictment for obstructing a highway did not apply for the costs until after the defendant's recognizance had been discharged, and until two years after judgment, and it did not appear that he had ever used the highway before it was stopped, and whilst it was stopped declared he did

not care about it, the Court held that he was not entitled to costs, although the prosecution was at his expense. The Court thought he was not a party grieved; that there ought to have been some special and peculiar injury accruing to him from the obstruction, besides that which affects all the subjects in common with him. (*R.* v. *Incledon*, 1 *M. & Sel.* 268. See also *Miles* v. *Rose*, 4 *M. & Sel.* 101.) Rated inhabitants of a parish, who were prevented by rioters from entering the vestry-room to attend a meeting called for the purpose of imposing a church rate, and who afterwards prosecuted the offenders, are parties grieved within the meaning of the above act. (*R.* v. *Thompkins*, 2 *B & Adol.* 287.)

10. *Costs after Removal by.*

In *R.* v. *Cook*, (1 *Man. & Ryl.* 526,) it was made a question on an indictment for a misdemeanor, whether the near relations of a person whose body has been disinterred for the purposes of dissection were parties grieved within the act, but the point does not seem to have been decided.

An indictment for a libel on a political dinner charged to have a tendency to produce a riot at that dinner, was removed by *certiorari* at the instance of the defendants; it was held that a person injured at a riot which took place at that dinner was not a person grieved within the act. (*Reg.* v. *Caldecott*, 1 *Dowl. N. S.* 556.)

Nor does the act apply to persons *intended* to be aggrieved, but only to those who have suffered actual injury. (*R.* v. *Ingleton*, 1 *Wils.* 139.) The defendant was indicted for attempting to set fire to the house of one Easton, in York, and the indictment also charged that the defendant solicited Mason, one of the prosecutors, to help to set fire to the house. Mason and one Glenton informed the mayor of York of this, who bound Mason and Glenton over to prosecute the defendant. The said defendant removed the indictment by *certiorari* into the Court of Queen's Bench, and was thereupon convicted and fined. On payment of the fine, it was moved that the recognizance should be discharged. Unto which it was objected that the defendant was obliged to pay the costs of the prosecutors. But by the Court—"This case is not within the act; for the act extends only to officers and persons really injured, which neither Glenton nor Mason are, for there was no damage done to the house, but only intended to be done, nor are either of them officers." And the recognizance was discharged.

Who a public officer within the act.

The costs thus given by the stat of Will. to persons acting in *public* capacities can only be claimed by them when they prosecute for some offence which actually comes within their own peculiar cognizance, and not a public or private grievance, with which they think fit to interfere.

Therefore a justice prosecuting a gaoler for an escape is not entitled to costs. (*R.* v. *Sharpness*, 2 *T. R.* 47.) The prosecutor, a justice of the peace, had indicted the defendant, who was the keeper of the gaol at St. Alban's, for suffering a prisoner to escape, who had been committed by him for felony; upon which indictment the defendant had been convicted. And it was contended that the prosecutor was entitled to costs under the 5 & 6 W. & M. c. 11, s. 3, as being a *public officer* prosecuting for the benefit of the public. *Ashhurst*, J. "It appears to me the defendant ought not to be charged with the costs; this is not one of those instances mentioned in the 3d section of the act, which only extends to those officers who prosecute or present *ex officio*, or where the prosecution is carried on by the party aggrieved. If a justice were to *present* a road, and the same were afterwards turned into an indictment, there the justice would be entitled to costs; or if a justice were to indict a constable or other inferior officer for disobeying his *order*, in such case also he would be entitled to his costs: but this is not a prosecution carried on by him as a magistrate, for any other person might have indicted the defendant; the offence in this case was such as concerned the general justice of the realm." *Buller*, J. "From a review of all the cases in a MS. note book, it appears that the prosecutor is not entitled to his costs; this book does not indeed include a case from Basingstoke, which came before this Court a few years ago, but there I understand the prosecution was carried on by the clerk of the peace, whose duty it was to draw up all presentments of

10. *Costs after Removal by.*

constables in form of indictments; and it was there determined that the prosecutor was entitled to costs. But here I cannot say it was the duty of the prosecutor as a justice of the peace to prosecute this defendant; the case originally came before him in the character of a magistrate on the complaint of some other person, and if the justice chose to take the prosecution out of private hands and to conduct it himself, he cannot be said to prosecute as a magistrate, but like any other individual. The Court has always construed this act of parliament as strictly as possible; (*a*) there was one case indeed on this statute, (*R.* v. *Goter*, M. 16 Geo. III.,) the law of which I doubt, where it was held that a person who was injured and was really the prosecutrix, was not entitled to costs, because her name did not appear on the back of the indictment, although it was well known she was the real prosecutrix; but I believe that case has been since overruled. (See *R.* v. *Smith, ante*, 576) In another case, afterwards, the question was whether the prosecutor were entitled to the costs of a trial at bar; and it was determined that he was not, because the statute only extended to small offences. These cases show that the Court has always put a strict construction on this act."—Rule absolute.

In *R.* v. *Kettleworth*, (5 *T. R.* 33,) it was held that a justice of the peace, who *indicted* a road out of repair, was entitled to costs after a removal of the indictment by *certiorari*, if the defendant be convicted. "If the verdict had been for the defendant, (Lord *Kenyon*, C. J. said,) and it had appeared that the prosecution was vexatious, the attorney might have been compelled to disclose his real client."

So in *R.* v. *Taunton St. Mary*, (3 *M. & Sel.* 465, *ante*, 577,) it was held that a constable of a manor presenting such an indictment for the non-repair of a highway within the manor, was an officer within the act.

Where an indictment was preferred by the Metropolitan Police Commissioners for an assault upon a constable belonging to their force, it was held that they were officers within the act. (*R.* v. *Waldegrave*, 1 *G. & D.* 615.)

Conviction necessary.

The terms in the act "if the defendant prosecuting such writ of *certiorari* be convicted," mean convicted by a *judgment*. In a case, therefore, where the judgment was arrested, the Court held that the defendant not having been found guilty of any offence which the law recognizes as such, (and therefore not considered as guilty persons,) ought not to be mulcted with costs for having removed a bad indictment from an inferior jurisdiction into the Queen's Bench. (*R.* v. *Turner and others*, 15 *East*, 570.) And where a *certiorari* obtained by a defendant was quashed, the Court had no power to give the prosecutor his costs of attending sessions. (*Reg.* v. *Higgins*, 5 *Ad. & Ell.* 554.)

What costs allowed.

The master of the Crown Office, in taxing the costs, ought only to consider those which are subsequent to the *certiorari*. (2 *Hawk.* c. 27, s. 56; and see *R.* v. *Passman*, 2 *Dowl.* 529; 1 *Ad. & Ell.* 603, S. C.)

The costs of the counts only on which the defendant is convicted should be allowed. (*Reg.* v. *Hawdon*, 3 *Per. & D.* 44; 11 *Ad. & Ell.* 143, S. C.)

The costs of conveying a defendant to gaol, in execution of his sentence, are reasonable costs within the statute. (*R.* v. *Gilbie*, 5 *M. & Sel.* 520.) The defendant was indicted for a misdemeanor at the Northumberland quarter sessions, and removed the indictment by *certiorari* into the Queen's Bench, and was afterwards found guilty, and sentenced to two years' imprisonment in the gaol for that county, in execution of which sentence he was conveyed thither at the prosecutor's expense. This expense was allowed to the prosecutor by the master, on taxing the costs. A rule *nisi* having been obtained for the master to review his taxation, it was argued, on showing cause, that this allowance was warranted by stat. 5 & 6 Will. & M. c. 11, s. 3, which enacts, "that if the defendant prosecuting the *certiorari* be convicted of the offence for which he was indicted, the Court of King's Bench shall give *reasonable costs* to the prosecutor." And it was urged, that if the indictment had been left with the sessions, this expense would not have been incurred, because the defendant would have been on the spot; wherefore it was by the

(*a*) *Sed query*, for the act is considered a remedial law. *Ante*, 576.

defendant's own act, who removed the indictment, that the costs were incurred and it is a part of the reasonable costs. The prosecutor, in discharge of his duty, had a right to see that the sentence of the Court was executed. In support of the rule it was urged, that the statute of Will. & M. did not contemplate costs such as the present, nor, indeed, any costs after judgment. And as to the defendant being the occasion of this expense, the sentence might as well have been to the prison of this Court as to the county gaol. The place, therefore, of imprisonment was the act of the Court. The recognizance of the defendant extends to the costs of the trial, and not of execution. The cases *R.* v. *Cholsey*, 2 *Cowp.* 726, and *Q.* v. *Summers*, 1 *Salk.* 55, were cited. Lord *Ellenborough*, C. J. "Under the terms of the recognizance the defendant was bound to pay all reasonable costs. These costs, if not immediately occasioned by the *certiorari*, were certainly incurred in consequence of it. If the indictment had remained below, no such expense would have been incurred. The defendant's own act, therefore, may be said to have occasioned the expense. It is reasonable that the defendant should bear the expense for which no other fund is provided." *Et per Bayley*, J. "It is a part of the prosecution to carry it to its legal conclusion." *Per Curiam.* Rule discharged. (*R.* v. *Gilbie*, 5 *M. & Sel.* 520)

10. *Costs after Removal by.*

The costs of a special jury cannot be allowed. (*R.* v. *Ld. Abingdon*, 1 *Esp.* 229.)

An indictment removed into the Queen's Bench by *certiorari* by the defendant, and made a special jury cause by the prosecutor, came on to be tried and was immediately referred. The order of reference stated that if the arbitrator should be of opinion that the defendant was guilty, and the prosecutor entitled *to costs*, the defendant agreed *to pay the costs*. The arbitrator did so find. The Court of Queen's Bench held that the prosecutor could not recover the costs of the special jury, since the judge had not certified for those costs, (pursuant to 6 Geo. IV. c. 50, s. 34,) and the order of reference did not expressely give a power of doing so to the arbitrator; also that the general term "costs" in this order did not include those of the reference and award. (*R.* v. *Moate*, 3 *B. & Adol.* 237.)

The amount of the costs to be taxed is not limited by the recognizance, which is only a further security for them, and the Court will not discharge the recognizance till the taxed costs are paid to the prosecutor (*R.* v. *Teal*, 13 *East*, 4.)

If the Court, on the certificate of the Queen's coroner, have given to the prosecutor one-third of the fine, they will order that sum to be deducted from the amount of the taxation. (*R.* v. *Osborne*, 4 *Burr.* 2125.) But the payment of the fine does not discharge the recognizance for the costs. (2 *Hawk.* c. 27, s. 53.)

Liability of one of several defendants for.

If an indictment against several defendants is removed by *certiorari* into the Queen's Bench without the consent of one, he cannot be compelled to pay the costs under the above act, although he may have appeared and pleaded to the indictment, and been tried on it. (*R.* v. *Hassell*, 5 *Dowl.* 531.)

Liability of sureties under recognizance.

The sureties are liable under their recognizance to pay the prosecutor his costs, although there is no undertaking to that effect in the recognizance, or direct provisions to that effect in the act. (*Reg.* v. *Bezant*, 7 *Dowl.* 680; and see *Reg.* v. *Hawden*, 1 *Ad. & Ell.* (*N. S.*) 464.)

If the defendant forfeit his recognizance under the statute, by not going to trial at the time specified, it will not be discharged on the application of the sureties until the costs of not proceeding to trial have been paid, notwithstanding the defendant was afterwards acquitted and taken in execution for the amount of the taxation. (*R.* v. *Lyon*, 3 *Burr.* 1461; *R.* v. *Turner*, 15 *East*, 572.)

In case of death of defendant.

If the defendant be found guilty, and die before the day in bank, his bail are liable to pay the costs. (*R.* v. *Turner*, 3 *B. & C.* 140; 4 *D. & R.* 816, S. C.)

Death of prosecutor.

The sum when duly ascertained by the master becomes a vested debt, and if the prosecutor die before it is paid, his personal representatives may recover it. (*R.* v. *Chamberlayne*, 1 *T. R.* 104; *R.* v. *Turner*, 15 *East*, 573.)

10. *Costs after Removal by.*

When *defendant* is entitled to costs.

Where the prosecutor of an indictment has removed it by *certiorari*, and there is no irregularity in the proceedings, the Court of Queen's Bench cannot, upon any representation of hardship imposed on the defendant, oblige the prosecutor to pay him his costs incurred below. (*R.* v. *Passman*, 1 *Adol. & Ell.* 603.)

In *R.* v. *Tremearne*, (5 *B. & Cres.* 761; 8 *D. & R.* 590, 684, S. C.,) where a true bill for perjury was found, and the judge at the assizes having refused to try it on account of manifest imperfections in the record, a new bill was preferred, whereupon the defendant was found guilty, but a new trial granted, and then the prosecutor, instead of taking down the old record, again preferred a new indictment for the same offence, and removed it into the Queen's Bench by *certiorari*, the Court refused to stay the proceedings upon that indictment until the prosecutor paid the costs of the former proceedings.

In *Jones* v. *Davies*, (1 *B. & Cres.* 143,) indeed, where a cause had been improperly removed by *certiorari* from the great sessions for Cardigan, it was held that the Court of Queen's Bench acquired a jurisdiction over the costs below by the *certiorari*, and that the master might tax them as he did in other cases. But that decision went on special grounds.

In *R.* v. *Bartrum*, (8 *East*, 269,) the defendant was indicted for perjury, and the indictment was removed from the sessions to the Queen's Bench by *certiorari*. The prosecutor gave notice of trial to the defendant, but on the day of trial withdrew the record without having countermanded the notice in due time. And it was held by the Court that he must pay the costs of the trial as in other cases. (And see *R.* v. *Gilbie*, 2 *Chit. Rep.* 159; *R.* v. *Johnson*, *R. & M. C. C.* 173; *R.* v. *Watton*, 4 *C. & P.* 229, S. P.)

Where a prosecutor, having removed an indictment by *certiorari*, gave notice of trial for the assizes and brought down the record, and withdrew it after it had been entered for trial, it was considered that the judge at the assizes could not order the prosecutor to pay the defendant the costs of the day; but that the motion must be made in the Court of Queen's Bench. (*R.* v. *Watton*, 4 *C. & P.* 229.)

Costs after removal of a conviction.

After removal of a Conviction, &c.]—By the 5 Geo. II. c. 19, s. 2, (*ante*, 566,) the condition of the recognizance (directed to be taken on a *certiorari* to remove judgments or orders of magistrates) is to pay the prosecutor his full costs in one month after confirmation of the order. And by section 3, a similar provision is made for the recovery of the costs as by the above statute of Will. & M. The enactment of sect. 3 is as follows:

Recognizances to be certified into the King's Bench.

Sect. 3. "That the recognizance and recognizances to be taken as aforesaid shall be certified into the Court of King's Bench at Westminster, and there filed with the *certiorari* and order, or judgment removed thereby; and if the said order or judgment shall be confirmed by the said Court, the persons entitled to such costs for the recovery thereof, within ten days after demand made of the person or persons who ought to pay the said costs, upon oath made of the making such demand and refusal of payment thereof, shall have an attachment granted against him or them by the said Court for such contempt, and the said recognizance so given upon the allowing of such *certiorari* shall not be discharged until the costs shall be paid, and the order so confirmed shall be complied with and obeyed."

Attachment for contempt.

When there is no recognizance taken on removing summary proceedings, there are no costs, for the Court has in that case no power to tax them by virtue of any of the statutes relating to criminal proceedings. (*R.* v. *Jenkins*, 4 *Burr.* 2126; 2 *Id.* 417.) And if the recognizance be as at common law, and not upon the statute, the Court will not order the recognizance to stand as a security for the prosecutor's costs. (1 *Burr.* 11; 2 *Stra.* 1165.) But, as we have already seen, (*ante*, 579,) if the defendant forfeit his recognizance under the statute, the recognizance will stand as a security to the prosecutor for his costs (if taxed) for the defendant's not going to trial pursuant to the condition, notwithstanding the defendant be afterwards acquitted, and the prosecutor takes him in execution for the amount. (3 *Burr.* 1463.)

XI. Forms.

In the Queen's Bench.

(1.) Affidavit by defendant for *certiorari* to remove an indictment from sessions, for not repairing a highway. (*a*)

A. B. of, &c. [gentleman,] maketh oath and saith, that at the last general quarter sessions of the peace holden in and for the county of S. a bill of indictment was preferred and found against the inhabitants of the parish of C. in the said county, for a nuisance in not repairing a certain common Queen's highway, leading from M. in the said county of S. towards and unto the town of B. in the county aforesaid, from the entrance into a lane called D. at a place called D. opposite to J. F.'s house, containing in length one quarter of a mile, and in breadth fifteen feet, extending from thence in a western direction as far as N. bridge, in which said indictment it is alleged that the inhabitants of the parish of C. aforesaid ought to repair and amend the same common Queen's highway, when and so often as it shall be necessary; and the deponent saith that the right or title to repair the said highway will come in question upon the trial of the said indictment as this deponent is advised and verily believes; and the determination of the said indictment may materially affect other parishes similarly circumstanced, by reason of the inclosures lately made in that part of the country, under and by virtue of an act of parliament passed in the year of her present Majesty's reign, intituled 'An Act,' &c.; and this deponent further saith, he is advised and believes that it will be proper to have the said indictment tried by a special jury, and absolutely necessary that the jury before whom the said indictment is tried should, previous to the trial thereof, view the said highway, which the defendants cannot have the benefit of at the sessions.

In the Queen's Bench.

(2.) Affidavit on which to apply to a judge for a *certiorari* to remove depositions, commitment and recognizance on a charge of a misdemeanor (unnatural practices), *before indictment found* at sessions, into the Queen's Bench. (*b*)

A. B. of the parish of , in the county of , and [six other deponents] *and C. D. of the city of , attorney, and E. F. of , clerk to the said C. D. severally make oath and say, and first this deponent A. B. on his oath saith, that he, this deponent, on Saturday the twenty-first day of September, now last past, was taken up at his parsonage house at aforesaid, by one of the constables of the hundred of , in the said county, upon a warrant under the hands and seals of R. B. N. and S. F. P., Esquires, two of her Majesty's justices of the peace for the said county, which warrant is hereunto annexed, and is marked A., upon a charge made by W. H., late a servant boy of this deponent, for an assault and misdemeanor on the person of the said W. H., and that about five o'clock in the afternoon of the same day he was taken to , in the said county, before the said justices, to answer the said complaint, and was committed for want of bail to the common gaol at , in the said county, to take his trial at the ensuing quarter sessions of the peace for the said county, to be held at , on the fourteenth day of October instant, upon a warrant of commitment of the said justices for the said assault and misdemeanor. And this deponent further saith, that he hath used his best endeavours to obtain a copy of the said warrant of commitment to the said gaol, but without effect, and that he, this deponent, was on Monday the twenty-third day of September last past, admitted to bail upon the said charge by the Right Honourable the Earl of E., a justice of the peace for the said county, himself in three hundred pounds, and two sureties in two hundred pounds each, to appear at the next ensuing quarter sessions. And this deponent further saith, that he is informed and advised and verily believes that in the neighbourhood in which he this deponent resides, and also in that part of the said county where the next and any other quarter sessions for the said county will be held, great, unjust, and unfounded, but violent prejudices have been excited against him in relation to the said charge, and that the most untrue, unjust, but very injurious reports and representations relating to the same have been maliciously and very industriously circulated in and throughout the said county, asserting in direct terms the opinions of the persons making and circulating the said reports, that this deponent hath been and is guilty of committing an unnatural crime, and also unnatural attempts and practices. And further, that in the said neighbourhood as well as throughout the said county there unhappily exists, not only against this deponent but generally against all the clergy, unjust but strong prejudices, insomuch that very many of those persons in the said county who would probably constitute the grand jury at the said quarter sessions, would, in the judgment, belief, and expectation of this deponent, be improperly biased and prejudiced against this deponent as well in respect of his being a clergyman as in respect*

(*a*) This form is given merely to show the nature of the affidavit required. (See *ante*, 564.)

(*b*) This form was approved of by Mr. Baron Parke, who issued a *certiorari* to remove depositions and recognizance *before* indictment found. The defendant on the trial was honourably acquitted.

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of the said reports, and also on account of the lamentable truth of several clergymen having of late years been convicted of offences of that nature, and on account thereof this deponent and his family and friends are informed and advised, expect and verily believe that no bill of indictment can be preferred to any jury of the said county against this deponent, and duly and fairly submitted to their candid and just consideration, unless they shall have received and duly heard and considered the charge and directions of one of the superior judges, in regard to their duty to observe impartiality, and avoid such prejudice. And this deponent further saith, that under the circumstances he is further informed and advised, and verily believes that he cannot be nor would be fairly tried by any jury at any quarter sessions or other sessions of the said county. And this deponent further saith, that he is advised and verily believes that being indicted for a misdemeanor, he will not be entitled to challenge any of the said jurors. And this deponent further saith, that he has lately had angry disputes with the said R. B. N. (one of the committing magistrates, and who occupies land in the said parish of ,) about his tithes, which disputes are not settled, and that when brought before the said R. B. N. on this charge, and being, as appeared to this deponent, treated with great harshness by the said R. B. N., he remonstrated with him on the impropriety of his acting in it, on account of these disputes. And this deponent further saith, that should this case be tried at the sessions, he would probably be on the bench of justices on that occasion. And this deponent further saith, that if the said trial of any indictment against him founded on the said charge should take place at the next or any subsequent sessions, he, this deponent, cannot expect nor could have a fair and impartial trial. And this deponent further saith, he is advised and believes that it will be proper and absolutely necessary that he should have the said indictment tried by a special jury at the assizes for the said county before one of the superior judges, whose weight and just influence would in all probability secure a fair trial; and also because it is essential that he, this deponent, should have the advice and assistance of Queen's counsel, or at least of counsel of greater experience than those who usually practise at the sessions. And this deponent further saith, that he is wholly innocent of the crime imputed to him by the said W. H. in his deposition, on which the charge is founded, and that he has never committed nor attempted to commit an unnatural crime with or upon the said W. H. or any other person whomsoever. And this deponent further saith, that the said W. H. came into his service at Michaelmas 1829, and that he turned him away early in March last for improper behaviour; and that he has charged this deponent with having committed acts of indecency towards him so long ago as the month of October 1829, during the greater part of which said month of October he, this deponent, was from home at Bognor and the Isle of Wight, and the said W. H. was at . And this deponent is informed and verily believes that the said charge and prosecution have originated and all proceedings in a foul conspiracy. And this deponent for the purposes of justice will disclose the parties thereto when duly required so to do. And this deponent further saith, that he is a clergyman, a prebendary of the cathedral church of , rector of the parish of , vicar of the parish of , in the said county of , and was domestic chaplain to the late bishop of for many years, and up to the time of his death; and that he is of the age of forty-five years, and has been such clergyman for twenty-two years and upwards, and that he hath a wife with whom he now and for seventeen years has lived in perfect happiness, and that he has eight children now living, all of whom reside constantly with this deponent and his said wife. And this deponent lastly saith, that as well for his own sake and for the sake of the clergy in general, and for the sake of his said wife and children, he is most anxious that the proceedings on the said charge should be removed into the Court of Queen's Bench, inasmuch as he is confident that no grand jury of any county, after hearing the charge of an enlightened judge, and cautioned against indulging prejudice, and to examine the witnesses brought before them in support of the said charge, will ever find any bill of indictment against him; and that thereby this deponent and his wife and family will avoid the anguish and disgrace even of a bill of indictment having been found a true bill, or of any pending prosecution. And this deponent, the said E. F., saith, that he attended at , on the said twenty-third day of September, with the bail before the magistrate who took the recognizances of bail, and then saw and read over the said warrant of commitment of the said A. B., and that was for an assault and misdemeanor on the person of the said W. H., and in the words and to the effect only of the warrant for apprehending the said A. B. hereunto annexed, and not for any more serious offence. And this deponent, the said C. D., for himself saith, that he and his father are the solicitors of the said A. B., and that they wrote to Messrs. E. and H., the clerks to the magistrates acting at , for a copy of the warrant of commitment, and that they received the two letters in reply hereunto annexed, marked B. *and* C. *And this deponent further saith, that he applied through their clerk, Mr. R. W., to the committing magistrates,*

for a copy of the informations against the said A. B., and warrant of commitment, and was informed shortly afterwards by the said R. W. that copies of the informations could not be given, and that he had not the warrant of commitment. And these eight other deponents severally make oath and say, that they have known and been in habits of intimacy and friendship with the said A. B. for a great many years, and that during all such time the said A. B. has borne a most irreproachable and exemplary character in society for good conduct and morality. And these deponents believe that the said A. B. has constantly lived with his wife on terms of mutual affection and kindness, which is not usually the characteristic of a person addicted to the depraved propensities imputed to him. And these deponents severally further say, that they believe that although the said A. B. hath, from the smallness of his income and his large family, been long labouring under great pecuniary difficulties, yet that except as respects this particular false imputation, he has never before been charged with any such or similar crime. And these deponents severally further say, that the habits of the lower classes in that part of the country where the said A. B. resides, and the neighbourhood about it, are very loose and depraved, and on the commonest occasions they impute to each other even the capital charge. And these deponents severally further say, that they recollect a few years ago a case which was tried at assizes, where a foul charge was made against a highly respectable clergyman (lately deceased) by two persons, who it was clearly proved, as these deponents believe, made the threat to impute the offence for the purpose of extorting money, and that they were transported for life. And these deponents further severally say, that very lately a mob of the lowest order assembled at a town about seven miles distant from the residence of the said A. B., and carried about the streets the effigy of a gentleman of great respectability with a beastly and unqualified written charge of a similar offence attributed to the said A. B.

The above named deponents, A. B., C. D., &c. were severally sworn at the city of the eighth day of October, A. D. 1833. } *A. B., C. D., &c.*

Before me,
J. D. N., a commissioner for taking affidavits in the said Court.

(3.) Recognizance to appear and plead to an indictment in Q. B. (a)

London } *BE it remembered, that on in the year of the reign of our sove-*
to wit. } *reign Lady Victoria, by the grace of God Queen of the united kingdom of Great Britain and Ireland, Defender of the Faith, A. B. (now a prisoner in her Majesty's gaol of Newgate), but late of , in the county of ; C. D. of , and E. F. of , came before me, Sir John Patteson, knight, one of her Majesty's justices of the Queen's Bench, and acknowledged to owe to our said Lady the Queen the several sums following, that is to say, the said A. B. the sum of* 200*l.*, *and the said C. D. and E. F. the sum of* 100*l. each, of lawful money of Great Britain, to be levied upon their several goods and chattels, lands and tenements, to her Majesty's use, upon condition that if the said A. B. shall appear in her Majesty's Court of Queen's Bench at Westminster, on the first day of next Term, and shall plead to all and singular indictments of whatsoever misdemeanors whereof he stands indicted, and at his own proper costs and charges shall cause and procure the issue or issues that may be joined thereon to be tried in the same term, or at the sittings of nisi prius to be holden after the same term, in and for the city of London, if the said Court shall not appoint any other time for the trial thereof, and if the said Court shall appoint any other time, then at such other time, and shall give due notice of such trial to the prosecutor or his clerk in Court, and shall appear from day to day in the said Court, and not depart until discharged by the said Court, then this recognizance to be void, or else to remain in full force.*

Taken and acknowledged the day and year first aforesaid, at , before me,
J. Patteson.

(4.) Notice of bail after removal of indictment into Queen's Bench.

In the Queen's Bench.

The Queen
against
A. B. on the prosecution of G. H.

SIR,

TAKE notice, that the above-named defendant will put in bail in this cause before the Honourable Mr. Justice , at his chambers in [Rolls Garden, Chancery Lane], to-morrow, at in the forenoon, for his appearance in this honourable Court in next term, then and there to answer and plead to the indictment you preferred against him at the last [general quarter] session of the peace of the county of , and which you have since removed into this honourable Court; the names of

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(a) See ante, 564; R. v. Bezant, 7 Dowl. 680.

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the bail are C. D. of, &c. [gentleman], and F. F., of, &c. [merchant]. Dated this day of , A. D. .

Your's, &c.

J. J. attorney for the above-named defendant.

To Mr. K. L., attorney for the prosecution.

(5.) *Certiorari* to justices of assize to remove an indictment from assizes.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to our justices assigned to hold our assizes in and for our county of , and to every of them, greeting. We being willing, for certain reasons, that all and singular indictments of whatsoever trespasses, contempts, and misdemeanors, whereof C. D. is indicted before you (as it is said), be determined before us and not elsewhere, do command you and every of you, that you or one of you do send under your seals, or the seal of one of you, before us, on the day of next, wheresoever we shall then be in England, all and singular the said indictments, with all things touching the same, by whatsoever name the said C. D. is called in the same, together with this our writ, that we may further cause to be done therein what of right and according to the law and custom of England we shall see fit to be done. Witness, Thomas Lord Denman, at Westminster, the day of , in the year of our reign.

By the Court.

Indorsed, "*At the instance of the prosecutor*" [or "*of the said C. D.*"]

If obtained by rule of court, add "*By rule of Court.*"

(6.) *Certiorari* to remove an indictment from quarter sessions into Queen's Bench.

VICTORIA, by the grace of God of Great Britain and Ireland Queen, Defender of the Faith, and so forth, to the keepers of our peace and to our justices, to hear and determine divers felonies, trespasses, and other misdemeanors committed within our county of , and to every of them, greeting. We being willing, for certain reasons, that all and singular indictments of whatsoever trespasses, contempts, and assaults, whereof G. A. and M. O. [gentlemen], are indicted before you (as it is said), be determined before us, and not elsewhere, do command you and every of you, that you or one of you do send, under your seals, or the seal of one of you, before us, on the day of , A. D. , wheresoever we shall then be in England, all and singular the said indictments, with all things touching the same, by whatsoever name the said G. A. and M. O. are therein called, together with this our writ, that we may further cause to be done therein what of right and according to the law and custom of England we shall see fit to be done. Witness, Thomas Lord Denman, at Westminster, the day of , in the year of our reign. By the Court.

Add the indorsement as in preceding form.

(7.) Return thereto.

First, on the back of the writ write the following words:

The execution of this writ appears in a schedule hereunto annexed.

The answer of J. P. Esq., and the justices assigned to keep the peace in and for the county of .

Then write on parchment the following schedule:

County of } I, J. P., chairman of the quarter sessions of the peace for the said county
of , and one of the justices of our sovereign Lady the Queen Victoria,
to wit. } assigned to keep the peace in and for the said county, and also to hear and determine divers felonies, trespasses, and misdemeanors in the said county committed, by virtue of this writ to me delivered, do, under my seal for myself and other the justices assigned to keep the peace in and for the said county, humbly certify unto her Majesty, in her Court of Queen's Bench, the indictment of which mention is made in the said writ, together with all things touching the same. Given at , the day of , in the year of the reign of Queen Victoria.

J. P. (L. S.)

(8.) Notice of intended motion for *certiorari* to remove a conviction, &c.

To A. B. Esquire, one of her Majesty's Justices of the Peace in and for the [or as the case may be].

WHEREAS you did, on the day of , in the year of our Lord , take the examinations of and , and upon such examinations as aforesaid, [or as the case may be], *did make and issue your order* [or *did convict*, &c. as the case may be.] *And whereas it appears that* [here state the objections to the order, conviction, or other proceeding], *and moreover that the said order* [*conviction*, or other proceeding, as the case may be], *was irregular and illegal, wherefore the said being resolved to seek a remedy for the injury which he* [or *they*] *has* [or *have*] *received and sustained by means of the said order* [or *conviction* or other pro-

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ceeding]; *I do hereby, on the behalf of the said , according to the formery the statute in that case made and provided, give you notice that her Majesty's Court of Queen's Bench will, in six days from the time of your being served with this notice, as soon after as counsel can be heard, be moved on behalf of the said , for a writ of* certiorari *to issue out of the said court, and to be directed to* [the proper officer of the quarter session of the peace, if it be a record of session, or otherwise to the justice in whose possession it ought to be], *for the removal of the record of,* &c. [as the case may be], *into her Majesty's said Court of Queen's Bench. Dated the day of ,* A. D. . *P. Q., Attorney for the said .*

(9.) *Certiorari* to two committing justices, to certify information, examination, and depositions, upon which prisoner was committed.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to C. D. and E. F., Esquires, two of our justices assigned to keep our peace in and for our county of , and also to hear and determine divers felonies, trespasses, and other misdemeanors committed within our said county, and to every of them, greeting. We being willing, for certain reasons, that all and singular informations, examinations, and depositions taken by and remaining with you, or either of you, in a certain case of felony or suspicion of felony charged against A. B., and for which you or one of you have committed the said A. B. to the prison of , as it is said, be sent by you before us, do command you and every of you, that you or one of you do send us, immediately after the receipt of this our writ, all and singular the said informations, examinations, and depositions, with all things touching the same, as fully and perfectly as they have been taken before you and now remaining in your custody, by whatsoever name the said A. B. is called in the same, together with this writ, that we may further cause to be done therein what of right and according to the law and custom of England we shall see fit to be done. Witness, Thomas Lord Denman. At Westminster, the day of , in the year of our reign.

[Indorse it as directed in the form, *ante*, No. 5.]

(10.) *Certiorari* to two justices to remove a conviction into Queen's Bench.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To [*A. B., Knight, Mayor of the city of York,*] *and* [*J. L., Knight*], *two of our justices assigned to keep our peace in and for our said city* [or *county*], *and also to hear and determine divers felonies, trespasses, and other misdeeds committed within our said city* [or *county*], *and to every of them, greeting. We being willing for certain causes, that all and singular records of conviction, of whatsoever trespasses and contempts against the form of the statute, intituled "An Act, &c." whereof C. D. is convicted by you (as it is said), be sent by you before us, do command you, that you send, or one of you do send, all and singular the records of conviction aforesaid, with all things touching the same, by whatsoever name the said C. D. may be named therein, before us, under your seals or the seal of one of you, on the day of , A. D. , wheresoever we shall then be in England, together with this our writ, that we may further cause to be done thereon that which of right and according to the law and custom of our realm of England we shall see fit to be done. Witness, Thomas Lord Denman, at Westminster, the day of , in the year of our reign.*

[Indorse it as directed in the form, *ante*, No. 5.]

Return from a single justice.

County of } *I, J. P. Esq. one of the justices of our Lady the Queen, assigned to keep*
to wit. } *the peace within the said county, and also to hear and determine divers felonies, trespasses, and misdemeanors in the same committed, by virtue of this writ to me delivered, do under my seal return unto her Majesty, in her Court of Queen's Bench, the conviction of which mention is made in the same writ, together with all matters touching the same. In witness whereof I, the said , have to these presents set my seal. Given at in the said county, the day of in the year of our Lord .*

J. P. (L. S.)

[Indorse the above on the writ of *certiorari*. The return may be with a schedule, as in the form, *ante*, 584, (No. 7,) leaving out the statement of the justice being chairman, and of the return being made on behalf of other parties, and substituting the word "*conviction*" for "*indictment*."

Chains, *as to hanging Murderers in*, see "*Homicide*," Vol. III.

Challenge to Fight.

Offence of.

WE have already seen, (*ante*, 303,) that the attempt or incitement to commit felony is in itself a misdemeanor, and so is the sending a challenge to fight, or the giving language which tends to the same end, or the acts of posting of opprobrious expressions which have the tendency to a breach of the peace, and they are indictable as misdemeanors at common law. (3 *Inst.* 157; *Com. Dig. Battle* (B.); 1 *Hawk.* c. 63, s. 3; *R.* v. *Rice*, 3 *East*, 581; *R.* v. *Phillips*, 6 *East*, 464.)

Mere words, which though they may produce a challenge, do not directly tend to that issue, as calling a man a liar, are not necessarily criminal; (*R.* v. *Langley*, 2 *Ld. Raym.* 1031; *R.* v. *Phillips*, 6 *East*, 471;) though it is probable they would be so, if it could be shown they were meant to provoke a challenge. And the same words, if written, might probably form the subject of an indictment or action for a libel.

Surety to keep the peace.

In the case of an information laid before a magistrate of a challenge given, he should forthwith issue his warrant to bring the parties before him, and require them to find sureties to keep the peace, and as to which, see "*Surety of the Peace*," Vol. V.

Criminal information for.

A challenge is one of those offences for which a criminal information will be granted by the Court of Queen's Bench. But this will not be granted where the party applying has first incited the proposal. (*R.* v. *Hankey*, 1 *Burr.* 316.) Nor if in the course of the transactions out of which the challenge arose, he has himself sent a challenge to a third person connected with the party against whom he moves. (*Rex* v. *Larrieu*, 7 *Ad. & E.* 277.) And this, although the prosecutor's challenge was sent into a foreign country, and did not show any intention to break the peace here. (*Id.*) The original letters need not be produced on the application, but copies of them will suffice, if sufficiently verified as correct. (*R.* v. *Chappell*, 1 *Burr.* 402.) An affidavit of the party applying for the information that B. had brought him a challenge from C., and that B. had refused to make an affidavit that C. sent him with it, is not evidence on which the Court will grant even a rule nisi for the information against C. for sending the challenge. (*R.* v. *Willet*, 6 *T. R.* 294; see "*Information*, Vol. III.)

Indictment for.

An indictment for this offence in most respects resembles that for sending a threatening letter. (See "*Threats*," Vol. VI.)

The *venue* may be either in the county where the challenge is concocted, or where it is received. (*R.* v. *Williams*, 2 *Campb.* 506.)

Punishment.

The *punishment* is fine and imprisonment, or both, as in other cases of misdemeanor. (*R.* v. *Rice*, 3 *East*, 514; see "*Misdemeanor*," Vol. V.)

The 9 Ann. c. 14, s. 8, so far as it relates to the forfeiture and punishment of persons assaulting and beating, or challenging or provoking to fight, any other person, on account of money won at play, is repealed by 9 Geo. IV. c. 31.

Duelling.

As to duelling, see "*Homicide*, Vol. III.

Commitment for sending a challenge.

[Commencement as usual, as *ante*, p. 9]: *That the said C. D. on the day of* A.D. *at the parish of in the said county, wickedly, wilfully, and maliciously did compose, write, send and deliver, to one A. B. a certain letter and paper writing, containing a challenge to fight a duel with and against him the said C. D. And you the said keeper, &c.* [as usual, as *ante*, p. 9, to the end.]

Commitment for provoking a man to send a challenge.

[Commencement as usual, as *ante*, p. 9]: *That the said C. D. on the day of* A. D. *at the parish of in the said county, wickedly, wilfully, and maliciously did speak, declare, say and publish to and in the presence and hearing of one A. B., certain provoking, malicious and scandalous words, with intent to instigate, excite, and provoke the said A. B. to fight a duel with and against him the said C. D. And you the said keeper, &c.* [as usual, as *ante*, p. 9, to the end.]

Forms.

Indictment for sending a challenge to fight a duel.

—— *to wit. THE jurors for our Lady the Queen upon their oath present, that C. D. late of the parish of in the county of labourer, on the day of in the year of the reign of our Lady the now Queen Victoria, being a person of a turbulent and quarrelsome temper and disposition, and contriving and intending not only to vex, injure and disquiet one A. B., and to do the said A. B. some grievous bodily harm, but also to provoke, instigate and excite the said A. B. to break the peace and to fight a duel with and against the said C. D. on &c. with force and arms, at the parish aforesaid, in the county aforesaid,* wickedly, wilfully and maliciously did compose, write, send and deliver, and cause and procure to be composed, written, sent and delivered unto the said A. B. a certain letter and paper writing containing a challenge to fight a duel with and against the said C. D. and which said letter and paper writing is as follows, that is to say:* [set out the letter *verbatim*, with *innuendoes*, if necessary:] *to the great damage, scandal and disgrace of the said A. B., and against the peace of our said Lady the Queen, her crown and dignity.*

Second count.

And the jurors aforesaid upon their oath aforesaid, do further present, that the said C. D., contriving and intending as aforesaid, afterwards, to wit, on the day and year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, wickedly, wilfully and maliciously did provoke, instigate, excite and challenge the said A. B. to fight a duel with and against him the said C. D., to the great damage of the said A. B., and against the peace of our said Lady the Queen, her crown and dignity. [If no duel was fought alter the second count, stating merely the attempt to provoke, &c.]

Indictment for provoking a man to send a challenge.

Commence as in the preceding form to the *]: *wickedly, wilfully, and maliciously did speak, declare, say and publish to, and in the presence and hearing of the said A. B. these words following, that is to say,* [here set out the words used,] *with intent to instigate, excite and provoke the said A. B. to challenge him the said C. D. to fight a duel with and against him the said A. B., to the great damage of the said A. B., and against the peace of our said Lady the Queen, her crown and dignity.*

Challenge of Jurors, see "*Jurors*," Vol. III.

Champerty, see *ante*, "*Buying of Titles*;" "*Maintenance*," Vol. V.

Chancery Proceedings, *Proof of*, see "*Evidence*," Vol. II. pp. 395, 396

Chance-medley, see "*Homicide*," Vol. III.

Chapel, see *post*, "*Church*;" "*Sacrilege*," Vol. V.

Character, *Evidence as to*, see "*Evidence*," Vol. II. p. 382, 383; "*Rape*," Vol. V.; *Evidence of Party acting in an Official Character*, see "*Evidence*," Vol. II. p. 379.

Charges, see *post*, "*Costs*."

Charitable Trusts and Donations.

By stat. 52 Geo. III. c. 101, in cases of breach and trust, a petition may be presented to Lord Chancellor, who shall hear the same in a summary way, and make order therein.

52 Geo. 3, c. 102.

The stat. 52 Geo. III. c. 102, for registering and securing of charitable donations, after reciting that "charitable donations have been given for the benefit of poor and other persons in England and Wales to a very considerable amount, and many of the aforesaid donations appear to have been lost, and others, from the neglect of payment and the inattention of those persons who ought to superintend them, are in danger of being lost, or rendered very difficult to be preserved," enacts, "that a memorial or statement of the real and personal estate, and of the gross annual income, investment, and the general and particular objects of all and every charity and charities, and charitable donations, for the benefit of any poor or other persons in any place in England and Wales, which shall have been founded, established, made, benefited, increased or secured, together with the names of the respective founders of or benefactors thereto, where known, and also of the person or persons in whose custody, possession, or control, the deeds, wills, and other instruments whereby such charities or charitable donations shall have been founded, established, made, benefited, increased or secured, may be, and also of the names of the then trustee or trustees, feoffee or feoffees, possessor or possessors, of such real or personal estate, shall, from and after six calendar months after the passing of this act, be registered by such person or persons who shall then be the trustee or trustees, feoffee or feoffees, possessor or possessors thereof, or some or one of such persons, in manner and in the form contained in the schedule to this act annexed, in the office of the clerk of the peace of the county, or city or town being a county of itself, within which such poor or other person shall be; and such memorial or statement shall be signed by such person or persons causing the same to be registered and left in the said office of such clerk of the peace, who shall forthwith transmit a duplicate or copy of the same unto the Enrolment Office of the High Court of Chancery."

Deeds, &c. respecting charitable donations already founded to be registered.

The like of charitable donations hereafter founded.

Sect. 2. "Wherever any such charity or charitable donations shall be founded, established, made or benefited, increased or secured by any deed, will, or other instrument hereafter to be made or executed by any person or persons, that then a like memorial or statement, according to the directions hereinbefore contained, shall be registered, and left and transmitted as aforesaid, by such person or persons as are hereinbefore mentioned, within twelve months after the decease of such person or persons by whom any such will, deed or deeds, or other instrument shall have been made or executed."

Clerk of peace to provide books wherein registries to be made.

Sect. 3. "For the purpose of such registries of such memorials or statements, the clerk of the peace for the time being of each and every county, or city or town being a county of itself, or riding within England and Wales, shall, as there shall be occasion, provide proper books of parchment or vellum, wherein such registers shall be made and entered; and every such original memorial or statement, and every such book provided as aforesaid, shall be carefully kept and preserved for public use and inspection in the office to which it shall belong, together with a correct index, to be made from time to time by such clerk of the peace, of such charities and charitable donations, distinguishing each by the name of the original or first donor or founder thereof, where known, or the appellation or title most generally used for such charity or charitable donations."

Notice in London Gazette, if persons benefited be not wholly in one county.

Sect. 4. "In case the persons to be benefited by any such charity or charitable donations as aforesaid shall not be wholly within any one county, then and in such case such clerk of the peace of the county where any such charity or charitable donation shall be registered, shall forthwith notify in the London Gazette the name or title thereof, according to the appellation or title used in the index aforesaid, and the names of the several places wherein the objects

of such charity or charitable donations shall be, and the particular or general objects thereof, and also of the name of the county wherein such memorial or statement shall have been registered." 52 Geo. 3, c. 102.

Sect. 5. "If any such charity or charitable donation shall not be duly memorialized, stated and registered according to the provisions of this act, it shall and may be lawful for any two persons or more, interested in such charity or charitable donations, to present a petition to the Lord Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal, or Master of the Rolls for the time being, or the Court of Exchequer, complaining thereof; and they are hereby required to hear such petition in a summary way, and upon affidavits, or such other evidence as shall be produced upon such hearing, to determine the same, and to make such order therein, and with respect to the costs of such application and proceedings, as to him or them shall seem fit, and which order shall be final and conclusive." If donations not registered, petition may be presented to Lord Chancellor, &c. complaining thereof.

Sect. 6. "No proceedings under the provisions hereinbefore mentioned shall extend or be construed to extend to decide any right or title as to the property that shall be so registered, or as to the persons who shall be entitled, or claim to be entitled, to the benefit thereof, or any interest therein." No proceedings to decide any right or title.

Sect. 7. "All and every clerk of the peace of the several counties and ridings in England and Wales, shall, as often as required, make searches concerning all memorials and statements directed by this act to be entered in his or their office as aforesaid, and shall also give copies of the same under his hand, if required by any person whatsoever, who shall tender or be willing to pay him the sum or sums hereinafter directed to be allowed to him for such copies of such memorials or statements as aforesaid." Clerk of peace to make searches, and give copies of registers.

Sect. 8. "Every such clerk of the peace shall be allowed for the registering every such memorial or statement as is by this act directed, the sum of four shillings and no more, in case the same do not exceed four hundred words; but if such memorial or statement shall exceed four hundred words, then after the rate and proportion of one shilling an hundred for all the words contained in such entry, and the like fees for the like number of words contained in every copy of any entry given out of the said register, and no more; and for every notification in the London Gazette, the costs of such notification, and the further sum of ten shillings for drawing and inserting the same, and transmitting the duplicate or copy hereinbefore mentioned unto the Enrolment Office of the High Court of Chancery, and no more." Allowance to clerk of peace, and to person inserting notification in Gazette.

Sect. 9. "Where any difficulty shall occur in making and preparing such memorial or statement as aforesaid, so as to render it necessary to employ any longer time than is allowed by the provisions of this act for registering such memorial or statement as hereinbefore is mentioned, it shall and may be lawful for the Court of Quarter Sessions for the county, or city or town being a county of itself, wherein such memorial or statement is intended to be registered, to allow, on application made to them, and on examination of the circumstances, such further time, not exceeding six calendar months, as to such court shall seem necessary to be given for the purpose of duly registering such memorial or statement as hereinbefore is mentioned." Time to be allowed to register memorial where difficulties occur.

Sect. 10. "It shall and may be lawful for the Court of Quarter Sessions of the county, or city or town being a county of itself, wherein such statement or memorial shall have been registered, to allow such reasonable costs and charges attending the preparing and registering, notifying and transmitting such memorial or statement, with reference to the income of the charity or charitable donation, to such person or persons causing the same to be registered, as such Court shall think fit; and it shall and may be lawful for such person or persons who shall have caused such memorial or statement to be registered, to deduct out of the income, funds, rents, and profits in his or their hands of such charity or charitable donation so by him or them memorialized and stated and registered, the sum and sums so allowed, and no more: provided always, that the said Court of Quarter Sessions shall not allow any sum whatever for and in respect of such costs and charges, unless it shall be stated to them upon the declaration in writing of the person or persons applying for such allowance, and signed by him or them, that such memorial Costs of preparing memorials to be allowed.

52 Geo. 3, c. 102.

or statement is, to the best of his, her, or their knowledge and belief, true in every respect, and that it doth contain, to the best of his, her, or their knowledge and belief, a true and full account of the real and personal estate, annual gross income, investment, and the particular or general objects of the charity or charitable donation of which such memorial or statement shall have been registered, together with the names of the respective donors or benefactors thereto, where known, and also of the person or persons in whose custody, possession or control, the deeds, wills, and other instruments hereinbefore mentioned, shall at such time be, and also the names of the trustee or trustees, feoffee or feoffees, possessor or possessors of such real and personal estate: provided always, that none of the provisions hereinbefore contained shall be construed to extend to any charity or charitable donation not issuing out of or secured upon any lands, tenements, or hereditaments, or directed by the founder or donor thereof to be secured thereon, or to be permanently invested in government or any public stocks or funds, nor to any charitable donation whatsoever, which by the direction of the donor thereof, or by the lawful rules of any charitable institution whatsoever, may be wholly or in part expended in and about the charitable purposes for which the same may have been given, at the discretion of the governors, directors, managers, or the trustee or trustees of such charitable institution at any time whatsoever."

Not to extend to donations not secured upon lands; nor to charitable institutions.

Not to extend to royal foundations, nor to certain institutions;

Sect. 11. "Nothing in this act shall be construed to extend to any hospital, school, or other charitable institution whatsoever, which shall have been founded, improved, or regulated by or under the authority of the king's most excellent majesty, or any of his royal predecessors, or of any special act of parliament thereunto particularly relating; nor to any charitable donation under the superintendence of any such hospital, school, or institution, nor to the governors of the corporation of the charity for the relief of poor widows and children of clergymen, nor to any friendly society, the rules whereof shall have been confirmed according to the provisions of the act or acts for the encouragement and relief of friendly societies; nor to either of the Universities of Oxford or Cambridge, nor to any college or hall thereto belonging, nor to any charitable bequest, devise, gift, or foundation whatsoever belonging thereto, or under the control, direction, superintendence, or management of the said Universities or either of them, or any college or hall therein respectively; nor to the Radcliffe infirmary within the University of Oxford; nor to the colleges of Westminster, Eton, or Winchester, or any of them; nor to any cathedral or collegiate church within England and Wales; nor to the Charter House; nor to the corporation of the Trinity House of Deptford Strond; nor to any funds applicable to charitable purposes for the benefit of any persons of the Jewish nation."

nor to charitable institutions of Quakers;

Sect. 12. "Nothing in this act contained shall extend to any charitable foundation or donation which shall have been or shall be given to and for the benefit of any person or persons of the society of people called Quakers, and which shall be under the superintendence and control of persons of that persuasion."

nor to charitable foundations, accounts of which are to be passed in Chancery, &c.

Sect. 13. "Nothing in this act contained shall extend to any charity or charitable donation or foundation, the accounts of the income and expenditure whereof shall have been directed to be annually passed in the High Court of Chancery, nor to any charity or charitable donation or foundation, the annual gross income whereof shall not exceed forty shillings, and of which the trustee or trustees, feoffee or feoffees, possessor or possessors, some or one of them, shall within six months after the passing of this act deposit in the hands of the minister of the parish wherein any of the objects of the charity, charitable donation, or foundation, shall be, a written memorial or statement in like form as in the schedule hereunto annexed is contained, and which by such minister shall be forthwith deposited in the parish chest."

Divers charities may be stated in memorial.

Sect. 14. "Where any body corporate, guild, or fraternity, shall be entrusted with the possession or distribution of divers charities or charitable donations or foundations, or of the rents and profits thereof, that in such cases all such charities, charitable donations and foundations, may be registered and stated in one and the same memorial."

Saving clause.

Sect. 15. "Saving always to the king's most excellent majesty, and to

all other persons, such power of superintending and regulating charities and charitable establishments, and the property and funds thereof, as they respectively had before the making of this act." 52 Geo. 3, c. 102.

SCHEDULE to which this act refers.

A MEMORIAL or statement in pursuance of an Act for the registering and securing of charitable donations; whereby it is declared by the undersigned [state the name or names of the persons who sign the memorial or statement] *that the real* [or *personal*] *estate* [state this as the case may be] *of the* [state the title or appellation of the charity or charitable donation] *consists of* [state this as the case may be; and if real estate, whether it be in lands, tenements, or hereditaments, and of what tenure, and where the same are situate, or whether of any charge or incumbrance on any lands, tenements, or hereditaments, and where situate: and if personal estate, describe the nature of it, and how secured] *and the gross annual income arising therefrom amounts to* [state the sum] *and the objects of which charity or charitable foundation are* [state the general or particular objects of the charity] *and which charity or charitable foundation was, according to the best of my* [or *our*, as the case may be] *knowledge and belief, founded by* [state by whom; and if benefited, increased, or secured by any other person, state the same and by whom] *and the deeds, wills, and other instruments* [state this as the case may be; and if no deeds, wills, or other instruments exist, state the same] *are, to the best of my* [or *our*, as the case may be] *knowledge and belief, in the custody, possession, or control* [state this as the case may be] *of* [state the name of the body corporate or natural person] *and the trustees,* [*feoffees*, or *possessors*] [state this as the case may be] *of the said real and personal estate* [state this as the case may be] *are, to the best of my,* [or *our*, as the case may be] *knowledge and belief* [state the name of the body corporate or natural person, as the case may be].

(Signed) *A. B.*
C. D.
E. F.

Trustee [or *trustees, feoffees, possessor* or *possessors*] *of the real* [or *personal*] *estate* [as the case may be] *of the charity or charitable donation hereby memorialized and registered.*

Chase, see "*Game*," Vol. III.

Chastity, *Solicitation of*, see "*Lewdness*," Vol. III.

Collieries, see "*Mines*," Vol. V.

Cheats and False Pretences.

HEREIN of the offence of cheating:—

I. *By the Common Law*, 591.
II. *By Statute 7 & 8 Geo. IV. c. 29, s. 53*..595
III. *By other Statutes*, 603.
IV. *Forms*, 603.

I. By the Common Law.

General doctrine as to what amounts to an offence at common law by a cheat.

Hawkins lays it down, that "cheats, which are punishable by the common law, may in general be described to be deceitful practices, in defrauding or endeavouring to defraud another of his known right, by means of some artful device, contrary to the plain rules of common honesty; as by playing with

1. *By the Common Law.*

false dice; or by causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written; or by persuading a woman to execute writings to another, as her trustee, upon an intended marriage, which in truth contained no such thing, but only a warrant of attorney to confess a judgment; or by suppressing a will; and such like." (1 *Hawk.* c. 71, s. 1.) But this general doctrine would include a variety of injuries for which the party's only remedy would be by action, and not by indictment; and it is now, it seems, settled by the various decisions on the subject, that at common law no cheat or fraud (not amounting to felony) is an indictable offence, unless it affects or may affect the public, and is effected by some deceitful and illegal practice, against which common prudence could not have guarded. (See 2 *East, P. C.* c. 18, s. 2; 2 *Russ. C. & M.* 282, 286, 3rd ed.)

Therefore, where the defendant was indicted and convicted for selling beer short of the due and just measure, to wit, sixteen gallons as and for eighteen. Upon a motion in arrest of judgment, it was said by the Court, "This is only an inconvenience and injury to a private person, arising from that private person's own negligence and carelessness in not measuring the liquor upon receiving it, to see whether it held the just measure or not. Offences that are indictable must be such as affect the *public*, as if a man use false weights and measures, and sell by them to all or to any of his customers, or use them in the general course of his dealing; so if there be any conspiracy to cheat; for these are deceptions that common care and prudence are not sufficient to guard against. These are much more than private injuries; they are *public offences*. But in the present case it is a mere *private* imposition or deception. No false weights or measures are used; no conspiracy; only an imposition upon the person he was dealing with, in delivering him a less quantity instead of a greater; which the other carelessly accepted. It is only a non-performance of his contract; for which non-performance the other may bring his action. So the selling an unsound horse for a sound one is not indictable. The buyer should be more upon his guard: and the distinction which was laid down, as proper to be attended to in all cases of this kind, is this; that in such impositions or deceits where common prudence may guard persons against their suffering from them, the offence is not indictable; but where false weights and measures are used, or false tokens produced, or such methods taken to cheat and deceive, as people cannot by any ordinary care or prudence be guarded against, there it is an offence indictable." (*R.* v. *Wheatley*, 1 *Bla. Rep.* 273; 2 *Burr.* 1125, S. C.)

A mere breach of contract not an offence;

as selling a less quantity than pretended,

So, if without false weights a party sells to another a less quantity than he pretends to sell, it is no offence. (*R.* v. *Young*, 3 *T. R.* 104.)

or bartering bad wine for hats,

So where one person pretended to be a merchant, and the other a broker, and as such bartered bad wine for hats, it was considered that they were guilty of the offence of a *conspiracy* to cheat, but not of an offence of cheating. (*R.* v. *Mackarty*, 2 *Ld. Raym.* 1179, 1184; 3 *Ld. Raym.* 325; 2 *Burr.* 1129; 2 *East, P. C.* c. 18, s. 1, p. 824.)

or falsely warranting a horse, unless there be a conspiracy.

So falsely warranting an unsound horse to be sound, well knowing it to be otherwise, is no offence, unless there be a conspiracy to defraud, and then an indictment might be supported for a conspiracy. (*R.* v. *Pywell*, 1 *Stark.* 402; and see *R.* v. *Codrington*, 1 *C. & P.* 661, *post.*)

Nor procuring another to execute a deed to his prejudice.

Nor is it, it seems, an offence to cause an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it is written, unless there be a conspiracy. (See 2 *East, P. C.* c. 18, s. 5, p. 823, explaining the case of *R.* v. *Skirret*, 1 *Sid.* 312; 1 *Hawk.* c. 71, s. 1, and *R.* v. *Parris*, 1 *Sid.* 431.)

Nor cheating at a race.

And though, in the case of *Q.* v. *Orbell*, it was held to be an indictable offence to get a person to lay money on a race, and to prevail with the party to run booty; yet the ground of the declaration appears to have been that the offence amounted to a conspiracy. (6 *Mod.* 42.)

Nor is a bare lie or false affirmation in a private transaction.

So the deceitful receiving of money from one man to the use of another, upon a false pretence of having a message and order to that purpose, is not an offence at common law in a private transaction, because it is accompanied

with no manner of artful contrivance, but only depends on a bare naked lie; and it is said to be needless to provide severe laws for such mischiefs, against which common prudence and caution may be a sufficient security. (1 *Hawk.* c. 71, s. 2; 2 *East's P. C.* 818.)

1. *By the Common Law.*

So in a case where a party obtained money of another, by pretending to come by the command of a third person to demand a debt or the like in his name, showing no voucher or token for his authority; it was holden not indictable, for it was the party's own fault to trust him. And by the Court, "We are not to indict one man for making a fool of another: let him bring his action." (*R.* v. *Jones*, 2 *Ld. Raym.* 1013; 1 *Salk.* 379; 6 *Mod.* 105, S. C.; and see *R.* v. *Bryan*, 2 *Strange*, 866; *R.* v. *Gibbs*, 1 *East*, 185.)

And the same where a false token used.

And it seems the same doctrine will hold good, though the defendant made use of an apparent token, which in reality is, upon the very face of it, of no more credit than his own assertion. (2 *East's P. C.* c. 18, s. 2; 2 *Russ. C. & M.* 3rd ed. 283.) Therefore, where an indictment at common law charged the defendant with deceitfully intending, by divers crafty means and subtle devices, to obtain possession of certain lottery tickets, the property of A., pretending that he wanted to purchase them, and delivered to A. a fictitious order for the payment of money, purporting to be a draft upon a banker for the amount, which he knew he had no authority to draw, and would not be paid; by which he obtained the tickets, and defrauded the prosecutor of the value. It was objected in arrest of judgment, that the defendant was not charged with having used any false token to accomplish the deceit; for that the banker's check, drawn by the defendant himself, entitled him to no more credit than his bare assertion that the money would be paid. And the objection was held good, and the judgment arrested. (*R.* v. *Lara*, 6 *T. R.* 565; and see *R.* v. *Flint*, *R. & R.* 460.)

But in another case, on an indictment on the repealed stat. 30 Geo. II. c. 24, where it appeared that the prisoner had obtained property by giving a draft on his banker and pretending he had cash there to pay it, *Bayley*, J. (before whom the prisoner was tried) said that this point had been recently before the judges, and that they were all of opinion that it is an indictable offence fraudulently to obtain goods by giving in payment a check upon a banker with whom the party keeps no cash, and which he knows will not be paid. (*R.* v. *Jackson*, 3 *Camp.* 370.)

But frauds affecting the public are frauds against public justice.

On the other hand, all cheats and frauds affecting or which may affect the public, are in general offences at common law, if effected by some deceitful and illegal practice or token, and they be such against which common prudence could not have guarded, and this notwithstanding they arise out of a particular transaction or contract.

Therefore cheats and frauds against the public justice of this realm are offences at common law. (2 *East's P. C.* c. 18, s. 4.) As where a person, who being committed to gaol under an attachment for a contempt in a civil cause, counterfeited a pretended discharge, as from his creditor, to the sheriff and gaoler, under which he obtained his discharge; he was held guilty of an offence at common law, in thus effecting an interruption to public justice, although the attachment not being for non-payment of money, the order was in itself a mere nullity, and no warrant to the sheriff for the discharge. (*R.* v. *Fawcett*, 2 *East's P. C.* c. 19, ss. 7, 45; and see *Omealey* v. *Newell*, 8 *East*, 364; 1 *Russ. C. & M.* 275, 3rd ed.; and see, as to falsely personating bail, *ante*, title "*Bail*," p. 330.)

Falsely pretending to discharge soldiers.

A person falsely pretending that he had power to discharge soldiers, took money of a soldier to discharge him, and being indicted for the same, the Court held the indictment to be good. (*Serlestead's case*, 1 *Latch.* 202.)

Enlistment by an apprentice.

So obtaining the queen's bounty for enlisting as a soldier by an apprentice, reclaimable by his master, is an offence at common law. (*R.* v. *Jones*, Coventry Lent Assizes, 1777; 2 *East's P. C.* 822; 1 *Leach*, 174.)

Counterfeit pass.

So a person for a counterfeit pass was adjudged to the pillory, and fined. (*Dalt.* c. 32.)

So the offence will be complete, though the fraud or cheat arise out of a particular transaction or contract with the offender.

1. *By the Common Law.*

Thus, an indictment lies for wilfully, deceitfully, and maliciously supplying prisoners of war with unwholesome food, not fit to be eaten by man. (*Treve's case*, 2 *East's P. C.* 821.)

Selling unwholesome food.

So it has been held an indictable offence at common law for a baker to sell bread containing alum in a shape which renders it noxious, although he gave directions to his servants to mix it up in a manner that would have rendered it harmless. (*R.* v. *Dixon*, 4 *Camp.* 122; 3 *M. & Sel.* 11, S. C.)

Miller changing corn.

So on an indictment against the defendant, a miller, for changing corn, and returning bad corn instead of it, it was considered maintainable; for being a cheat in the way of trade, it is deemed an offence against the *public*. (*R.* v. *Wood*, 1 *Sess. Ca.* 217.) But in a later case, it was held not indictable for a miller receiving good barley to grind at his mill, to deliver a musty and unwholesome mixture of oat and barley meal, different from the produce of the barley: and Lord *Ellenborough*, C. J., there said, "The allegation that the quantity (of meal) delivered was musty and unwholesome, if it had alleged that the defendant delivered it as an article for the food of man, might possibly have sustained the indictment: but I cannot say that its being musty and unwholesome necessarily and *ex vi termini* imports that it was for the food of man, and it is not stated that it was to be used for the sustentation of man, only that it was a mixture of oat and barley meal. As to the other point, that this is not an indictable offence, because it respects a matter transacted in the course of trade, and where no tokens were exhibited by which the party acquired any greater degree of credit; if the case had been that this miller was owner of a soke mill, to which the inhabitants of the vicinage were bound to resort in order to get their corn ground, and that the miller, observing the confidence of this his situation, had made it a colour for practising a fraud, this might have presented a different aspect; but as it is, it seems no more than the case of a common tradesman, who is guilty of a fraud in a matter of trade or dealing." (*R.* v. *Haynes*, 4 *M. & Sel.* 214.)

False weights.

If a person sell by false weights, though only to one person, it is an indictable cheat; but it would be otherwise if he sold without false weights a *less quantity* than he pretended to sell, unless he used any artful method to cheat. (*R.* v. *Young*, 3 *T. R.* 104; and see *R.* v. *Nicholson*, cited in *R.* v. *Wheatley*, *ante*, 592; and *R.* v. *Dunnage*, 2 *Burr.* 1130.)

Using false dice.

Cheating by means of false dice, &c., is an offence at common law. (*R.* v. *Leeser*, *Cro. Jac.* 497; *R.* v. *Maddox*, 2 *Roll. R.* 107.) It is also now an offence by statute; see "*Gaming*," Vol. III. p. 311, 314.)

A minor going about pretending to be of age.

As there are frauds which may be relieved civilly, and not punished criminally (with the complaints whereof the courts of equity do generally abound); so there are other frauds, which in a special case may not be helped civilly, and yet shall be punished criminally: thus if a minor go about the town, and pretending to be of age, defraud many persons by taking credit for considerable quantities of goods, and then insist on his nonage; the persons injured cannot recover the value of their goods, but they may indict and punish him for a *common cheat*. (*Barl.* 100.)

False news.

Writers of *false news* are indictable for it as an offence at common law; and it would perhaps be held at the present day that the fabrication of false news, calculated to produce any public detriment, would be an offence. (See *Stark. Libel*, 546; 2 *Russ. C. & M.* 278.)

Form of indictment.

As regards the form of the indictment, where the fraud has been effected by false tokens, and the offence is so charged, the false tokens must be specified and set forth. It is not sufficient to allege generally that the cheat was effected by certain false tokens or false pretences. (2 *East's P. C.* c. 18, s. 13, p. 837.)

But it does not seem to be necessary to describe them more particularly than they were shown or described to the party at the time, and in consequence of which he was imposed upon; and it is also said not to be necessary to make any express allegation that the facts set forth show a false token. (2 *East's P. C.* c. 18, s. 13, p. 838.)

An objection appears to have been made to one of the counts of an indict-

ment for a cheat at common law, that it charged the false pretence to have been made to one person, and the deceit to have been practised on a different person. (*Lara's case*, 2 *Leach*, 647.) But see *R.* v. *Douglas*, 1 *Campb.* 212, *post*, 601, where the pretence was made to a servant, but the money of the mistress obtained.

1. *By the Common Law.*

The offence is punishable by fine or imprisonment, or both, like any other misdemeanor. (1 *Hawk.* c. 71, s. 3.)

Punishment.

II. By Statute 7 & 8 Geo. IV. c. 29, s. 53.

Stat. 7 & 8 Geo. IV. c. 29, s. 53, after reciting that "a failure of justice frequently arises from the subtle distinction between larceny and fraud," enacts "that if any person shall by any false pretence obtain from any other person any chattel, money, or valuable security, with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to suffer such other punishment, by fine or imprisonment, or by both, as the Court shall award: provided always that if, upon the trial of any person indicted for such misdemeanor, it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor, (*a*) and no such indictment shall be removable by *certiorari*; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts." (See the general clauses affecting all the provisions of this act, *post*, "*Larceny*," Vol. III.)

Obtaining money, &c. by false pretences a misdemeanor.

Punishment.

No acquittal if offender found guilty of larceny.

No *certiorari*.

Not to be tried for a larceny if tried for the misdemeanor.

To the punishment of imprisonment may be added hard labour for the whole or any part of the term, also solitary confinement; (7 & 8 Geo. IV. c. 29, s. 4:) such confinement not exceeding one month at any one time, nor three months in any one year; 7 Will. IV. & 1 Vict. c. 90, s. 5. (See tit. "*Larceny*," *post*, Vol. III.)

Hard labour.

Solitary confinement.

Formerly where goods had been obtained from another by mere fraud the Court had no power of awarding restitution on conviction of the offender, as in cases of felony; (*Parker* v. *Patrick*, 5 *T. R.* 175; *R.* v. *De Veaux*, 2 *Leach*, 585;) though the obtaining goods by false pretences did not in general change the property in the goods. (*Noble* v. *Adams*, 7 *Taunt.* 59; *Stevenson* v. *Hart*, 4 *Bingh.* 476.) But this is now remedied by the 7 & 8 Geo. IV. c. 29, s. 57, which see, tit. "*Larceny*," Vol. III.

Restitution of the goods obtained.

What a False Pretence within the Act.]—In general any false pretence of an existing fact, made with the fraudulent intent of obtaining from another any part of his property, is within the act.

What a false pretence within the act.

If a man be authorised to inspect and pay a number of journeymen, and to draw on the clerk of the masters for the amount of the sums earned, and he delivers in a false account, and draws on the clerk for the amount in such false account, he will be guilty under the statute; as he would never have obtained the credit unless he had delivered his fictitious estimate. (*R.* v. *Witchell*, 2 *East*, *P. C.* 830.)

In general.

So would a carrier, if he obtains money by pretending to have delivered goods and to have lost the receipt given him by the person to whom they were directed. (*R.* v. *Airey*, 2 *East's Rep.* 30; *R.* v. *Coleman*, 2 *East's P. C.* 672.)

So in the case of *R.* v. *Count Villeneuve*, 1778, cited in 3 *T. R.* 98, which was tried before *Morton*, C. J., of Chester, and *Buller*, J., at Chester; the defendant applied to Sir T. Brougton, telling him that he was instructed by

(*a*) Before this enactment, if it appeared the offence amounted to larceny, the defendant was acquitted, and very nice questions arise as to what amounts to larceny where false pretences are used (See *R.* v. *Pear*, 2 *East's P. C.* 689; *R.* v. *Adams*, *R. & R.* 225.)

2. By Statute 7 & 8 Geo. 4, c. 29.

the Duke de Lauzun to take some horses from Ireland to London, and that he had been detained so long by contrary winds that his money was spent. Sir T. Broughton was thereupon induced to advance some money to him, but it afterwards appearing that the whole story was a fiction, the defendant was tried for a cheat on the now repealed stat. 30 Geo. II. and convicted: the judgment was affirmed.

So if a person procuring a tradesman to sell him goods as for ready money, direct him to send his servant with them to his lodgings, and then deliver fabricated bills in payment, retaining the goods, though he cannot be prosecuted for felony in stealing them, he may be found guilty under the act of obtaining them by false pretences. (2 *Leach*, 614.)

Obtaining money from the county treasurer by a forged order, purporting to be signed by a magistrate, for payment of expenses of conveying vagrants, is an offence within the act. (*R.* v. *Rushworth*, *R. & Ry.* 317; 1 *Stark.* 396, S. C.)

So is obtaining money from the keeper of a post office, by assuming to be the person mentioned in a money order which the party presented for payment. (*R.* v. *Story*, *R. & R.* 81.)

Pretending a security to be valid.

A party pretending that his own bill, note, check, or other security is a good and valid one, may be a false pretence within the act, as if a party pretend that his own check is a valid security when it is drawn upon a banker with whom he never kept an account. (*R.* v. *Parker*, 7 *C. & P.* 825; *R.* v. *Jackson*, 3 *Camp.* 370.) So obtaining as a loan from the drawer of a bill accepted by the prisoner and negotiated by the drawer, part of the amount for the purpose of paying the bill under the false pretence that the prisoner was prepared with the residue of the amount, has been held a false pretence within the act, the prisoner being shown not to be so prepared and not intending so to apply the money. (*Rex* v. *Crossley*, 2 *M. & Rob.* 17.) But where the indictment stated that the prisoner contriving, &c. to cheat A. B., falsely pretended to A. B. that he was a captain in the East India Company's service, and that a certain promissory note which he then delivered to A. B., was a valuable security for 21*l.*, by means of which false pretences he fraudulently obtained from A. B. 8*l.* 15*s.*, whereas the prisoner was not a captain, &c., and the note was not a valuable security, &c.; it was held, as it did not appear but that the note was not the prisoner's own promissory note, or that he knew it to be worthless, there was no sufficient false pretence in that respect, and, as the two pretences were to be taken together, that the indictment was bad, and judgment given upon it was reversed in error. (*R.* v. *Wickham*, 2 *Per. & D.* 333; 10 *Ad. & Ell.* 39, S. C.) And obtaining credit in account from the party's own banker, by drawing a bill on a person on whom the party has no right to draw, and which has no chance of being paid, is not within the act, though the banker pays money for him in consequence thereof to an extent he would not otherwise have done. (*R.* v. *Wavell*, *R. & M. C. C.* 224.) As to uttering a forged instrument, see *post*, 598.)

The pretence must be of an existing fact.

But the pretence must be of some existing fact, made for the purpose of inducing the prosecutor to part with his property. Therefore, a pretence that the party *would do* an act he did not mean to do, as a pretence to pay for goods on delivery, is not a false pretence within the act, but merely a promise for future conduct. (*R.* v. *Goodhall*, *R. & R.* 461; *R.* v. *Clifford*, *K. B.* 1824.) And it seems that a false representation as to a future event is not within the act. (See *R.* v. *Parker*, 2 *Mood. C. C.* 1; 7 *C. & P.* 825, S. C.)

An indictment for false pretences against H. and B. charged that F. P. was possessed of a mare, and H. of a horse, and that H. and B. falsely pretended to F. P. that B. "was then and there possessed of a certain sum of money, to wit, the sum of 12*l.*," and that if F. P. would exchange his mare for H.'s horse, B. was willing and ready to purchase the horse of F. P. and give him 12*l.* for it, "whereas in truth and in fact the said B. was not then and there possessed of the said sum of 12*l.*," and was not then and there ready and willing to purchase the said horse: It was held, that the indictment was bad, as it did not aver that the defendants knew that B. was not possessed of 12*l.* (*R.* v. *Henderson*, 1 *C. & Marsh.* 328.)

So it does not lie for obtaining money by offering to tell a person who had lost some horses where they were, and then refusing to tell, without an averment and proof that the prisoner pretended he *knew* where they were, but that he did *not know*. (*R.* v. *Douglas*, *Lincoln Summer Assizes*, 1835, *R. & M. C. C.* 462, S. C.)

2. *By Statute* 7 & 8 *Geo.* 1, c. 29.

A mere breach of contract, though the promise was as to a fact existing at the time it was made, will not be a false pretence within the act. Where the prisoner sold to the prosecutor a reversionary interest which he had previously sold to another, and the prosecutor took a regular assignment of it with the usual covenant for title, *Littledale*, J., held, that he could not be convicted for obtaining money by false pretences; for if this were within the statute, every breach of warranty or false assertion at the time of a bargain might be treated as such, and the party be transported. (*R.* v. *Codrington*, 1 *C. & P.* 661.) And see as to how far cheating on a contract may be an offence at common law, *ante*, 592. A false warrantry of a horse would not be such offence, *id.* If the parties were guilty of a *conspiracy* then they might be indicted for that offence, *id.*

Mere breach of contract.

Where the indictment charged that the defendant, having in his possession a certain weight of twenty-eight pounds, falsely pretended to C. that a quantity of coals, which he delivered to C., weighed sixteen hundred weight, (meaning 1792 pounds weight), and were worth 1*l.*, and that the weight was fifty-six pounds, by means of which he obtained a sovereign from C. with intent to defraud him of part thereof, to wit, 10*s.*; whereas the coals did not weigh 1792 pounds, and were not worth 1*l.*, and whereas the weight was not fifty-six pounds, and whereas the coals were of the weight of 896 pounds only, and were not worth more than 10*s.*, and whereas the weight was twenty-eight pounds only; the judges held a conviction on the indictment wrong, on the ground that all the pretences, except that relating to the weight, were mere false affirmations, and that, as to the weight, there was no allegation to connect the sale of the coals with the use of the weight. (*R.* v. *Reed*, 7 *C. & P.* 848.)

An attorney who had appeared for a person who was fined 2*l.* on a summary conviction, called on the person's wife and told her that he had been with another person, who was fined 2*l.* for a like offence to Mr. B. and Mr. L., and that he had prevailed on Mr. B. and Mr. L., to take 1*l.* instead of 2*l.*, and that if she would give him 1*l.* he would go and do the same for her. She gave the attorney a sovereign, and afterwards paid him for his trouble. It was proved that the attorney never applied to either Mr. B. or Mr. L. respecting either of the fines, and that both were afterwards paid in full: it was held that the attorney was guilty of obtaining money by false pretences. (R. v. *Asterley*, 7 *C. & P.* 191.)

Obtaining money in character of an attorney.

There may be a sufficient false pretence within the act by the acts and conduct of the party, without any verbal representations of a false and fraudulent nature. As where a person at Oxford, who was not a member of the university, went for the purpose of fraud in a commoner's dress and obtained goods, this was held a sufficient false pretence though he said nothing false. (*R.* v. *Bernard*, 7 *C. & P.* 784. And see *R.* v. *Wickham*, *ante*, 596.)

No verbal representation necessary to constitute a false pretence.

So if a man assume the name of another to whom money is required to be paid by a genuine instrument, this is within the act. (*R.* v. *Story*, *Russ. & Ry.* 81.) The prisoner paid his addresses to the prosecutrix, and obtained a promise of marriage from her, which promise she afterwards refused to ratify. He then threatened her with an action, and by this means obtained money from her. During the whole of the transactions the prisoner had a wife. On an indictment against him for obtaining money under false pretences, the pretences laid were, first, that he was unmarried; secondly, that he was entitled to bring and maintain his action against her for a breach of promise of marriage; it was held, that the fact of the prisoner paying his addresses was sufficient evidence for the jury on which they might find the first pretence, that the prisoner was a single man and in a condition to marry; and that there was sufficient evidence on which to find the falseness of the other pretence, that he was entitled to maintain his action for breach of promise of

2. *By Statute* 7 & 8 *Geo.* 4, c. 29.

marriage, and that such latter false pretence was a sufficient false pretence within the statute. (*Reg.* v. *Copeland*, 1 *C. & Marsh.* 516.) We have already seen that if a person obtain goods from another upon giving him in payment his check upon a banker, with whom in fact he has no account, this is a false pretence within the act.

The fact of uttering a counterfeit note as a genuine note is tantamount to a representation that it was so. And where a man obtained goods and money for a forged note of hand for ten shillings and sixpence, it was held a false pretence within the act. (*R.* v. *Freeth*, *R. & R.* 127.) In a more recent case, however, where the prisoner obtained goods by means of a forged order, *Taunton*, J., is reported to have held that he could not be indicted for obtaining them by false pretences, but should have been indicted for forgery. (*R.* v. *Evans*, 5 *C. & P.* 553.)

The pretence must be false,

The pretence must be false and wilfully so. Where the defendants were charged with obtaining money by colour and pretence of their being collectors of the property tax, and it appeared in evidence that they had in fact been appointed collectors by the commissioners, though in an informal manner: this was holden not to be a *false* pretence, within the meaning of the act. (*R.* v. *Dobson*, 7 *East*, 218.) Where the prisoner passed for money the note of a country bank which he knew had stopped payment, it appearing that one of the parties was solvent, *Gaselee*, J., held that he could not be convicted. (*R.* v. *Spencer*, 3 *C. & P.* 420.) See further as to the pretences being partially false, *post*, 600.

and for the purpose of defrauding prosecutor of his property;

The pretence must be for the purpose of obtaining the property of another, to cheat and defraud him of it. A pretence to a parish officer, as an excuse for not working, that the party has not clothes, when he really has, though it induce the officer to give him clothes, is not a pretence within the statute, the statement being rather a false excuse for not working, than a false pretence to obtain goods. (*R.* v. *Wakeling*, *R. & R.* 504.) A. owed B. a debt, of which B. could not get payment. C., a servant of B., went to A.'s wife and obtained two sacks of malt of her, saying that B. had bought them of A. C. knew this to be false, but took the malt to B. his master, to enable him to pay himself the debt. It was held, that if C. did not intend to defraud A., but merely to put it into his master's power to compel A. to pay him a just debt, C. ought not to be convicted of obtaining the malt by false pretences. (*R.* v. *Williams*, 7 *C. & P.* 354.) The intent may be implied sufficiently from the facts of the case.

and must be calculated to obtain the property.

The pretence must, it would seem, be such as is calculated to induce the party to whom it is made to part with his property, and whether it is so calculated is perhaps a question for a jury. But it need not be such against which common prudence might have guarded. (See per *Denman*, C. J., in *R.* v. *Wickham*, 10 *Ad. & Ell.* 34; 2 *Russ. C. & M.* 289, 3rd ed. And see *R.* v. *Smith*, *post*, 598.)

Where the defendants, falsely pretending that they had made a bet with A. B. that one of them should run ten miles within an hour, prevailed upon J. N. to join them in the bet, and obtained from him twenty guineas as his share in it; the judges held this to be within the statute, notwithstanding the pretence was probably one against which common prudence might have guarded. (*R.* v. *Young*, *in error*, 3 *T. R.* 98. And see *R.* v. *Smith*, *post*, 598.)

An indictment for false pretences charged in the first count that the defendant "unlawfully did falsely pretend to one J. L. that he, the said J. T. (the defendant), was sent by W. P. for an order to go to J. B. for a pair of shoes," by means of which false pretence he did obtain from J. B. a pair of shoes, of the goods and chattels of J. B., with intent to defraud J. L. of the price of the said shoes, to wit, nine shillings, of the monies of J. L. The second count charged that he falsely pretended to J. L. that W. P. had said that J. L. was to give him, the said J. T. (the defendant), an order to go to J. B. for a pair of shoes, by means of which false pretence he did obtain from J. B., in the name of J. L., a pair of shoes of the goods of J. B., with intent to defraud J. L. of the same. It was held, that both of these counts were

bad in arrest of judgment, as neither of them charged a sufficient false pretence within the statute. (*Reg.* v. *Fully*, 9 *Car. & P.* 227.)

2. *By Statute*, 7 & 8 *Geo.* 4, c. 29.

A defendant was charged in the first count of an indictment with having falsely pretended that he was Mr. H. who had cured Mrs. C. at the Oxford infirmary, and thereby obtaining one sovereign, with intent to defraud G. P. "of the same." The second count laid the intent to be to defraud G. P. "of the sum of 5*s.*" parcel of the value of the said last-mentioned piece of the current gold coin." It was proved that the defendant made the pretence and thereby induced the prosecutor to buy, at the price of 5*s.*, a bottle containing something which he said would cure the eye of the prosecutor's child. The prosecutor gave him a sovereign and received 15*s.* in change. It was further proved that the defendant was not Mr. H. It was held, that this was a false pretence within the act, and that the intent was properly laid in the second count. (*Reg.* v. *Bloomfield*, 1 *C. & Marsh.* 537.)

Laying a plan against defendant.

If a party obtain money by a false pretence, knowing it to be false at the time, it is no answer to show that the party from whom he obtained the money laid a plan to entrap him into the commission of the offence. (*R.* v. *Ady*, 7 *C. & P.* 140.)

Property must be obtained by means of the pretence.

Property must be obtained by the false Pretence.]—The property must be obtained by means of the false pretence charged. The prisoner was charged with obtaining a filly by the false pretence that he was a gentleman's servant, and had lived at Brecon, and had bought twenty horses in Brecon fair. It appeared that he bought the filly of the prosecutor for 11*l.*, making him this statement which was false, and also telling him that he would come down to the Cross Keys and pay him. The prosecutor stated that he parted with his filly because he expected the prisoner would come to the Cross Keys and pay him, and not because he believed that the prisoner was a gentleman's servant, &c. It was held, that if the prosecutor did not part with his filly by reason of the false pretence charged or any part of it, the prisoner must be acquitted. (*R.* v. *Date*, 7 *C. & P.* 352.)

And where the prisoner obtained money through the imprudence of the prosecutor and not by means of the false pretences used, it was held no offence. (*R.* v. *George Smith*, *Hereford Spring Assizes*, 1832, 2 *Russ. C. & M.* 312, 3rd ed.)

A person endeavouring by a counterfeit letter to defraud another of goods, and being apprehended on suspicion of such fraud before he got the goods into his possession, would not be guilty of an offence within the act. (*R.* v. *Brian*, 2 *Sess. Ca.* 27. See *R. & R.* 107, n.; *R.* v. *Phillips*, 6 *East*, 464.) But he might be indicted for the attempt to defraud. (See "*Attempts*," *ante*.)

Nature of the property obtained.

What Property is within the Act.]—The statute requires the property to be a chattel, money, or valuable security. The 5th section defines what shall be deemed a *valuable security*. See it, title "*Larceny*," Vol. III.

If a bill of exchange or the like be obtained, it must appear to be duly stamped. Where a prisoner by false pretence obtained a check on a banker on *unstamped* paper, payable to D. F. J., and not payable to *bearer*, this was held not a valuable security, as it would have been a breach of the law for the banker to pay it. (*R.* v. *Yates*, *R. & M.* 170.)

Where, to induce his bankers to pay his checks, a defendant drew a bill on a person on whom he had no right to draw, and which had no chance of being paid, in consequence of which the bankers paid money for him; it was holden not to be within the act, because he only obtained credit, and not any specific sum on the bill. (*R.* v. *Wavell*, *R. & M.* 224.)

The indictment for. Venue.

The Indictment for.]—As to the venue in general, see "*Indictment*," Vol. III. Before the 7 Geo. IV. c. 64, s. 12, it was decided the venue should be laid in the county where the money was obtained, and not where the false pretences were used. (*R.* v. *Burdett*, 4 *Barn. & Ald.* 179.) But by that statute it might be laid in either county.

Several defendants.

Several defendants may be included in the same indictment, if they were

2. *By Statute* 7 & 8 *Geo.* 4, c. 29.

all jointly concerned in the false pretence used. (See *Young and others* v. *Rex in error*, 3 *T. R.* 98.) And in general, on an indictment against two, charging them with a joint offence, either may be found guilty. But they cannot be found guilty separately of separate parts of the charge; yet if they be found guilty separately upon a pardon or *nolle prosequi*, as to one who stands second upon the verdict, judgment may be given against the other. (2 *Russ. C. & M.* 309, 3rd ed., citing *R.* v. *Hempstead, M. T.* 1818, *R. & R.* 344, S. C.) In *R.* v. *Martin*, 8 *Ad. & Ell.* 481, a husband and wife were jointly convicted of the offence

Several charges.

So several charges of misdemeanor may be included in the same indictment. (*Young* v. *Rex, in error, supra.*)

Must state the false pretences.

It is necessary to set forth the false pretences employed by the defendant, as they will appear at the trial, in order that the Court may see what they are, and judge whether they are within the act. (*R.* v. *Mason*, 2 *T. R.* 581; *R.* v. *Plestow*, 1 *Camp.* 495; *R.* v. *Fuller*, 2 *East's P. C.* c. 18, s. 13, p. 837; *R.* v. *Munox*, 1 *Sess. Ca.* 201; 2 *Stra.* 1127.)

In *R.* v. *Mason* (2 *T. R.* 581), the defendant was indicted for obtaining money by *false pretences;* and on his trial at the sessions at Worcester he was convicted, and received sentence of transportation for seven years. The defendant brought a writ of error, and assigned for error, that it did not appear by the indictment what the particular and specific false pretences were, by which he obtained the money. *Buller*, J. "The question is not a new one: I remember a case when I was at the bar, and I argued it on the analogy to the case in *Strange* for obtaining a note by false tokens, which entirely governs this. That was a case on the stat. 33 Hen. VIII. c. 1, which makes it an offence to obtain money or goods by false tokens. The stat. 30 Geo. II. c. 24, only enlarges the description of the offence in the statute of Hen. VIII. Both statutes are made *in pari materiâ*, and whatever has been determined in the construction of one of them is a sound rule of construction for the other. The judgment was arrested in the case in *Strange*, because the indictment did not specify the *false tokens;* then, by the same reason, an indictment on stat. 30 Geo. II. c. 24, which speaks of *false pretences*, must state what the false pretences are, otherwise the indictment is bad; there is no distinction between the two cases, the same objection which held in the one must also prevail in the other. I am of opinion that the objection is fatal." *Grose*, J., of the same opinion; observing, "that this is a charge for a precise crime, and therefore it must be alleged." Judgment reversed, and the defendant ordered to be set at liberty.

But sufficient to state them in the terms in which they were made.

But the false pretences need not be described more particularly than they were shown or described to the party at the time, and in consequence of which he was imposed on; nor is it necessary to make any express allegation that the facts set forth show a false token or a false pretence. (*R.* v. *Terry*, *Cro. Car.* 564, 3 *T. R.* 102; 2 *East's P. C.* 837.)

And where an objection was taken that the pretence was not stated with sufficient *certainty*, inasmuch as a wager therein mentioned was stated only to have been made "with a colonel in the army then at Bath," without setting forth the colonel's name. But the objection was overruled, and Lord *Kenyon*, C. J., said that the charge was sufficiently certain to enable the defendants to know what they were called upon to answer for, and that perhaps the colonel's name, with whom the wager was stated to have been made, was not mentioned, in which case he could not have been described with greater accuracy. And further, that if such a wager had been actually depending, it was competent to the defendants to have proved it in their defence. (See *R.* v. *Young*, *ante*, 598.)

Or according to their effect.

It seems also that the very words used by the defendant need not be stated, and that it will suffice to state the effect of the pretence. (*R.* v. *Scott*, 2 *Russ. C. & M.* 307, 3rd ed., cited in *R.* v. *Parker*, *ante*, 596.)

Need not in express words allege that defendant did "falsely pretend."

Where the indictment alleged that the defendant *unlawfully, knowingly, and designedly* pretended certain things, "by means of which said *false* pretences" he obtained the money; and in the subsequent part of the indictment all the pretences were averred to be false; this averment was held

sufficient, without averring that the defendant "did *falsely* pretend," &c. (*R.* v. *Airey*, 2 *East's Rep.* 30; 2 *East's P. C.* 831; *Deacon's Dig.* 233.)

2. *By statute 7 & 8 Geo. 4, c. 29.*

So it seems sufficient to allege that the defendant did knowingly and designedly obtain the money or the goods by such and such pretences, (stating them,) and then to aver that those pretences were false. (*Id.*; *R.* v. *Howarth*, 3 *Stark.* 26.)

But the indictment must negative by special averment the truth of the pretences. It is not enough to charge that the defendant *falsely pretended*, &c. (setting forth the pretences) *by means of which said false pretences he obtained the money*, &c.; therefore for want of such averment in the indictment, the Court of Queen's Bench reversed the judgment (*R.* v. *Perrott*, 2 *M. & Sel.* 379.) As to when proof of part of the false pretences charged will suffice, see *post*, 602.

But must expressly aver that the pretences were false.

In some cases the indictment should allege that defendant knew the falsity of the pretence. A defendant was convicted on an indictment for obtaining money by offering to tell a person who had lost some horses where they were, and then refusing to tell, and that he could not tell. The conviction was held bad, as the indictment ought to have stated that prisoner pretended he knew where the horses were. (*R.* v. *Douglas*, *Lincoln Summ. Assizes*, 1835, *ante*, 597.)

And sometimes that defendant knew them to be so.

An indictment for false pretences against H. and B. charged that F. P. was possessed of a mare and H. of a horse, and that H. and B. falsely pretended to F. P. that B. "was then and there possessed of a certain sum of money, to wit, the sum of 12*l.*," and that if F. P. would exchange his mare for H.'s horse, B. was willing to purchase the horse of F. P., and give him 12*l.* for it; "whereas in truth and in fact the said B. was not then and there possessed of the said sum of 12*l.*," and was not then and there ready and willing to purchase the said horse; it was held that the indictment was bad, as it did not aver that the defendants knew that B. was not possessed of 12*l.* (*Reg.* v. *Henderson*, 1 *Car. & M.* 328.)

An indictment that defendant "unlawfully, knowingly, and designedly did "*feloniously* pretend," has been held to be bad. (*R.* v. *Walker*, 6 *C. & P.* 657, *sed quære*, and see *R.* v. *Parradice*, *R. & R.* 205, title "*Fish*," Vol. III. p. 54.)

"Feloniously" pretend, held bad

An indictment for a fraud at common law, charging the false pretence to have been made to one person, and the deceit to have been practised on a different person, was held bad. (*R.* v *Lara*, 2 *Leach*, 647; 2 *East's P. C.* 819, 824; 6 *T. R.* 565, S. C.) But see *R.* v. *Douglas*, 1 *Camp.* 212, where the pretence was made to a servant, but the money of the master was obtained.

Statement as to whom the pretence was made.

The *intent to cheat* should be stated in every material part of the indictment. An indictment for presenting a forged order to W. L. treasurer, &c. pretending it was genuine, and obtaining from W. L, under it, 4*l.* 10*s.* 6*d.* after charging that the prisoner, with intent to cheat, &c. the treasurer presented the order, and that he knowingly, &c. pretended it was a genuine order, proceeded, "and so the jurors, &c. say, that the prisoner, on, &c. did obtain the said sum of, &c ;" but the intent to cheat and defraud W. L. was not stated in this part of the indictment, nor was the obtaining charged to have been effected knowingly and designedly: the indictment was held bad. (*R.* v. *Rushworth*, 1 *Stark.* 396; *R. & R.* 317, S. C.)

Must state an intent to defraud.

The *property* which the defendant obtained should be stated accurately. It may be described in the same manner as in an indictment for larceny, see "*Larceny*," Vol. III.

Statement of property.

The statement as to who was the *owner* of the property should be according to the fact, or a variance would be fatal. As to the statement of the ownership of property in particular instances of partners, counties, parishes, turnpike and other trustees, &c. see the enactments of the 7 Geo. IV. c. 64, title "*Indictment*," Vol. III. And generally the indictment is not good unless in addition to the false pretences it contains the requisites of a count for larceny, and if it do not allege the money, &c. obtained to be the pro-

Statement of ownership of.

2. *By Statute* 7 & 8 *Geo.* 4, c. 29.

perty of any person, it will not be sufficient, inasmuch as it could not in that state be pleaded as a bar to a subsequent indictment for larceny, which the offence is made by the proviso contained in the 53rd section. (*Reg.* v. *Norton*, 8 *Car. & P.* 196.) And this defect is not aided by verdict, but the indictment is bad on error. (*Reg.* v. *Martin*, 8 *Ad. & Ell.* 481.)

Certiorari.]—The statute (sect. 53) expressly takes away the right to a *certiorari* in all indictments for obtaining money by any false pretence. (*Reg.* v. *Butcher*, 9 *Dowl.* 135.) However, where counts are joined on this act with counts for a conspiracy at common law, to obtain goods by false pretences, the *certiorari* is not taken away. (*R.* v. *Saunders*, 5 *D. & R.* 611; and see *R.* v. *Fowler*, 1 *Ad. & Ell.* 836; and *ante*, "*Certiorari*," p. 555.)

Evidence.

The Evidence.]—The necessary evidence may, for the most part, be elicited from the foregoing observations and decisions.

If the false pretence be in writing, it may be proved by secondary evidence if the paper be lost before the trial. (*R.* v. *Chadwick*, 6 *C. & P.* 18.)

The false pretences must be proved as laid; for here it was alleged that the defendant said he had paid a sum of money into the Bank of England, and it was proved in evidence that he merely alleged "the money has been paid into the bank," the variance was holden fatal. (*R.* v. *Plestow*, 1 *Camp.* 494.) But a basket is sufficiently described in the proceedings, under the general term "parcel." (*R.* v. *Douglas*, 1 *Campb.* 212.) On an indictment for delivering in payment of a horse certain promissory notes, which the prisoner knew to be not good nor of any value, the notes purported to be of a country bank, which was supposed to have failed; it was held, that at all events it was necessary to prove that the notes were bad and of no value. (*R.* v. *Flint*, *R. & R. C. C.* 460. See *R.* v. *Spencer*, 3 *C. & P.* 420.)

If the indictment charge the defendant with having attempted to obtain money by means of a paper writing purporting to be an order for money, and the instrument cannot be considered as stated in the indictment to be such an order, it is bad. (*R.* v. *Cartwright*, *R. & R.* 106.)

But it is not necessary to prove the whole of the pretence charged; proof of part of the pretence, and that the money was obtained by that part, will suffice. (*R.* v. *Hill*, *R. & R.* 190; per Patteson, J. in *R.* v. *Adey*, 7 *C. & P.* 140; per Coleridge, J. in *R.* v. *Dale*, 7 *C. & P.* 352.) This, however, must be confined to cases where the part not proved is a separate and independent pretence; for if the false pretences are so connected together in the record that one cannot be separated from the other and the statement of one of those pretences is insufficient in point of law, no judgment can be given upon the other pretence. (*R.* v. *Wickham*, 10 *A. & E.* 34; *ante*, 596.)

Formerly, if the evidence proved not only an intent to cheat or defraud, but also established a pre-existing *animus furandi*, and a constructive taking, such as to constitute larceny, the misdemeanor being merged in the felony, the defendant was entitled to his acquittal. (*R.* v. *Pear*, 2 *East*, *P. C.* 689.) But now by stat. 7 & 8 Geo. IV. c. 29, s. 53, (*ante*, 595,) the defendant may be convicted, although it appear at the trial that the offence amounts to larceny, and not merely to obtaining money, &c. by false pretences. The safer course, therefore, to adopt, where it is doubtful whether the offence is larceny, or obtaining goods under a false pretence, is to indict for the misdemeanor; in which case, if the offence should turn out to be larceny, the prisoner may nevertheless be convicted by force of the statute. These two offences are sometimes difficult to be distinguished in cases where there has been a constructive taking; but the difficulties arising from this circumstance appear to be obviated by the statute. (*Jervis*, *Arch. C. L.* 9th edit. 299.)

III. By other Statutes.

There are also various other statutes besides the 7 & 8 Geo. IV. c. 29, protecting the public and parties against the cheats and frauds of others, which will be found noticed under their proper titles in other parts of this work. By other statutes.

As to the offence of a bankrupt's obtaining goods under a false pretence of carrying on business in the ordinary course of trade, see *ante*, "*Bankrupt*," p. 364. Bankrupts.

As to fraudulent omissions by an insolvent in his schedule, see "*Insolvent*," Vol. III. Insolvents.

As to frauds and cheats by servants and others in trades, see "*Servants*," Vol. V. Servants.

As to giving false characters to servants, see "*Servants*," Vol. V.

As to apprentices fraudulently enlisting themselves, see "*Military Law*," Vol. V. p. 117.

As to frauds by the false personation of soldiers, see "*Military Law*," Vol. V. p. 139; and of sailors, see "*Seamen*," Vol. V.

As to the false personation of bail, see *ante*, "*Bail*," p. 330. Bail.

As to frauds by gaming, see "*Gaming*," Vol. III. p. 311, 314. Gaming.

As to false weights, see "*Weights and Measures*," Vol. VI. Weights.

As to the offence of telling fortunes, see "*Witchcraft*," Vol. VI. Fortune-telling.

There are several enactments respecting particular persons and things, which make the obtaining of property under a particular species of fraud a larceny, and which will be found considered, *post*, "*Larceny*," Vol. III. And amongst these are frauds of agents, servants, lodgers, manufacturers, and persons employed in public offices. Larceny.

By the 13 Eliz. c. 5, fraudulent conveyances, judgments, &c. are declared void, and the parties to them are made subject to a forfeiture of a year's value of the lands, &c. and to imprisonment for half a year. See 1 *Chit. Stat.* 385. Fraudulent conveyances.

And stat. 27 Eliz. c. 4, enacts, that fraudulent conveyances made to deceive purchasers shall be void, and that the parties thereto shall forfeit a year's value of the lands, &c., and be imprisoned for half a year.

IV. Forms.

To the Constable of in the county of .

(1.) Warrant on 7 & 8 Geo. 4, c. 29, s. 53, to apprehend an offender for false pretences.

County of } WHEREAS complaint hath been made unto me one of her Majesty's justices of the peace for the said county, upon the oath of A. I. of that on the day of A. O. did knowingly, unlawfully and designedly, by false pretences then and there made by him, that is to say, by [here state shortly the false pretences,] *obtain certain goods and chattels* [or *monies* or *valuable securities*,] *to wit, &c. of the property, goods, and chattels of the said A. I. of and from the said A. I., with intent then and there to cheat and defraud the said A. I. of the same, contrary to the statute in that case made and provided. These are therefore in her Majesty's name to command you, upon sight hereof, forthwith to apprehend and bring the said A. O. before me, to answer the said complaint, and further to be dealt with according to law. Given under my hand this day of* A.D. 18 .

to wit.

(2.) Commitment thereon.

[Commencement as usual, *ante*, p. 9, (No. 1.)] *that the said C. D. on the day of , A.D. , at the parish of , in the said county, knowingly, unlawfully, and designedly, by certain false pretences then and there made by him, that is to say,* [here state shortly the false pretences,] *did then and there obtain from the said C. D. certain goods and chattels* [or *monies*, or *valuable securities*] *of the said C. D. with intent then and there to cheat and defraud the said C. D. of the same: against the form of the statute in that case made and provided. And you the said keeper, &c.* [as usual, as *ante*, p. 9, to the end.]

4. *Forms.*

(3.) Indictment at common law for selling by false weights and measures.

—— *to wit. THE jurors for our Lady the Queen upon their oath present, that C. D. late of the parish of , in the county of , labourer, on the day of , in the year of the reign of our Lady the now Queen Victoria, and from thence until the taking this inquisition, did use and exercise the trade and business of a* [grocer,] *and during that time did deal in the buying and selling by weight of divers goods, wares, and merchandizes, to wit, at the parish aforesaid, in the county aforesaid; and that the said C. D. contriving and fraudulently intending to cheat and defraud the subjects of our said Lady the Queen, whilst he used and exercised his said trade and business, to wit, on the day and year aforesaid, and on divers other days and times between that day and the day of taking this inquisition, with force and arms, at the parish aforesaid, in the county aforesaid, did knowingly, unlawfully, wilfully, and publicly keep in a certain shop there, wherein the said C. D. did so as aforesaid carry on his said trade, a certain false pair of scales for the weighing of goods, wares, and merchandizes, by him sold and disposed of in the way of his said trade and business; which said scales were then and there, by artful and deceitful ways and means, so made and constructed as to cause the goods, wares, and merchandizes weighed therein and sold thereby, to appear of greater weight than the real and true weight by one-eighth part of such apparent weight; and that the said C. D. on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, (he the said C. D. then and there knowing the said scales to be false as aforesaid,) did knowingly, willingly, and fraudulently sell and utter to one A. B. a subject of our said Lady the Queen, certain goods in the way of his said trade, to wit, a large quantity of* [butter] *weighed in and by the said false scales, as and for two pounds weight of* [butter], *whereas in truth and in fact the weight of the said* [butter] *so sold as aforesaid was short and deficient of the said weight of two pounds by one-sixth part of the said weight of two pounds, to wit, at the parish aforesaid, in the county aforesaid, to the great damage of the said A. B., to the evil example of all others, and against the peace of our Lady the Queen, her crown and dignity.*

(4.) Indictment for defrauding a person of a sum of money by colour of a false and counterfeit letter and other false token.

—— *to wit. THE jurors for our Lady the Queen, upon their oath present, that L. P. late of the parish of , in the county of , labourer, compassing and devising how he might unlawfully obtain and get into his hands and possession the monies of the honest liege subjects of our said Lady the Queen, for the maintenance of his unthrifty living, on the day of , in the year of the reign of our Lady the now Queen Victoria, at the parish aforesaid, in the county aforesaid, falsely and deceitfully did pretend and affirm to one T. T.* [*that his, the said L. P.'s name, was H. H. and that he was the son of H. H. of N. in the county of S. Esquire, and nephew to Mr. H. of N. in the county of S. (meaning J. H. of N. in the county of S. clerk,) and that the said L. P. a certain false and counterfeit letter, in the name of him the said J. H. as a true letter of the proper handwriting of him the said J. H. falsely, fraudulently, and deceitfully, to the said T. T. then and there did deliver, (he the said J. H. of N. in the county of S. clerk, then and long before being the special friend and intimate acquaintance of him the said T. T.) by which said false and counterfeit letter it was mentioned that the said J. H. desired the said T. T. to supply the bearer thereof, Mr. J. H. with the sum of sixty guineas, and to place it to his account, (meaning the account of him the said J. H.)*] *and that the said T. T. then and there believing the said false and counterfeit letter to be of the proper handwriting of him the said J. H. did then and there pay and deliver the said L. P. sixty pieces of gold coin of the proper coin of this kingdom called guineas, of the value of sixty-three pounds of lawful money of Great Britain, whereas in truth and in fact the said J. H. never did write or send, or cause to be written or sent, any such letter to the said T. T. desiring the said T. T. to supply the said H. H. with any sum of money whatever, and so the jurors aforesaid, on their oath aforesaid, do say, that the said L. P. on the said, &c. at, &c. by colour of the said counterfeit letter, and by the said false pretences, unlawfully, falsely, fraudulently, and deceitfully, did obtain and get into his hands and possession, of and from the said T. T. the said sum of sixty-three pounds, of the monies of him the said T. T. and the said L. P. the said T. T. of his money aforesaid then and there fraudulently and deceitfully did deceive and defraud, to the great damage and deceit of the said T. T. to the evil example of all others, against the peace of our Lady the Queen, her crown and dignity, and also against the form of the statute in such case made and provided.*

(5.) Indictment on 7 & 8 Geo. 4,

—— *to wit. THE jurors for our Lady the Queen upon their oath present, that J. O. late of the parish of , in the county of , labourer, on the day of ,*

4. Forms.

c. 20, s. 53, for obtaining goods, &c. by false pretences.

in the year of the reign of our Lady the now Queen Victoria, at the parish aforesaid, in the county aforesaid, unlawfully did falsely pretend to J. P. that [he the said J. O. then was the servant of one C. C. of , then and there exercising and carrying on the trade and business of a tailor, (the said C. C. then and long before being well known to the said J. P. and a customer of the said J. P. in his said trade and business,) and that he the said J. O. was then sent by the said C. C. to the said J. P. for five yards of superfine woollen cloth for the said C. C.] by means of which said false pretences the said J. O. did then and there, to wit, on the day of , in the year of the reign aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully obtain from the said J. P. [five yards of superfine woollen cloth] of the value of [four pounds, fifteen shillings] of the chattels ["any chattel, money, or valuable security"] of the said J. P. with intent then and there to cheat and defraud the said J. P. of the same, whereas in truth and in fact the said J. O. was not then the servant of the said C. C., and whereas he the said J. O. was not then sent by the said C. C. to the said J. P. for the said cloth, or for any cloth whatsoever, for the said C. D.) to the great damage of the said J. P. against the peace of our said Lady the Queen, her crown and dignity, and also against the form of the statute in such case made and provided.

Check on a Banker, *forgery of,* see "*Forgery,*" Vol. III. p. 130. *Larceny or Embezzlement of,* see "*Larceny,*" Vol. III. *Obtaining Money by False Pretences on, ante,* 596, 598.

Cheese, see *ante,* "*Butter and Cheese.*"

Chelsea Hospital, *Offences relating to,* see "*Seamen,*" Vol. V.; *as to laying Property in, in Indictments, post,* "*Indictment,*" Vol. III.

Children and Infants.

As to the abduction of, see *ante,* title "*Abduction.*"
As to abortion, see *ante,* title "*Abortion.*"
As to the support of bastard children, see *ante,* title "*Bastards.*"
As to the support of poor children, see "*Poor,*" Vol. IV.
As to the marriage of, see "*Marriage,*" Vol. V.
As to their right to defend a parent, see *ante,* title "*Assault,*" p. 283.
As to the apprenticeship of, see *ante,* title "*Apprentices.*"
As to the employment of in factories and mills, see "*Factories,*" Vol. III.
As to the employment of in mines, see "*Mines,*" Vol. V.
As to the imprisonment of juvenile offenders, see "*Gaols for Juvenile Offenders,*" Vol. III.

Herein of,—

I. *How far they are liable for crimes, &c.* 606.
II. *When competent Witnesses,* 608.
III. *Stealing &c. of,* 609.
[9 Geo. IV. c. 31, s. 21.]
IV. *Carnally abusing,* 610.
[9 Geo. IV. c. 31, s. 17.]
V. *Murder of,* 612.
VI. *Concealing the Birth of,* 613.
[9 Geo. IV. c. 31, s. 14.]
VII. *Other matters relating to,* 616.

1. *Infants, how far liable.*

I. How far liable for Crimes, &c.

Infant, who.

By an infant or minor, is meant any one who is under the age of twenty-one years. (1 *Inst.* 2.)

Committing a capital offence under seven.

Within seven years of age there can be no guilt whatsoever of any *capital* offence; the infant may be chastised by his parents or tutors, but cannot be capitally punished, because he cannot be guilty; and if he be indicted for such an offence as is in its nature capital, he must be acquitted. (1 *Hale*, 19, 20; 4 *Bla. Com.* 23.)

Under fourteen.

It has indeed been said, generally, that those who are under a natural disability of distinguishing between good and evil, as infants under the age of fourteen years, which is called the age of discretion, are not punishable by any criminal prosecution whatsoever. But this must be understood with some allowance; for if it appear by the circumstances that an infant under the age of discretion, and of the age of seven or upwards, could distinguish between good and evil, as if one of the age of nine or ten years kill another and hide the body, or make excuses, or hide himself, he may be convicted and condemned, and forfeit as much as if he were of full age. But in such case the judges will in prudence respite the execution in order to get a pardon; (see "*Pardon*," Vol. V.;) and it is said, that if an infant, apparently wanting discretion, be indicted and found guilty of felony, the justices themselves may dismiss him without a pardon. And in general it must be left to the discretion of the judge, upon the circumstances of the case, how far an infant, under that age, is *capax doli*, or hath knowledge to discern betwixt good and evil. (*Hale's Sum.* 43; 1 *Hawk.* c. 1, s. 8; 1 *Hale*, 18; 4 *Bla. Com.* 24; and see *R.* v. *Wild*, 1 *Mood. C. C.* 452.)

Respiting execution for a pardon.

In a modern case it was considered, that if a child, more than seven and under fourteen years of age, is indicted for felony, it should be left to the jury to say, whether the offence was committed by the prisoner; and if so, whether, at the time of the offence, the prisoner had a guilty knowledge that he or she was doing wrong. And the presumption of law is, that a child of that age has not such guilty knowledge, unless the contrary be proved by the evidence. (*R.* v. *Owen*, 4 *C. & P.* 236.)

The following is an important case as to the capability of an infant of ten years old to commit the crime of murder, and as to the expediency of visiting such an offender with capital punishment.

Case of murder by a boy ten years old.

At *Bury Summer Assizes*, 1748, (*Fost.* 70,) *William York*, a boy of ten years of age, was convicted before Lord Chief Justice *Willes*, for the murder of a girl of about five years of age, and received sentence of death. But the Chief Justice, out of regard to the tender years of the prisoner, respited execution till he should have an opportunity of taking the opinion of the rest of the judges, whether it were proper to execute him or not, upon the special circumstances of the case; which he reported to the judges as follows:—The boy and girl were parish children, but under the care of a parishioner, at whose house they were lodged and maintained. On the day the murder happened, the man of the house and his wife went out to their work early in the morning, and left the children in bed together. When they returned from work, the girl was missing; and the boy being asked what was become of her, answered, that he had helped her up, and put on her clothes, and that she was gone he knew not whither. Upon this, strict search was made in the ditches and pools of water near the house, from an apprehension that the child might have fallen into the water. During this search, the man, under whose care the children were, observed that a heap of dung near the house had been newly turned up. And, upon removing the upper part of the heap, he found the body of the child, about a foot's depth under the surface, cut and mangled in a most barbarous and horrid manner. Upon this discovery, the boy, who was the only person capable of committing the act that was left at home with the child, was charged with the fact, which he stiffly denied. When the coroner's jury met, the boy was again charged, but persisted still to deny the fact. At length, being closely interrogated, he fell to crying, and said he would tell the whole

truth. He then said, that the child had been used to foul herself in bed; that she did so that morning; (which was not true, for the bed was searched, and found to be clean;) that thereupon he took her out of the bed, and carried her to the dung heap, and with a large knife, which he found about the house, cut her in the manner the body appeared to be mangled, and buried her in the dung heap; placing the dung and straw that was bloody under the body, and covering it up with what was clean; and having done so, he got water and washed himself as clean as he could. The boy was the next morning carried before a neighbouring justice, before whom he repeated his confession, with all the circumstances he had related to the coroner and his jury. The justice, very prudently, deferred proceeding to a commitment, till the boy should have an opportunity of recollecting himself. Accordingly, he warned him of the danger he was in, if he should be thought guilty of the fact he stood charged with, and admonished him not to wrong himself; and then ordered him into a room where none of the crowd that attended should have access to him. When the boy had been some hours in this room, where victuals and drink were provided for him, he was brought a second time before the justice, and then he repeated his former confession; upon which he was committed to gaol. On the trial, evidence was given of the declarations before mentioned to have been made before the coroner and his jury, and before the justice, and of many declarations to the same purpose, which the boy made to other people after he came to gaol, and even down to the day of his trial. For he constantly told the same story in substance, commonly adding that the devil put him upon committing the fact. Upon this evidence, with some other circumstances tending to corroborate the confession, he was convicted. Upon this report of the Chief Justice, the judges, having taken time to consider of it, unanimously agreed,—1st, That the declarations stated in the report were evidence proper to be left to the jury; 2nd, That supposing the boy to have been guilty of the fact, there were so many circumstances stated in the report, which were undoubtedly tokens of what Lord Chief Justice *Hale* somewhere (1 *Hale*, 630) called a *mischievous discretion*, that he was certainly a proper object for capital punishment, and ought to suffer: for it would be of very dangerous consequence to have it thought that children may commit such atrocious crimes with impunity. There are many crimes of the most heinous nature, such as in the present case the murder of young children, poisoning parents or masters, burning houses, and the like, which children are very capable of committing, and which they may in some circumstances be under strong temptations to commit; and therefore, though the taking away the life of a boy ten years old may savour of cruelty, yet, as the example of this boy's punishment may be a means of deterring other children from the like offences, and as the sparing this boy, merely on account of his age, will probably have a quite contrary tendency, in justice to the public, the law ought to take its course, unless there remaineth any doubt touching his guilt. In this general principle all the judges concurred. But two or three of them, out of great tenderness and caution, advised the Chief Justice to send another reprieve for the prisoner; suggesting that it might possibly appear, on further inquiry, that the boy had taken this matter upon himself, at the instigation of some person or other, who hoped by this artifice to screen the real offender from justice. Accordingly, the Chief Justice did grant one or two more reprieves; and desired the justice who took the boy's examination, and also some other persons, in whose prudence he could confide, to make the strictest inquiry they could into the affair, and make report to him. At length he, receiving no further light, determined to send no more reprieves, and to leave the prisoner to the justice of the law, at the expiration of the last; but before the expiration of that reprieve, execution was respited till further order, by warrant from one of the Secretaries of State. And at the Summer Assizes, 1757, he had the benefit of his majesty's pardon, upon condition of his entering immediately into the sea service. (And see 1 *Hale*, 26; *R.* v. *Wild*, 1 *Mood. C. C.* 452.)

1. *Infants, how far liable.*

An infant under fourteen is presumed by law unable to commit a rape,

Committing a rape.

1. *Infants, how far liable.*

and therefore it seems cannot be guilty of it; and though in other felonies *malitia supplet ætatem* in some cases, yet it seems, as to this fact, the law presumes him impotent, as well as wanting discretion. (1 *Hale*, 630. And see *R.* v. *Eldershaw*, 3 *C. & P.* 396; *R.* v. *Groombridge*, 7 *C. & P.* 582.) Nor is any evidence admissible to show that in fact he had arrived at the full state of puberty, and could commit the offence. (*Reg.* v. *Phillips*, 8 *C. & P.* 736; *Reg.* v. *Jordan*, 9 *C. & P.* 118.) But he may be a principal in the second degree, if he aid and assist in the commission of this offence, as well as other felonies, and it appear that he had a mischievous discretion; for the excuse of impotency will not in such case apply. (1 *Hale*, 630.) And he may be convicted of an assault with intent to commit a rape; (*R.* v. *Eldershaw*, 3 *C. & P.* 396); or of an assault under the 7 Will. IV. & 1 Vict. c. 85, s. 11, Vol. V. p. 7. (*R.* v. *Bromilow*, 2 *Mood. C. C.* 122; 9 *C. & P.* 366, S. C.)

Forcible entry.

An infant may be guilty of forcible entry, in respect of personal actual violence. (1 *Hawk.* c. 24, s. 35.) And the justices may fine him therefore; but yet it shall be good discretion in the justices of the peace to forbear the imprisonment of such infant. (*Dalt.* c. 126.) Because it is said, that he shall not be subject to corporal punishment, by force of the general words of any statute wherein he is not expressly named. (1 *Hawk.* c. 64, s. 35.)

Other misdemeanors.

So, in regard to other misdemeanors attended with a notorious breach of the peace, such as riot, battery, or the like, an infant is liable as a person of full age. (1 *Hale*, 20, 21; 4 *Bla. Com.* 22.)

So he is liable for perjury or cheating. (3 *Bac. Abr. Infancy* (H).

An infant under twenty-one is not liable for not repairing a bridge or highway, or other such acts of omission (4 *Bla. Com.* 22; *Co. Lit.* 257.)

He may be convicted on a penal statute. (See 4 *Bla. Com.* 308; 2 *B. & P.* 93, 530; 8 *T. R.* 545.)

II. When competent Witnesses.

When competent witnesses.

A witness must not only have a competent share of reason, but also know the nature and binding obligation of an oath Children, therefore, who are not able to understand its moral obligation, cannot be examined. (*Bul. N. P.* 293.) At one time, indeed, their age was considered as the criterion of their competency; and it was a general rule, that none could be admitted under the age of nine years, very few under ten; (*R.* v. *Travers*, 2 *Str.* 700; 1 *East's P. C.* 442; 1 *Hale*, 302; 2 *id.* 278); which was in some measure denying them the protection of law against secret acts of violence. A more reasonable rule has been since adopted; and the admissibility of children is now regulated, not by their age, but by their apparent sense and understanding. And in *Brazier's case*, on an indictment for assaulting an infant of five years of age, with intent to ravish her, it was agreed by all the judges, that children of any age might be examined on oath, *if capable of distinguishing between good and evil;* (which must be taken to mean a belief in God, or in a future state of rewards and punishments); but they cannot be examined in any case without oath. (1 *East's P C.* 443-4; 1 *Leach*, 237; and see *per Alderson*, J., in *R.* v. *Perkins*, 2 *Mood. C. C.* 135.) This is now the established rule in all cases, criminal as well as civil, and whether the prisoner be tried for a capital offence, or for one of an inferior nature. (*R.* v. *Travers*, 2 *Stra.* 700.)

The child should, it seems, feel the binding obligation of an oath, from the general course of its religious education. The effect of the oath should arise from religious feelings of a permanent nature, and not merely from instructions confined to the nature of an oath recently communicated to it for the purposes of a trial. (*R.* v. *Williams*, 7 *C. & P.* 321; 2 *Russ. C. & M.* 3rd ed. 970.)

Whether the infant be a competent witness or not, is for the Court to decide. (1 *Stark. Evid.* 94.)

If a child is too young to be sworn, it follows, as a necessary consequence, that any account which it may have given to others ought not to be admitted. On an indictment, therefore, for a rape on a child five years old, where the

child was not examined, but an account of what she had told her mother, about three weeks after the transaction, was given in evidence by the mother, and the jury convicted the prisoner, principally, as was supposed, on that evidence: the judges, on a case reserved for their opinion, thought the evidence clearly inadmissible, and the prisoner was accordingly pardoned. (*R.* v. *Tucker*, 1 *Phill. Ev.* 20; see *R.* v. *Pike*, 3 *C. & P.* 598.)

2. *When competent Witnesses.*

"Where the evidence of children is admitted, it is much to be wished," says Sir *William Blackstone*, "in order to render their evidence credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact; and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion." "It seems, however," adds Mr. *Phillipps*, in noticing this opinion of the learned commentator, "impossible to lay down any general rule on this subject, applicable to all cases. A prisoner may be legally convicted on such evidence alone, and unsupported; and whether the account of the witness requires to be corroborated in any part, or to what extent, is a question exclusively for the jury, to be determined by them on a review of all the circumstances of the case, and especially of the manner in which the child has given his evidence. The evidence may be so circumstantial, so plain and clear, and so free from all mixture of partiality and ill-will, as to leave no reasonable doubt of the prisoner's guilt, although it stands unsupported by other witnesses."

Putting off trial, &c. till competent.

When the child has appeared not sufficiently to understand the nature and obligation of an oath, judges have often thought it necessary, for the purposes of justice, to put off the trial of the prisoner, directing that the child in the mean time should be properly instructed; (1 *Phillipps's Ev.* 19); which course, however, would not be allowed in the case of an adult witness. (*R.* v. *Wade*, *R. & M. C. C.* 86.) If the jury is sworn, and the prisoner is put upon his trial, before the incompetency of the witness is discovered, the proper course is, not to discharge the jury, but to direct an acquittal. (*R.* v. *Wade*, *R. & M. C. C.* 86.)

III. Stealing of.

Child stealing, a felony.

By stat. 9 Geo. IV. c. 31, s. 21, "if any person shall maliciously, either by force or fraud, lead or take away, or decoy or entice away, or detain any child under the age of ten years, with intent to deprive the parent or parents, or any other person having the lawful care or charge of such child, of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong; or if any person shall, with any such intent as aforesaid, receive or harbour any such child, knowing the same to have been, by force or fraud, led, taken, decoyed, enticed away or detained, as hereinbefore mentioned; every such offender, and every person counselling, aiding or abetting such offender, shall be guilty of felony, and, being convicted thereof, shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment; provided always, that no person who shall have claimed to be the father of an illegitimate child, or to have any right to the possession of such child, shall be liable to be prosecuted by virtue thereof, on account of his getting possession of such child, or taking such child out of the possession of the mother, or any other person having the lawful charge thereof."

Punishment for.

Proviso as to persons claiming to have a right to the child, &c.

If the convict be already under sentence of transportation or imprisonment, this sentence may commence after the expiration of the former sentence. (7 & 8 Geo. IV. c. 28, s. 10.)

Abettors.

By sect. 31, every person who shall counsel, aid, or abet the commission of any misdemeanor punishable under this act, shall be liable to be proceeded against and punished as a principal offender."

3. *Stealing of.*

Commitment for stealing, &c., a child.

[Commencement as usual, as *ante*, p. 9]: *That the said C. D., on the day of , in the year of our Lord , at , in the county aforesaid, a certain child, then under the age of ten years, to wit, of the age of seven years, named E. F., the son* [or *daughter*] *of one J. F., then and there feloniously and maliciously, by force and fraud, did lead and take away* [or *decoy and entice away*, or *detain*, as the case may be], *with intent then and there and thereby to deprive the said J. F. of the possession of the said child*: [or *with intent certain articles, to wit, &c., of the value of pounds, upon and about the person of the said E. F. the goods and chattels of the said J. F. then and there and thereby feloniously to steal, take and carry away*:] [or *with intent then and there and thereby to deprive one A. B. of the possession of the said E. F., the said A. B. then and there having the lawful care and charge of the said E. F.*, according to the fact]: *against the form of the statute in that case made and provided. And you the said keeper, &c.* [as usual to the end.]

Indictment for a like offence.

—— *to wit.*] *THE jurors for our Lady the Queen upon their oath present, that C. D., late of the parish of A., in the county of B., labourer, on the day of , in the year of the reign of our Lady the now Queen Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, a certain child then under the age of ten years, to wit, of the age of seven years, named E. F., the son* [or *daughter*] *of one J. F., then and there feloniously and maliciously, by force* [or *fraud*] *did lead and take away, with intent then and there and thereby to deprive the said J. F. of the possession of the said child*: [or *with intent then and there and thereby to deprive one A. B. of the possession of the said E. F., the said A. B. then and there having the lawful care and charge of the said E. F.*] [or *with intent certain articles, to wit, of the value of pounds, upon and about the person of the said E. F., of the goods and chattels of the said J. F. then and there and thereby feloniously to steal, take and carry away*: according to the facts; and if any doubt, add more counts accordingly]: *against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said C. D. afterwards, to wit, on the day and year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, a certain other child then under the age of ten years, to wit, of the age of seven years, named E. F. the son* [or *daughter*] *of the said J. F. then and there feloniously, maliciously and by fraud did decoy and entice away, with intent, &c.* [as in the first count to the end.] [Add another count merely stating the detention, or such other counts as the difficulties in the evidence may suggest.]

Second count.

IV. Carnally abusing Children.

As to the offence of rape, which is the carnal knowledge of a woman or child against the will of the party, see *post*, "*Rape*," Vol. V.

As to the offence of an assault with intent to commit a rape, or abuse a child under ten years, or commit any other felony, see *ante*, 293.

As to attempts to commit offences in general, see *ante*, "*Attempt*."

Carnally abusing a girl under ten years; a girl between ten and twelve years.

By stat. 9 Geo. IV. c. 31, s. 17, "if any person shall unlawfully and carnally know and abuse any girl under the age of ten years, every such offender shall be guilty of felony, and being convicted thereof shall suffer death as a felon; and if any person shall unlawfully and carnally know and abuse any girl being above the age of ten years and under the age of twelve years, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for such term as the Court shall award."

Punishment.

But the punishment of death is abolished by the 4 & 5 Vict. c. 56, s. 3, which, after reciting the 9 Geo. IV. c. 31, ss. 16 and 17, enacts, "that from and after the commencement of this act (1st Oct. 1841), if any person shall be convicted of any of the said offences hereinbefore last specified, such person shall not be subject to any sentence, judgment, or punishment of death, but shall, instead of the sentence or judgment in and by the said act hereinbefore last recited, ordered to be given or awarded against persons convicted of the said last-mentioned offences, or any of them respectively, be liable to be transported beyond the seas for the term of his natural life."

Abettors.

As to persons aiding or abetting the commission of this offence, see *ante*, 609.

By the 4 & 5 Vict. c. 56, s. 6, this offence is not triable at any general or quarter sessions.

4. *Carnally abusing, &c.*

Observations and decisions as to the offence.

A boy under the age of fourteen, and therefore incompetent to commit a rape, cannot be convicted of this offence, and evidence is not admissible to prove that he has arrived at the full age of puberty. (*R.* v. *Jordan*, 9 *C. & P.* 118.) But he may be convicted of an assault under the 7 Will. IV. & 1 Vict. c. 85, s. 11, Vol. V. p. 7. (*R.* v. *Bromilow*, 2 *Mood. C. C.* 122; 9 *C. & P.* 366, S. C.)

On an indictment for the offence of carnally abusing a child under ten years of age, the child must be proved by clear evidence to be under that age. Where the offence was committed on the 5th February, 1832, and the child's father proved that on his return home after an absence of a few days on the 9th February, 1822, he found the child had been born, and was told by the grandmother that she had been born the day before, and the register of baptism showed that the child had been baptized on the 9th February, 1822; this evidence was holden not sufficient to prove the age of the child. (*R.* v. *Wedge*, 5 *C. & P.* 298.) So evidence by the child herself, that she was ten years old on a particular day, her mother being ill at home, and her father being unable to state the precise time of her birth, has been held insufficient. (*R.* v. *Day*, 9 *C. & P.* 722.)

As to the admissibility of the child as a witness in general, see *ante*, 608. The child may be a witness if she appear sufficiently to understand the nature and moral obligation of an oath. (*Id.*)

The indictment should, it seems, conclude "contrary to the form of the statute." (1 *East's P. C.* 448; 2 *Russ. C. & M.* 694, 3d ed.) The word "ravished" need not be inserted. (*Id.*)

This offence of carnally knowing and abusing a child under ten years old is not a felony which includes an assault within the 7 Will. IV. & 1 Vict. c. 85, s. 11, (Vol. V. p. 7,) even though it be stated in the indictment for the felony that the prisoner made an assault on the child. (*Reg.* v. *Banks*, 8 *Car. & P.* 574.) Nor can a party be convicted of an assault under that enactment for carnally knowing and abusing a child between the age of ten and twelve years where the child consented. (*R.* v. *Martin*, 2 *Mood. C. C.* 123; 9 *C. & P.* 213, S. C.)

Where an indictment in the first count charged the prisoner with having assaulted E. R., an infant above the age of ten and under the age of twelve years, with intent to carnally know and abuse her; and in the second count, charged that the prisoner unlawfully did put and place the private parts of him against the private parts of the said E. R., and did thereby then and there unlawfully attempt and endeavour to carnally know and abuse the said E. R.; it was held that the second count was bad, because it did not aver that the said E. R. was between the ages of ten and twelve, and that the word "said" did not help it, as it did not incorporate the description of E. R. contained in the first count, but that if the second count had contained the words, "the said E. R. then and there being above the age of ten years and under the age of twelve years," it would have been sufficient. (*Reg.* v. *Martin*, 9 *C. & P.* 215; see *Rex* v. *Cheere*, 3 *B. & C.* 902; 7 *D. & R.* 461, S. C.)

Commitment for carnally abusing a girl under ten years.

[Commencement as usual, *ante*, p. 9.] *on the day of , A. D. , at the parish of , in the said county, feloniously did assault one C. D. a girl then under the age of ten years, to wit, of the age of [nine] years, and her the said C. D. then and there feloniously did unlawfully and carnally know and abuse, against the form of the statute in that case made and provided. And you the said keeper, &c.* [as usual to the end.]

The like of a girl between ten and twelve years.

Same as preceding form, omitting "*feloniously*," and stating the girl as "*a girl then above the age of ten years, and under the age of twelve years, to wit, of the age of [ten] years.*"

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4. *Carnally abusing, &c.*

Indictment for carnally abusing a girl under ten years.

—— to wit. THE jurors for our Lady the Queen upon their oath present, that C. D. late of the parish of , in the county of , labourer, on the day of in the year of the reign of our Lady the now Queen Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon one E. F. a girl then under the age of ten years, to wit, of the age of nine years, in the peace of our Lady the Queen then and there being, feloniously did make an assault, and her the said E. F. then and there feloniously did unlawfully and carnally know and abuse, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

The like, of a girl between ten and twelve years.

—— to wit. THE jurors for our Lady the Queen upon their oath present, that C. D. late of the parish of , in the county of , labourer, on the day of in the year of the reign of our Lady the now Queen Victoria, with force and arms, in and upon one E. F. a girl then above the age of ten years, and under the age of twelve years, to wit, of the age of eleven years, in the peace of God and our Lady the Queen then and there being, did unlawfully make an assault, and her the said E. F. then and there did unlawfully and carnally know and abuse, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

V. Murder of.

Child murder.

The offence of murder in general will be found fully discussed under title "*Homicide*," Vol. III.

What amounts to.

In order to constitute the offence of child-murder it must be clearly established that the child was born alive. It must appear to have been alive after the whole body of the child was brought into the world. It is not sufficient that the child respire in the progress of the birth. (*R.* v. *Poulton*, 5 *Car. & P.* 329.) There must be an independent animation in the child, a complete separation from the mother. (*R.* v. *Enoch*, 5 *C. & P.* 539; *R.* v. *Wright*, 9 *id.* 754; *R.* v. *Sellis*, 7 *id.* 850.) But it seems that if a child be wholly produced and then killed, it will be the offence of murder, though the umbilical cord be not severed. (*R.* v. *Sellis*, 7 *C. & P.* 850; *R.* v. *Crutchley*, *id.* 814; *R.* v. *Reeves*, 9 *id.* 25.) There is no occasion for the child to have breathed after it was born, if born alive. (*R.* v. *Brain*, 6 *C. & P.* 349.) (*a*)

(*a*) The following observations upon the subject of infanticide are collected in Mr. J. Jervis's valuable work on Coroners, 127, 8.

The first question which naturally presents itself is, whether the child was born alive. As a test of this, it was formerly usual to immerse the lungs in water, it being supposed that if they floated, the child must have respired. But this test is now quite exploded, for it is obvious, that if the child make but one gasp and instantly die, the lungs will swim in water as readily as if the child had breathed longer, and it is not uncommon for an infant to breath as soon as its mouth is protruded from its mother, although it may die before its body be born. (*Hunt.* 17.) Air may also be passed into the lungs by inflation or be generated by putrefaction, and both will produce the same effect.

This question is, however, less difficult in cases of immature birth. Under the fifth month no fœtus can be born alive; from the fifth to the seventh it may come into the world alive, but cannot maintain existence; but at the seventh it may be reared. As the period of gestation may be pretty accurately ascertained from the appearance of the fœtus in these cases, the doubt is easily resolved. (See *For. Med.* 312; *Prac. Med.* 112; 3 *Par.* 100.)

The next question is, the cause of the death. Now the child may die in the womb,—during the labour by pressure —or by strangulation from the umbilical cord. (*Elem. of Mid.* 180.) In which latter cases the body presents appearances which to a common observer would seem to be the marks of a violent death. Upon this subject Dr. Hunter says,— "When a child's head or face is swollen, and is very red or black, the vulgar, because hanged people look so, conclude it was strangled, nothing is more common in natural births."—p. 13.

But the child, though safely delivered, may still die without any criminal act of the mother. Children may be born so weak, that if left to themselves, after breathing or sobbing, they would die; or

5. *Murder of.*

By the 9 Geo. IV. c. 31, s. 14, *infra*, if on the trial of the indictment for the murder of a child the proof fails, the defendant may nevertheless be convicted of the concealment of the birth, if there be evidence to meet it, and as to which see *infra*. But no person but the mother can be so convicted. (*R.* v. *Wright*, 9 *C. & P.* 754.) And where the indictment is bad for not describing the child properly, the defendant cannot be convicted on that indictment for the concealment. (*Reg.* v. *Hicks*, 2 *M. & Rob.* 302.)

When prisoner may be convicted of concealing the birth.

It has been considered that the enactment extends to a trial on the coroner's inquest, as well as upon a bill found by the grand jury. (*R.* v. *Cole*, 2 *Leach*, 1095; 3 *Camp.* 371; *R.* v. *Maynard*, *R. & R.* 240; 1 *Russ. C. & M.* 574, 3d ed. by Greaves.)

As to the offence of abortion, see *ante*, "*Abortion.*"

Abortion.

Indictment for the murder of a child by smothering.

—— *to wit. THE jurors for our Lady the Queen upon their oath present, that A. W., late of the parish of , in the county of , single woman, on the day of , in the year of the reign of our Lady the now Queen, being big with a [female] child, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, the said [female] child from her body did bring forth alive, and that the said A. W. not having the fear of God before her eyes, but being moved and seduced by the instigation of the devil, afterwards, to wit, on the day and year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon the said child, in the peace of God and our said Lady the Queen then and there being, feloniously, wilfully, and of her malice aforethought, did make an assault; and that the said A. W. with both her hands, the said child in a certain linen cloth of the value of twopence, feloniously, wilfully, and of her malice aforethought, did put, place, fold, and wrap up, by means of which such said putting, placing, folding, and wrapping up of the said child in the said linen cloth by her the said A. W. as aforesaid, the said child was then and there choked, suffocated, and smothered; of which said choking, suffocation, and smothering, the said female bastard child then and there died. And so, &c.* [Conclude as usual in indictments for murder by suffocation, see "*Homicide*," Vol. III.] *And the jurors, &c.* [state the delivery and assault as in first count.] *And that the said A. W., with both her hands, the said child into a certain privy there situate, wherein was a great quantity of human excrements and other filth, then and there feloniously, wilfully, and of her malice aforethought, did cast and throw, by reason of which said casting and throwing of the said child into the said privy by her the said A. W. as aforesaid the said child in the said privy with the excrements and filth aforesaid was then and there choked and suffocated, of which said choking and suffocation the said child then and there died. And so, &c.* [Conclude as in first count.]

Second count, for throwing a child into a privy, whereby it was smothered.

VI. Concealment of Birth of.

Concealment of birth of.

The murder of *bastard* children by the mother was considered as a crime so difficult to be proved, that the stat. 21 Jac. I. c. 17, was passed, which made the concealment of the death of a bastard child an undeniable evidence of murder in the mother, except she could prove by one witness at least that it was actually born dead. But this law, which was accounted to savour strongly of severity, and always construed most favourably for the unfortunate object of accusation, was repealed, together with an Irish act upon the same subject, by stat. 43 Geo. III. c. 58, s. 3, (called Lord Ellenborough's Act.) (4 *Bla. Com.* 198; 1 *Russ. C. & M.* 3d ed. 572.) The latter act did not make the concealment an offence for which an indictment would lie. (*R.* v. *Parkinson*, 1 *Russ. C. & M.* 571.)

Made a misdemeanor.

This latter act, except as to its repeal of the former, is repealed by the 9 Geo. IV. c. 31, and the 14th section of which act enacts, "That if any woman shall be delivered of a child, and shall, by secretly burying or otherwise disposing of the dead body of the said child, endeavour to conceal the birth thereof, every such offender shall be guilty of a misdemeanor, and being

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even a strong child may be suffocated by being left upon its face either in the pool made by the natural discharges or upon wet clothes. (*Hunt.* 18.) These and a variety of other causes may contribute to the death of new-born infants, particularly where the mother is delivered in secret by herself, and being exhausted, frequently faints and becomes insensible.

6. *Concealment of Birth of.*

Punishment.

On trial of indictment for murder, she may be found guilty of the misdemeanor.

convicted thereof shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years; and it shall not be necessary to prove whether the child died before, at, or after its birth: provided always, that if any woman tried for the murder of her child shall be acquitted thereof, it shall be lawful for the jury, by whose verdict she shall be acquitted, to find, in case it shall so appear in evidence, that she was delivered of a child, and that she did, by secret burying or otherwise disposing of the dead body of such child, endeavour to conceal the birth thereof, and thereupon the Court may pass such sentence as if she had been convicted upon an indictment for the concealment of the birth."

Abettors.

As to persons aiding and abetting the commission of this offence, see the 31st sect. *ante*, 609.

Not triable at sessions.

The offence is not triable at any quarter sessions, 5 & 6 Vict. c. 38, s. 1.

Observations and decisions as to the offence.

The above provision is in effect nearly the same as that of the 43 Geo. III. c. 58, s. 3, except that the woman may now be indicted for the concealment as a specific misdemeanor, whereas under the 43 Geo. III. she could be only found guilty of this offence after a trial on an indictment or inquisition for murder; and also that by this act hard labour may be imposed. Also by this new act, the offence is extended to the concealment of the birth of any child, whether a bastard or not. The words "disposing of the dead body" are new, and they seem very much narrower than those of the 43 Geo. III. (*Russ. C. & M.* 3d ed. 571, note by Greaves.)

The stat. 43 Geo. III. c. 58, s. 3 and 4, was held to extend to all cases of concealment of the birth, whether the child be born alive or otherwise, and although the birth was probably known to an accomplice. (*R.* v. *Cornwall*, *R. & R.* 336.) The same law would apply to the 9 Geo. IV.

Under the 21 Jac. I. it was held that if the mother called for help, or had previously confessed her pregnancy, (*R.* v. *Peat*, 1 *East's P. C.* 229,) these circumstances would probably negative the *concealment*. So if the woman made provision for the birth of her child, this also, it was held under the same act, might be deemed a circumstance indicative of her intention not to conceal it. (*Id.*) So under the 43 Geo. III. it appears to have been considered that if the woman made her pregnancy known to persons not implicated with her in the concealment, it would be an answer to the charge of concealment. (*R.* v. *Mary Southern*, 1 *Burn's J.* 24th ed. 335.) (*a*) And in a case

(*a*) In this case the prisoner was indicted for the wilful murder of her female bastard child. It appeared in evidence, that in the course of the night she was delivered of the child, which at four o'clock in the morning she took and threw into the privy. It also appeared that she had provided a cap and some trifling articles of child-bed linen. No marks of violence appeared on the body of the child; and the surgeon, who examined the prisoner soon after her delivery, added, that from the state of the afterbirth, and from the appearance of the child, he was of opinion that even if the child had been born alive, it could only have lived for a very short period. It was contended for the prisoner, that the statute of 43 Geo. III. c. 58, did not apply to the case of a still-born bastard child; and that from the construction which had been put on the former stat. of 21 James I. c. 27, (the defects of which it was the object of the stat. 43 Geo. III. c. 58, to remedy, and within the provisions of which the present case would not fall,) that even if it did not sufficiently appear that the child was born dead, the circumstances of the prisoner having made provision for the birth would take the case out of the statute. But *Bayley*, *J.*, said, he should rule that the stat. 43 Geo. III. c. 58, extended to all cases, whether it was proved that the child was still-born, or left the matter in doubt; and that he was of opinion in this case there was sufficient evidence to go to the jury of a concealment of the birth. His lordship added, that if the prisoner had avowed her pregnancy while she was in that state, or had, to the knowledge of any other persons, made preparation for her confinement, these circumstances would undoubtedly have been evidence to have satisfied a jury that the putting away the child was not for the purpose of concealing the birth, but that they would only have been matters of evidence, and would not have withdrawn the question of concealment from the consideration of the jury. The jury found the prisoner guilty of the concealment, and she was sentenced to be imprisoned two months in the house of correction.

under the 9 Geo. IV. the prisoner was delivered of a child whose dead body was found at the prisoner's father's house in a bed among the feathers. There was no evidence to show who placed it there, but it being proved that the prisoner had sent for a surgeon at the time of her confinement, and had prepared child's clothes, *Parke*, J. directed an acquittal on the charge of endeavouring to conceal the birth (*R* v. *Higley*, 4 *C. & P.* 366) But in a more recent case it was considered that the fact of the woman sending for a person at the beginning of her labour, and her previously allowing her pregnancy to be known to other persons, was only evidence for the consideration of the jury that she did not intend concealment, and not a bar to the prosecution, and that she might notwithstanding be convicted of the concealment. (*R* v. *Douglas*, 1 *Mood. C. C.* 480; 7 *C. & P.* 644, 8 C.)

6. *Concealment of Birth of.*

The woman must have done some act of disposal of the body after the death of the child. The denial of the birth is not of itself sufficient evidence of such act. (*Reg.* v. *Turner*, 8 *C. & P.* 755; *R.* v. *Nash*, 1 *Russ. C. & M* 3rd edit 574.)

The woman must have completely disposed of the body of the child; a prisoner found with the body still in her possession, though about to dispose of it, cannot be convicted (*R.* v. *Snell*, 2 *M & Rob* 44.) And hiding the body in a place from which a further removal is contemplated, has been held not sufficient to warrant a conviction. (*R.* v *Ash*, 2 *M. & Rob* 294; *R.* v. *Bell*, *id.*; *R.* v. *Watkins*, 1 *Russ. C. & M.* 3rd edit. 573, 574.) But according to a more recent case, it is not essential that the dead body should either be put in some place intended for its *final* deposit, or be buried or destroyed; (*Reg.* v. *Goldthorpe*, 1 *Car. & M.* 335,) and in that case it was held, that putting the body between a bed and a mattrass was sufficient to complete the offence.

The indictment must show the mode of disposing of the body. (*Reg.* v. *Hounsell*, 2 *M. & Rob.* 292.)

Commitment on 9 Geo. 4, c. 31, s. 14, for concealing the birth of a child.

[Commencement as usual, as *ante*, p. 9,] *that the said C. D. on the day of at the parish of in the county of being then and there delivered of a certain child, did, by secretly burying the same,* [according to the fact,] *unlawfully endeavour to conceal the birth thereof, against the form of the statute in such case made and provided, and you the said keeper,* &c. [as usual to the end.]

Indictment for like offence.

—— *to wit. THE jurors for our Lady the Queen upon their oath present, that A. B. late of the parish of in the county of gentleman, on the day of in the year of the reign of our Lady the now Queen Victoria, at the parish aforesaid, in the county aforesaid, being then and there pregnant with child, was then and there delivered of the said child alive, and which said child then and there instantly died, and that the said A. B being so delivered of the said child as aforesaid did then and there unlawfully endeavour to conceal the birth of the same by then and there secretly burying* [as the case may be, and state the mode of disposing,] *the dead body of the said child, against the form of the statute in that case made and provided, and against the peace of our Lady the Queen, her crown and dignity.*

Second count.

And the jurors aforesaid, on their oath aforesaid, do further present that the said A. B. on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, being then and there pregnant with child, was then and there delivered of the said last-mentioned child, which said last-mentioned child was, at the time the said A. B. was so delivered of him as last aforesaid, dead: and the said A. B. being so delivered of the said last-mentioned child as aforesaid, did then and there unlawfully endeavour to conceal the birth of the same, that is to say, by secretly burying [according to the fact] *the dead body of the said last-mentioned child, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.*

VII. Other Matters relating to.

What offices an infant cannot fill.

An infant cannot be appointed to an office of public and pecuniary trust; therefore he cannot be appointed to the office of clerk of a Court of Requests. (*Claridge* v. *Evelyn*, 5 *B. & Ald.* 81.)

But the office of clerk of the peace being merely ministerial, may be held by an infant. (*Crosbie* v. *Hurley*, 1 *Alcock & N.* 431.)

It seems, however, he cannot be a bailiff or sheriff's officer. (*Cuxon* v. *Winter*, 2 *M. & Ry.* 313.)

He cannot exercise the office of burgess. (*R.* v. *White*, 2 *Selw. N. P.* 1068, n.)

Cannot be an M.P. or voter.

He cannot be a member of parliament. (7 & 8 Will. IV. c. 25, s. 8.)

Nor can he vote in the election of one. (*Id.*)

Juror.

An infant before twenty-one years of age shall not be sworn on an inquest. (7 & 8 Will. III. c. 32, s. 4; 1 *Inst.* 172.)

Dower, marriage, and choosing guardian.

A woman at nine years of age may have dower; at twelve may consent to marriage; and at fourteen is of age of discretion, and may choose a guardian. (1 *Inst.* 78.)

Age of allegiance.

A man is of age at twelve years to take the oath of allegiance in the torn or leet. (*Id.*)

May be executor.

He may be appointed executor at any age, even a child in *ventre sa mere* may be so appointed. (1 *Will. Executors*, 128.) But if appointed sole executor he cannot act till of the age of twenty-one years. (38 Geo. III. c. 87.)

When an administrator.

If the next of kin be an infant, administration must be granted to another person during his minority. (1 *Will. Executors*, 295.)

Cannot make a will.

By the recent statute, 1 Vict. c. 26, s. 7, no will made by any person (after the 1st January, 1838,) under the age of twenty-one years, shall be valid. As to wills made before that date, the common law seems not to have determined precisely at what age one may make a testament of a personal estate; it was generally allowed that it might be made at the age of eighteen, and some said under, for the common law will not prohibit the spiritual Court in such cases. (1 *Inst*, 89; 1 *Hale*, 17.) The age of discretion is fourteen; and therefore it would seem that an infant of that age, or above it, might before the above act make a will of personal estate.

Cannot make a deed, or alien his lands or goods, &c.

At twenty-one, and not before, persons may bind themselves by any deed, and alien lands, goods and chattels; (1 *Inst.* 171;) or release a debt. (*Id.* 264.)

Nor enter into recognizance.

Upon which ground infants may not enter into recognizance to keep the peace, or to be of good behaviour, but their sureties only. It has been held, however, that infancy is no ground for discharging a forfeited recognizance to appear at the assizes to prosecute a felony. (*Ex parte Williams*, 13 *Price*, 673.)

When liable on a contract.

The general rule is, that the contract of an infant, however fair and conducive to his interest it may really be, is not binding on him, unless it be for the supply of *necessaries* to him, suitable to his degree, estate, and condition; or unless after the age of twenty-one he confirm it by some writing signed by him; which term "necessaries" does not simply mean his necessary meat, drink, apparel, physic, and such like; and teaching or instruction; it includes all such things as are useful and suitable to his state and condition in life, and not merely such as are requisite for his bare subsistence. (*Peters* v. *Fleming*, 6 *Mee. & W.* 42.)

It is a question for the jury whether the articles are such as a reasonable person of the age and situation of the infant would require for real use. (*Id.*)

But the question is subject to the control of the judge; and a jury having found that certain things were necessaries, contrary to the opinion expressed by the judge at the trial, the Court considered the verdict as perverse, and granted a new trial. (*Harris* v. *Fane*, 1 *Scott. N. R.* 287; 1 *M. & Gr.* 550, S. C.)

There is no inflexible rule of law making it incumbent on a tradesman to institute inquiries as to the situation and resources of an infant before he gives him credit for necessaries. (*Brayshaw* v. *Eaton*, 7 *Scott*, 183; 5 *Bing. N. C.* 331, S. C.)

7. Other Matters relating to.

Although an infant may be liable on his contract for necessaries, yet if he enter into an obligation or other writing, with a penalty for the payment of any of these, that obligation shall not bind him. (1 *Inst.* 172.) Nor will he be liable on a bill of exchange or promissory note, though the consideration for it be necessaries. (*Williams* v. *Harrison*, *Carth.* 160; *Holt*, *Rep.* 359, S. C.; *Williamson* v. *Watts*, 1 *Camp.* 552.) Nor will he be liable on an account stated; for he is not competent to state an account. (*Trueman* v. *Hurst*, 1 *T. R.* 40; and *Bartlett* v. *Emery*, *ib.* 40, n. (*a*).)

As to how far infants may be bound out and are liable under contracts of apprenticeship, see the law fully treated of, *ante*, "*Apprentice.*"

Liability of father for articles supplied.

The moral obligation which a father is under to provide for his child, imposes on him no liability to pay the debts incurred by that child; and he is not so liable, unless he has given the child authority to incur them, or has contracted to pay them. (*Mortimer* v. *Wright*, 6 *Mee. & W.* 482; *Rolfe* v. *Abbott*, 6 *C. & P.* 286; *Urmston* v. *Newcomen*, 4 *Ad. & Ell.* 899; *Clements* v. *Williams*, 8 *C. & P.* 58; *Seaborne* v. *Maddy*, 9 *C. & P.* 497.) It is mainly a question for a jury to decide on, whether the father authorised the supply of the articles, or the incurring of the subject-matter of the claim. (See *Law* v. *Wilkins*, 6 *Ad. & Ell.* 718; 1 *Nev. & P.* 697, S. C.)

Obligation under poor laws.

As to a parent's obligation to maintain his children, and *vice versâ*, so far as is required under the poor laws, see "*Poor Law*," Vol. IV.

Things of necessity bind him.

Things of necessity shall bind him, as a presentation to a benefice; for otherwise the lapse shall incur against him. (1 *Inst.* 172.)

Trust estates.

And infants seised of estates in trust, or by way of mortgage, may make conveyances thereof, as the Courts of Chancery or Exchequer shall direct. (7 Anne, c. 19; 4 Geo. III. c. 16.)

Surrender of leases.

And they may surrender leases in the Courts of Chancery or Exchequer, in order to renew the same. (29 Geo. II. c. 31.)

May purchase.

Also an infant hath, without consent of any other, capacity to purchase, for it is intended for his benefit; and at his full age he may either agree thereunto and perfect it, or without any cause to be alleged, waive or disagree to the purchase; and so may his heirs after him, if he agree not thereunto after his full age. (1 *Inst.* 2.)

Must appear by guardian, &c.

An infant cannot answer but by guardian; but he may sue either by his next friend or by guardian; (*Anon.* 3 *Salk.* 196;) otherwise it will be error in fact. (*Castledine* v. *Mundy*, 1 *Nev. & M.* 635; 4 *B. & Adol.* 90, S. C.)

Custody of.

Where a person supposed to be improperly in custody is brought up on *habeas corpus*, the Court, if there appear no ground for restraint, will order that such person be at liberty to go where he pleases, and will if necessary give him the protection of an officer in going. But if the party be a legitimate child, too young to exercise a discretion, the legal custody is that of the father, and if the mother has possessed herself of the child adversely to him, and he claims it, the Court will oblige her to deliver it up.

Nor will this rule be departed from on the ground that the father has formed an adulterous connection, which still continues, if it appear that he has never brought the adultress to his house, or into contact with his children, and does not intend to do so.

It seems that the child would not be given into the father's custody, if it appeared that in his hands it would be exposed to cruelty or gross corruption. (*Rex* v. *Greenhill*, 4 *Adol. & Ell.* 624; 6 *Nev & M.* 244, S. C.)

A father claiming from his wife the custody of their legitimate child on *habeas corpus*, the Court, on a representation by the wife of his profligacy and cruelty, referred it to a barrister to determine as to the proper custody of the child, the wife (who was in contempt for disobeying the writ) and the husband consenting to abide by such determination. (*Rex* v. *Dobbyn*, 4 *Ad. & Ell.* 641, n.)

An infant child, in the custody of the mother, brought up by *habeas corpus* at

7. *Other Matters relating to.*

the father's instance; it was ordered, that the child should remain with the mother; the father's access to be regulated by the master. (*Rex* v. *Wilson*, 4 *Ad. & Ell.* 645, n.)

2 & 3 Vict. c. 54.

By the 2 & 3 Vict. c. 54, passed to amend the laws relating to the custody of infants, sect. 1, it is enacted, that judges in equity may make an order on petition for the access of mothers to their infant children, and if such children be within the age of seven years, for the delivery of them to their custody until attaining such age. And by sect. 3, such orders may be enforced by process of contempt. Provided, by sect. 4, that a mother against whom adultery has been established shall not be entitled to the benefit of the act.

It has been held that the vice-chancellor has jurisdiction to make orders under this act, although the lord chancellor and master of the rolls are alone mentioned in it. (*In re Taylor*, 10 *Sim.* 291.)

Appointment of guardians over, by parents, &c.

By stat. 12 Car. II. c. 24, s. 8, any person having a child or children under twenty-one years of age, and not married, may, by deed or will attested by two witnesses, dispose of the custody and tuition of such child or children, until they shall be of the age of twenty one, or for a lesser time; and this, whether such parent be within or above the age of twenty-one.

In a recent case it has been decided that the mother of an illegitimate child has no power to appoint a guardian for it under this statute; and that therefore the Court of Q. B. will not on habeas corpus order an illegitimate child to be delivered up by a person to whose care it had been committed by the mother, into the custody of a person who was appointed guardian and devisee in trust for its benefit, by the will of the mother. (*Ex parte Glover*, 4 *Dowl. P. C.* 291; 1 *Har. & Woll.* 508, S. C.)

Mother no right to custody after such appointment.

A father having, by will, appointed a guardian of his children, the mother has no right to their custody, though the Court, exercising a discretion with respect to the infant's health, may leave them under her care. Also, the Court will not interfere as to the religious education of an infant upon any supposed pecuniary advantages to be derived from a change of faith, against the injunctions of the father. (*Talbot* v. *Shrewsbury, Earl*, 4 *Jur.* 380)

Custody of bastards.

As to the respective parents' rights to the custody of illegitimate children, see *ante*, "*Bastard*," p. 388.

Chimney Sweepers & Chimneys.

3 & 4 Vict. c. 85.

By the 3 & 4 Vict. c. 85, intituled "*An Act for the Regulation of Chimney Sweepers and Chimneys*," after reciting that "An act was passed in the fifth year of the reign of his late majesty, intituled '*An Act for the better Regulation of Chimney Sweepers and their Apprentices and for the safer Construction of Chimneys and Flues*,' to continue in force until the first day of January in the year one thousand eight hundred and forty, and from thence until the end of the then next session of parliament;" it is enacted, "That the said act shall continue and remain in full force until the first day of July in the year one thousand eight hundred and forty-two."

Continuance of 4 & 5 Will. 4, c. 35, until 1st July, 1842

Penalty for compelling or allowing children to climb chimneys.

Sect. 2. "That from and after the first day of July, in the year one thousand eight hundred and forty-two, any person who shall compel or knowingly allow any child or young person under the age of twenty-one years to ascend or descend a chimney, or enter a flue, for the purpose of sweeping, cleaning, or coring the same, or for extinguishing fire therein, shall be liable to a penalty not more than ten pounds, or less than five pounds."

No child under sixteen years to be apprenticed to a chimney sweeper.

Sect. 3. "That from and after the passing of this act it shall not be lawful to apprentice to any person using the trade or business of a chimney sweeper any child under the age of sixteen years, and that every indenture of such apprenticeship which may be entered into after such date shall be null and void."

Children apprenticed between 1st July, 1841, and 1st

Sect. 4. "That upon the application of any child apprenticed to any person using the trade or business of a chimney sweeper, at any time after the

first day of July, one thousand eight hundred and forty-one, and previously to the first day of July, one thousand eight hundred and forty-two, to any justice of the peace having jurisdiction where the master or mistress of such child shall reside, it shall be lawful for such justice to summon such master or mistress to appear, at a reasonable time, to be named in the summons, not being sooner than seven days from the time of granting the summons, before any two justices having jurisdiction as aforesaid; and upon proof made upon oath, to the satisfaction of the justices by whom the case shall be heard, that such apprentice is desirous of being discharged from his or her apprenticeship, it shall be lawful for such justices forthwith to discharge such apprentice by warrant under their hands and seals, for which warrant no fees shall be paid; and no writ of certiorari or other process shall issue to remove any proceedings under this enactment into any of her Majesty's superior Courts of record in England or Ireland, or into the Court of Session in Scotland."

3 & 4 Vict. c. 85.

July, 1842, may apply to be discharged.

Certiorari taken away.

Sect 5. "That from and after the first day of July, one thousand eight hundred and forty-two, all existing indentures of apprenticeship to the trade or business of a chimney sweeper of any child who shall then be under the age of sixteen years shall be null and void."

Indentures of children under sixteen years to cease after 1st July, 1842.

Sect. 6. "And whereas it is expedient, for the better security from accidents by fire or otherwise, the improved construction of chimneys and flues provided by the said act be continued; be it enacted, that all withs and partitions between any chimney or flue which at any time after the passing of this act shall be built or rebuilt, shall be of brick or stone, and at least equal to half a brick in thickness; and every breast-back and with or partition of any chimney or flue hereafter to be built or rebuilt shall be built of sound materials, and the joints of the work well filled in with good mortar or cement, and rendered or stuccoed within; and also that every chimney or flue hereafter to be built or rebuilt in any wall, or of greater length than four feet out of the wall, not being a circular chimney or flue twelve inches in diameter, shall be in every section of the same not less than fourteen inches by nine inches; and no chimney or flue shall be constructed with any angle therein which shall be less obtuse than an angle of one hundred and twenty degrees, except as is hereinafter excepted; and every salient or projecting angle in any chimney or flue shall be rounded off four inches at the least, upon pain of forfeiture, by every master builder or other master workman who shall make or cause to be made such chimney or flue, of any sum of not less than ten pounds nor exceeding fifty pounds: provided nevertheless, that notwithstanding this act chimneys or flues may be built at angles with each other of ninety degrees and more, such chimneys or flues having therein proper doors or openings not less than six inches square."

Regulating construction of chimneys.

Penalty.

Sect. 7. "That all convictions for penalties for any offence against this act may be had before two or more justices of the peace acting for the county, riding, city, borough, division, or place where the offence shall happen, or before the sheriff or stewart of any county or stewartry in Scotland; and such penalties, and the costs and charges attending the recovery thereof, shall be levied by distress and sale of the goods and chattels of the offender or person liable or ordered to pay the same respectively, by warrant under the hands and seals of two or more of the said justices, or under the hand of any such sheriff or stewart, rendering the overplus of such distress and sale (if any) to the party or parties, after deducting the charge of making the same, which warrant such justices or sheriffs or stewarts are hereby empowered and required to grant, upon conviction of the offender by confession, or oath of one or more credible witness or witnesses; and the penalties, costs, and charges, when so levied, shall be paid, the one half to the informer, and the other half to the overseers or managers of the poor of the parish, township, or place where the offender shall dwell and inhabit, to be by such overseers or managers applied in aid of the rate or assessment raised for the relief of the poor of such parish, township, or place, and in Scotland, in parishes where there shall be no assessment for the relief of the poor, as the said managers shall direct, or to her Majesty in case there shall be no such overseer or manager." (See *post*, "*Distress by Justices' Warrant*," Vol. II.)

Before whom convictions may be had.

Penalties and costs to be levied by distress.

And one half to be paid to the informer and the other to the poor of the parish, &c.

3 & 4 Vict. c. 85.

In default of payment of penalty the parties convicted to be sent to prison.

Sect. 8. "That the justices of the peace or sheriffs or stewarts by whom any person shall be convicted and adjudged to pay any sum of money for any offence against this act may adjudge that such person shall pay the same, together with costs, either immediately or within such period as the said justices shall think fit; and that in default of payment at the time appointed such person shall be imprisoned in the common gaol or house of correction (with or without hard labour), as to the said justices or sheriffs or stewarts shall seem meet, for any time not exceeding two calendar months; the commitment to be determinable upon payment of the amount of the penalty and costs."

Inhabitants not incompetent witnesses by reason of paying rates.

Sect. 9. "That no inhabitant of any parish, township, or place shall be deemed an incompetent witness in any suit, action, information, complaint, appeal, prosecution, or proceeding to be had, made, prosecuted, or carried on under the authority of this act, for any offence committed within such parish, township, or place, by reason of such person being rated or assessed to, or liable to be rated or assessed to, or being otherwise interested in, the rates or assessments of any such parish, township, or place."

Distress not to be deemed unlawful for want of form.

Sect. 10. "That where any distress shall be made for any sum or sums of money to be levied by virtue of this act, the distress itself shall not be deemed unlawful, nor the party or parties making the same be deemed a trespasser or trespassers, on account of any default or want of form in any proceedings relating thereto, nor shall the party or parties distraining be deemed a trespasser or trespassers from the beginning on account of any irregularity which shall be afterwards done by the party or parties distraining, but the person or persons aggrieved by such irregularity may recover full satisfaction for the special damage in an action on the case, to be brought in some of the courts of record at Westminster or Dublin, or by action raised or complaint preferred in the Court of Session in Scotland: provided always, that no plaintiff or plaintiffs shall recover in any action for any such irregularity, trespass, or wrongful proceeding if tender of sufficient amends for any such special damage shall be made by or on behalf of the party or parties who shall have committed or caused to have been committed any such irregularity or wrongful proceeding before such action or complaint brought; and in case no such tender shall have been made it shall be lawful for the defendant or defendants in any such action, by leave of the Court where such action shall depend, at any time before issue joined, to pay into Court such sum of money as he or they shall see fit, whereupon such proceedings or orders and judgments shall be had, made, and given in and by such Court as in other actions where the defendant is allowed to pay money into Court."

Tender of amends.

Appeal.

Sect 11. "That any person who shall think himself or herself aggrieved by any conviction by any justice or justices of the peace under this act may appeal to the next Court of general or quarter sessions of the peace which shall be holden, not less than twelve days after the day of such conviction, for the county, stewartry, riding, city, borough, division, or place wherein the cause of complaint shall have arisen; provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within three days after such conviction, and seven clear days at the least before such session, and shall also either remain in custody until the session, or enter into a recognizance, with two sufficient sureties, before a justice of the peace, conditioned personally to appear at the said session of the peace, and to try such appeal, and to abide the judgment of the Court thereupon, and to pay such costs as shall be by the Court awarded; and upon such notice being given, and such recognizance being entered into, the justice before whom the same shall be entered into shall liberate such person, if in custody, and the Court at such session shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the Court shall seem meet, and in case of the dismissal of the appeal or affirmance of the conviction shall order and adjudge the offender to be punished according to the conviction, and to pay such costs as shall be awarded, and shall, if necessary, issue process for enforcing such judgment; and all judgments, determinations, and proceedings of such justices not ap-

pealed from as aforesaid, and of such sheriff or stewart, or quarter sessions, shall be final, and not subject to review by any process of law or court whatever, any law or usage to the contrary notwithstanding." (See *ante*, title "*Appeal.*") 3 & 4 Vict. c. 85.

Sect. 12. "That no conviction or adjudication made on appeal therefrom shall be quashed for want of form, or be removed by certiorari or otherwise into any of her Majesty's superior Courts of record; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same." (As to enactments of this nature, see *post*, "*Conviction*," *ante*, "*Certiorari.*") Conviction not to be quashed for want of form or removed by certiorari.

Discharge of an apprentice under the 3 & 4 Vict. c. 85, s. 4, who was bound after the 1st July, 1841, and before the 1st July, 1842.

—— *to wit. WHEREAS A.B. of , in the county aforesaid, a child of the age of twelve years, on the day of , applied to me J. P., Esquire, one of her Majesty's justices of the peace for the said county, and informed me that he the said A. B., after the 1st day of July,* 1841, *and previously to the 1st day of July,* 1842, *to wit, on the day of , was apprenticed to C. D., of aforesaid, then and there and now using the trade or business of a chimney sweeper, whereupon I the said J. P. having jurisdiction where the said C. D. resides, issued my summons to the said C. D. to appear before me and W. O., Esquire, another of her Majesty's justices of the peace for the said county having jurisdiction as aforesaid, at a reasonable time named in such summons, the same not being sooner than seven days from the time of granting such summons; and whereas the said C. D. hath appeared this day before us the said justices in pursuance of the said summons, and the said A. B being now examined by us in the presence of the said C. D. hath deposed upon oath to the satisfaction of us the said justices, that the said A. B. is desirous of being discharged from his said apprenticeship, we the said justices do therefore by these presents discharge the said A. B. of and from his said apprenticeship to the said C. D., anything contained in the indenture of apprenticeship made between them or otherwise howsoever to the contrary notwithstanding. Given under our hands and seals this day of , in the year of our Lord* 1844.

Choses in Action, *Larceny of*, see "*Larceny*," Vol. III.

Christening, *Proof of*, see "*Evidence*," Vol. II. p. 385.

Christian Name, *Statement of, in an Indictment*, see "*Indictment*," Vol. III.; *in a Conviction, post*, "*Conviction.*"

Church or Chapel.

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I. The Church or Chapel itself, and general Matters relating to.

Definition of word church.

THE ancient Saxon word is *cyrce*, the Danish *kircke*, the Belgic *kerçke*, the Cimbric *kirkia* or *kurk;* probably from the Greek word κυριακὴ, belonging to the Lord, or κυρίου οἰκία, the Lord's House; so that we have lost the ancient pronunciation of the word (except in the northern parts of England and Scotland) by softening the letters *c* or *ch*, as we have done in many cases; which letters the ancient Greeks and Romans always pronounced hard, as the letter *k*.

What a parish chapel.

A parochial chapel has the parochial rights of christening and burying; and differeth in nothing from a church but in the want of a *rectory* and *endowment*. (*Degge*, pt. 1, c. 12.)

When a perpetual curacy.

If it has parochial rights, as clerk, wardens, &c.; rights of divine service, as baptism, sepulture, &c.; and the inhabitants have a right to them there and not elsewhere, and the curate has small tithes and surplice fees, and an augmentation, it is a *perpetual curacy*, and the curate is not removable at pleasure.

What a chapel of ease.

A chapel merely of ease is that which was not allowed a *font* at its institution, and is used only for the ease of the parishioners in prayers and preaching, (sacraments and burials being received and performed at the mother church,) and commonly where the curate is removable at the pleasure of the parochial minister. (1 *Burn's Eccl. L.* 299.) It is merely *ad libitum*, and has no parochial rights; therefore, on the union of the two parishes, one is frequently deemed the parish church, and the other a parochial chapel, but not a chapel of ease. (*Attorney-General* v. *Breton*, 2 *Ves. sen.* 425, 427.)

Whether a chapel be a parochial chapel or chapel of ease, is matter of spiritual conusance. (See 1 *Burn's Eccl. L.* 300.)

Every new church built by the commissioners appointed for building churches by 58 Geo. III. c. 45, and intended as the parish church of any division of a parish, intended to be a *separate* parish, is a chapel of ease *during the existing incumbency* of the original parish church, and shall be served by a curate nominated by such incumbent, licensed by the bishop, and paid by the commissioners. (58 *Geo. III.* c. 45, s. 18; 59 *Geo. III.* c. 134, s. 12. See also 1 & 2 *Vict.* c. 106; *Steers' P. L. by Clive*, 64.)

What a free chapel.

Free chapels were places of religious worship exempt from all ordinary jurisdiction, except that the incumbents were generally instituted by the bishop,

and inducted by the archdeacon of the place. Most of these chapels were built upon the manors or ancient demesnes of the crown, whilst in the king's hands, for the use of himself and retinue, when he came to reside there. When the crown parted with these estates, the chapels went with them, and retained their first freedom. Where this does not appear to have been their origin, such are thought to have been built and privileged by grants from the crown. (*Tanner's Notit. Monast. Pref.* 28; *Steers' P. L. by Clive*, 62.)

1. *The Church and General Matters as to.*

Private chapels are such as noblemen and others have at their own charge built in or near their houses for them and their families to perform religious duties in. The chaplains are provided by the owners with honorable pensions. They should be consecrated by the bishop. (*Degge*, pt. 1, c. 12.) The repair of them is cast upon the owners, notwithstanding it be annexed to the church. (2 *Inst.* 489.)

Private chapels.

It is said that no person can erect a church without the leave and consent of the bishop. (*Gibs.* 189.) Nor can any person erect a new public chapel forming part of the ecclesiastical establishment of the Church of England, whether as a chapel or otherwise, without the concurrent consent of the incumbent, patron, and bishop, and without a provision for the indemnity or compensation of the future incumbent, perhaps in all cases, and certainly if his pecuniary rights and interests are affected. (*Bliss* v. *Woods*, 3 *Hag.* 509; *Ken. Par. Ant.* 585.)

Who may erect a church or chapel.

The law takes no notice of churches or chapels as such till they are consecrated by the bishop; (3 *Inst.* 203, 204; *Gibs.* 190;) except in cases of extreme necessity, as if a church were destroyed by fire, in which case the service might be performed in another place, even in the open air, before the consecrated altar table. (*Inst. J.* c. ii. 18.) In a recent case, a marriage had on the site or ruins of an old church, which was unroofed and in part pulled down for the purpose of repair, was held valid, the publication of banns having been made in an adjoining parish church. (*Stallwood* v. *Fredger*, 2 *Phil. E. C.* 292.) As to the form and mode of consecration and dedication of churches and chapels, see 1 *Burn's E. L.* 323 to 342, by *Tyrwhitt*.

Consecration necessary.

After a new church is erected, it cannot be consecrated without a competent endowment. By the civil law, the endowment must be made even before the building be begun. (1 *Burn's E. L.* 324, by *Tyrwhitt.*)

Endowment of.

At the consecration of a chapel there was often some fixed endowment, as of lands or tithes, or voluntary contributions given to it, for its more easy dependence on the mother church. (*Degge*, pt. 1, c. 12.)

By stat. 17 Car. II. c. 3, in cities and towns corporate, the bishop (with the consent of the mayor, aldermen, and justices of the peace, and of the patron,) may unite two churches or chapels; and make order, with the like consent, that the patrons present by turns, having regard to the value of the livings united; and the incumbents thereof shall be graduates.

Uniting of churches.

Sect. 2. Notwithstanding any such union be made by virtue hereof, each of the parishes so united shall continue distinct as to all rates, taxes, parochial rates, charges, and duties, and all other privileges, &c. whatsoever, other than such as are before specified; and churchwardens shall be elected for each parish, as they were before such union made.

The number of churches was augmented from time to time, chiefly by the piety of individuals, till the practice of bequeathing their property to pious uses was encouraged by the priests to such an alarming extent, that the statutes of mortmain were passed to prevent the continuance of the evil.

Increase of.

Statutes of mortmain.

In the late reign, however, several acts of parliament were passed, authorising the gift, by deed or will, of land to the extent of five acres, or other property, not exceeding 500*l.* towards erecting, rebuilding, or providing any church or chapel, where the liturgy and rites of the united church of England and Ireland are observed, or any house of residence, &c. &c. (See 43 *Geo. III.* c. 108; 51 *Geo. III.* c. 115; 52 *Geo. III.* c. 161.)

Additional churches.

And a considerable addition has since been made under the powers of the 58 Geo. III. c. 45; 59 Geo. III. c. 134; and 3 Geo. IV. c. 72, through the agency of commissioners appointed to examine into the state of parishes, and to ascertain the means of church accommodation. (*Steers' P. L. by Clive*, 19.)

1. *The Church and General Matters as to.*

The 5 Geo. IV. c. 103, and the 1 & 2 Will. 4, c. 38, amended, explained, and extended by 1 & 2 Vict. c. 107, gave power to persons willing to build churches by subscription, or partly by subscription, and partly by rates, to do so without the concurrence of the commissioners, if the consent of the bishop, and that of the incumbent and patron, where necessary, were procured. (See also 2 & 3 Will. IV. c. 61; 7 Will. IV. & 1 Vict. c. 75; 2 & 3 Vict. c. 49; and 3 & 4 Vict. c. 60; *Steers' P. L.* 20.)

Clauses are commonly inserted in the several acts of parliament for making provision for the rectors of new churches, which clauses give certain powers to justices of the peace in relation to the assessments to be made for that purpose. And in the case of borrowing money for rebuilding clergymen's houses, by the 17 Geo. III. c. 53, s. 1, (called Mr. Gilbert's act, explained and amended by stat. 21 Geo. III. c. 66,) the estimates are to be sworn to before a justice of the peace or master in chancery; and see stat. 5 Geo. IV. c. 89.

But these enactments more immediately belonging to the ecclesiastical law, and not relating in any way to the office and duties of a justice of peace or parish officer, it has not been considered expedient to insert them in this work. (See *Burn's E. L.* tit. *Churches; Steers' P. L. by Clive*, tit. *Church*. Some of the enactments as to pews will be found, *post*, 629; as to church repairs and church rates, *post*, 654.)

Freehold in churches.

The soil and freehold of the church and churchyard belongs solely to the parson or incumbent for public purposes, and not for his own emolument. (*Per Bayley*, J. *Bryan* v. *Whistler*, 8 *B. & Cres.* 293; 2 *M. & R.* 330, S. C.) And he alone has the right of making any disposition of or bringing any action for an injury with respect thereto. (See *Bac. Abr. Churchwardens*, B.; 1 *Curteis*, 260.) The *fee simple* of the glebe is in abeyance. (1 *Fost.* 341.)

Way through.

But although the church and churchyard be the parson's and be[illegible]secrated, yet a man may prescribe to have a way through either. (2 *Rolle's Abr.* 295.)

Action for injuring.

If the walls, windows, or doors, or any part of the freehold of the church or churchyard be injured by any person, the incumbent of the rectory, or his tenant if they be let, may have his action for the damages. (*Wats.* c. 39.)

II. Chancel, Aisle.

Chancel.

Chancel (cancellus) seemeth properly to be so called *a cancellis*, from the lattice work partition betwixt the quire and the body of the church, so framed as to separate the one from the other but not to intercept the sight. (1 *Burn's E. L.* 342.)

The freehold of it is in the parson, and is parcel of his glebe. (*Brownl. & Goldsb. R.* 45.)

By the rubric before the common prayer it is ordained that the chancels shall remain as they have done in times past, that is to say, distinguishable from the body of the church in manner aforesaid. (*Gibs.* 199.)

A grant of any part of the chancel of a church by a lay impropriator to his heirs and assigns is not valid in law, and therefore such grantee, or those claiming under him, cannot support trespass for pulling down his or their pews there erected. (See *Clifford* v. *Wicks*, 1 *B. & Ald.* 498.)

The rector cannot alienate any part of the chancel or church without the consent of the ordinary, and it is inconsistent with the duty of either to grant it. (See *Steers' P. L. by Clive*, 21.)

Aisle.

Ile is said to proceed from the French word *aile* (*ala*), a wing, for that the Norman churches were built in the form of a cross, with a nave and two wings. (*Burn's E. L.* 342.) Bingham derives it from ναος, or *navis*, and says it was originally a square building between the narthea and the sanctuary, or the chancel. (*Bingh.* vol. 1, p. 292.)

An ile which hath from time immemorial belonged to a particular house, and which may be established by repairs done by the owners of that house, is

part of his frank tenement, and the ordinary cannot dispose of it or intermeddle in it, and this because the law presumes in such a case that the ile was erected by his ancestors, or those whose estate he hath, and is thereupon particularly appropriated to their house. But merely sitting in or using the pew would be no evidence of the right. (*Gibs.* 197; 12 *Coke*, 105; *Cro. Jac.* 366; 1 *Burn's E. L.* 343.) Residence in the parish is not necessary to the right. (*Gibs.* 197.) The title cannot be maintained upon mere prescription, or upon any new grant by a faculty from the ordinary to a man and his heirs, but the ile must always be supposed to be held in respect of the house, and will always go with the house to him that inhabits it. (*Hussey* v. *Leighton*, 12 *Co.* 106; *Crook* v. *Sampson*, 2 *Keb.* 92.) 2. *Chancel and Isle.*

If a person has good title to the ile, if the ordinary places another person in it with the proprietor, the latter may sue the ordinary in an action on the case: and if he be impleaded in the spiritual court for the same, a prohibition will lie. So if any private person sits in it, or obstructs the owner's right, or buries his dead there, he may sue him in a similar form of action. (*Wats.* c. 39.)

As to pews and seats in the chancel or ile, see *post*, 630. Pews and seats in.

III. The Churchyard, and herein of Burials.

A churchyard is a place belonging to the church, and where dead bodies are buried. Churchyard.

The soil and freehold in it is in the parson, and he may sue for any injury to his right thereto. See *ante*, 624. Freehold in.

A person may prescribe to have a way through it. (2 *Roll. Abr.* 265.) But no one can make a private door into it without the consent of the parson, and a faculty also from the bishop for the same. (1 *Burn's E. L.* 349.) The right of way if a private one is maintainable in the ecclesiastical court. (2 *Roll. Ab.* 287; 1 *Ventr.* 208.) Path or way through.

Under the 59 Geo. III. c. 134, s. 59, the commissioners for building new churches have the power of stopping up unnecessary paths in churchyards, provided the same be done with the consent of two justices, and on giving notice in the manner and form prescribed by the 55 Geo. III. c. 68. The notice prescribed by that act states, that the order will be lodged at the next quarter sessions, and will then be confirmed and inrolled, unless upon an appeal against the same to be then made, it be otherwise determined. The 59 Geo. III. c. 134, contains no other enactment relating to an appeal, and it has therefore been held, that although it appeared to be the intention of the legislature to give an appeal against the order of the commissioners, they had not carried that intention into effect, and that an appeal would not lie. (*Reg.* v. *Stock*, 3 *Nev. & Per.* 420; 8 *Ad. & Ell.* 405, S. C.)

By stat. 13 Edw. I. st. 2, c. 6, no fairs or markets shall be kept in churchyards. Fairs in.

If trees in the churchyard be cut down, or the grass thereon eaten by a stranger, the incumbent may bring his action (*Bro. Abr. Trespass*, 210); and so may his lessee if the churchyard be let (*Rol. Abr.* 337); the soil and freehold being in the incumbent. As between the rector and vicar, it seems that the right to trees belongs to him who is bound to repair. (2 *Rol. Abr.* 337; *Gibs.* 207.) Trees and herbage in.

By the 35 Edw. I. stat. 2, the parson cannot cut them down but when the chancel wants repairing, and by that statute they shall not be converted to any other use except the body of the church doth need like repairs, in which case the rectors of poor parishes of their charity shall do well to relieve the parishioners with bestowing upon them the same trees, but the statute does not command, but only commends this gift to be made. It would seem however from what fell from Lord Hardwicke in *Stracy* v. *Frances*, 2 *Atk.* 217, that a rector may cut down timber for the repairs of the parsonage house, and for the repairs of old pews belonging to the rectory, as well as for repairs of the chancel, though not for any common purpose; also that he is entitled to botes for the repairing barns and outhouses belonging to the parsonage.

3. *Churchyard. Burials.*

An injunction may be granted to prevent the improper cutting of trees in the churchyard. (See *Stracey* v. *Frances, supra; Hoskins* v. *Featherstone*, 2 *Bro. C. C.* 552.) A prohibition also lies. (See *Gibs.* 208; 11 *Coke*, 49.)

Fences and walls of.

By *Canon* 85, the churchwardens or questmen shall take care that the churchyards be well and sufficiently repaired, fenced, and maintained with walls, rails, or pales, as have been in each place accustomed, at their charge unto whom by law the same appertaineth. (1 *Curt.* 621.)

Liability to repair.

The parishioners are bound to repair the fence of the churchyard at their own charge. (*Lind.* 253; 2 *Inst.* 489.) And Lord *Coke* says, "that the parishioners ought to repair the inclosure of the churchyard, because the bodies of the more common sort are buried there, and for the preservation of the burials of those that were, or should have been while they lived, the temples of the Holy Ghost." (2 *Inst.* 489.) And if the churchyard be not decently inclosed, the church (which is God's house) cannot decently be kept, and therefore this the parishioners ought to do by custom known and approved; and the conuzance thereof belonged to the ecclesiastical court. (*Id.*)

By prescription the vicar may be liable to repair the fence. In *R.* v. *Reynell, Clerk*, (6 *East*, 315,) a vicar was indicted for a *misdemeanor*, in not repairing the fence of a churchyard, which he had been immemorially bound to repair, by means whereof cattle broke in and injured the tombstones, church porch, &c. to the nuisance of the parishioners; contrary to the evidence there was a verdict for defendant, and the Court of Queen's Bench refused to grant a rule *nisi* for a new trial on the ground of the verdict being against evidence, because it is a general rule not to give a new trial when there has been a verdict of acquittal, and therefore left the prosecutors to indict again for any continuing want of repair. No doubt was intimated of an indictment lying.

It has been said, that if the owners of lands adjoining to the churchyard have used time out of mind to repair so much of the fence thereof as adjoineth to their ground, such custom is a good custom, and the churchwardens may have an action against them at the common law for the same. (*Gibs.* 194.) But this is erroneous. The doctrine laid down in 2 *Rol. Abr.* 287, merely is, that if a prescription, or custom *ratione tenuræ* to repair, be pleaded in the ecclesiastical court, a prohibition shall go, and *proceedings* be had at common law, not that an action lies; and *Godolphin* is to the same effect; and 2 *Ayloffe's Parergon Juris Canonicæ*, 174; and see *Gibs. Cod.* 217. It seems that no action lies, but an indictment will, if any damage has been occasioned to tomb stones, and by cattle getting in. (*R.* v. *Reynell*, 6 *East*, 315.)

By the 59 Geo. III. c. 134, s. 39, the Commissioners for the building of additional churches may, if they think fit, alter, repair, pull down and rebuild, or order or direct to be altered, &c., the walls or fences of any existing churchyard or burial ground of any parish or chapelry, and fence of any additional or new burial ground to be provided for by this act, and also stop up and discontinue, or alter or order to be stopped up, &c., any entrance to any churchyard or burial ground, and the footways and passages over the same, as to them may appear useless and unnecessary, or as they shall think fit to alter, provided the same be done with the consent of two justices of the peace, and on notice being given as prescribed by 55 Geo. III. c. 68; 59 Geo. III. c. 134, s. 39.

Enlarging of, &c.

The 56 Geo. III. c. 141, enables ecclesiastical corporate bodies under certain circumstances to alienate lands for enlarging cemeteries or churchyards. (And see 58 Geo. III. c. 45, s. 33; 1 & 2 Vict. c. 107, s. 9.)

By the 59 Geo. III. c. 134, s. 36, all parishes, or extra-parochial places required by the commissioners, shall furnish lands for enlarging existing or making additional churchyards, or burial grounds, as the commissioners shall deem necessary; and the commissioners shall give notice to the churchwardens, to be left at their abodes, of the intention to enlarge the existing or set out new burial grounds, and of the extent of ground required for such purpose, and for a proper approach thereto, and of the place in which the same is required to be provided; and the churchwardens shall within fourteen days call a meeting of the vestry, or persons possessing the powers of vestry, for taking all necessary measures for providing the same: and in case

the parish or place cannot provide the same without purchase, the vestry, or persons possessing the powers of vestry, are required forthwith to proceed to treat for ground according to such notice, but shall not conclude any bargain without the commissioners' approbation.

3. *Churchyard. Burials.*

The 3 Geo. IV. c. 72, s. 26, empowers the commissioners therein mentioned to authorise any parish, chapelry, township, or extra-parochial place, to procure and buy additional burial grounds, and empowers churchwardens to complete the purchases.

The 1 & 2 Will. IV. c. 38, s. 17, enacts, that after five years from the conveyance of any lands, &c., as a site for any church or chapel, or any church or chapelyard under that act, they shall be absolutely vested in the persons to whom they are conveyed, provided that if recovered in ejectment, they tender the value found by the jury and costs within two months after the judgment.

Right to burial in.

The churchyard is the common burial place for all parishioners, (*Comp. Incumb.* 381,) who have a common law right to be buried in it, without paying anything for breaking the soil; (1 *Burn, Eccl. Law*, 258; *Andrews* v. *Cawthorne, Willes*, 536;) and a *mandamus* lies to compel the clergyman to inter the body of a parishioner if he should refuse; (*R.* v. *Coleridge*, 2 *B. & Ald.* 806; 1 *Chit. Rep.* 588, S. C.;) and, it would seem, a criminal information might be granted against him. (*R.* v. *Taylor, Willes*, 538.) And by canon 68, no minister shall refuse or delay to bury any corpse that is brought to the church or churchyard, convenient warning being given him thereof, in such manner and form as is prescribed in the Book of Common Prayer.

Parishioners.

Non-parishioners.

With respect also to non-parishioners, it would seem from what fell from Lord Denman, C.J. in the recent case of *R.* v. *Stewart*, (4 *P. & D.* 849; 12 *A. & E.* 773, S. C.,) that every person dying in this country, and not within certain exclusions laid down by the ecclesiastical law, has a right to a christian burial, and to be buried in the churchyard of the parish in which he dies.

Who excluded from.

As to who are excluded from christian burial, it is to be observed that the rubric, confirmed by the 13 & 14 Car. II. c. 4, forbids the use of the customary office in the burial of any that die *unbaptized*, which was thought to have made church baptism necessary. But it has been held that a minister of the established church cannot refuse to bury the child of a dissenter; (*Kemp* v. *Wickes*, 3 *Phil.* 264;) nor the body of any person who was baptized with water, and in the name of the Holy Trinity, though never baptized otherwise than by a layman. (*Escott* v. *Martin*, 6 *Jurist*, 765.) (*a*)

Persons who have laid violent hands on themselves, having capacity to govern themselves, and therefore not lunatics or persons of insane mind, are excluded from christian burial. (1 *Burn, E. L.* 261.) Attainted felons, and traitors who die before execution, are not excluded. (*Id.*) As to the burial of a *felo de se*, see "*Felo de Se*," *post*, Vol. III.

In a particular part of churchyard.

The clergyman cannot be compelled to bury the corpse of any person, even though the corpse of a parishioner, in any particular vault, or other particular part of the churchyard; and the court have refused to grant a *mandamus* to compel him to do so. (*Ex parte Blackmore*, 1 *B. & Adol.* 122.) He has a

(*a*) Although the rubric of the Common Prayer Book prior to 1603, in that part relating to private baptism, directed that those present should call upon God for his grace, and say the Lord's prayer if the time would suffer, and then one of them should name the child, using water and calling upon the name of the Trinity; and the rubrics of 1603 and 1661 contained the following direction: "Of them that are to be baptized in private houses in the time of necessitie by the minister of the parish, or any other lawful minister that can be procured."—"First, let the lawful minister and them that be present call upon God for his grace, &c.;" yet this latter direction is not to be looked upon as an alteration of the rule then subsisting as to the validity of lay baptism, but only as directory—not as substitutionary, but cumulative. The validity of lay baptism was therefore unaffected thereby. (*Escott* v. *Martin*, 6 *Jur.* 765.) A clergyman refusing to perform the office for the interment of the dead over the body of a parishioner so baptized, due notice of the death having been given him, was suspended for three months. (*Martin* v. *Escott*, 2 *Curt.* 692.)

3. *Churchyard. Burials*

right to exercise a discretion on that subject. (*Id.*) The mode of burial is a question purely of ecclesiastical cognizance. (2 *B. & Ald.* 806.) A custom that every parishioner has a right to bury his dead relations in the churchyard as near their ancestors as possible, is bad. (*Fryer* v *Johnson*, 2 *Wils.* 28.)

Vault in church.

It seems a rector cannot grant a vault in the church, but only leave to bury there in each particular instance. (*Bryan* v. *Whistler*, 8 *B. & C.* 288; 2 *Man. & R.* 318, S. C.) Where a rector granted to *A. B.*, by parol, leave to make a vault in the parish church and to bury a certain corpse there, and that he should have the exclusive use of the vault; and afterwards, without the leave of *A. B*, opened the vault and buried another person there; it was held, that no action could be maintained against him for so doing; for that, if the rector had power to grant the exclusive use of a vault, he could not by parol do it. (*Id.*)

The 58 Geo. III. c. 45, provides, that no burials are to be permitted in any church or chapel erected under the act, or in the adjacent cemetery at a less distance than twenty feet from the external walls, except in vaults wholly arched with brick or stone under any church or chapel, and to which the only access shall be by steps on the outside of the external walls, under the penalty of 50*l.* upon conviction before two justices of the peace, one half to the informer, the other to the poor of the parish.

Who bound to bury.

The common law casts on some one the duty of carrying to the grave decently the dead body of any person without the means of private burial, and such duty is, it seems, cast upon the householder, in whose house the dead body lies. (See *R.* v. *Stewart*, 4 *P. & D.* 349; 12 *A. & E.* 773, S. C.) It would seem, therefore, however, that where a pauper dies in any parish house, poor house, or union house, that circumstance casts on the parish or union, as the case may be, the duty of burying the body, not by virtue of the statute 43 Eliz. c. 2, but on the principles of the common law. (*Id.*) But overseers are not bound either by common law, or that statute, to bury a pauper settled in their parish, who dies in the parish, but not in any parish house. It must be observed, that under the 22 Geo III. c. 83, s. 38, (Gilbert's Act,) the expenses of the burial of any poor person, found in a parish to which he did not belong, are to be paid by the guardians of the place where he was settled, after being allowed and certified by a justice. As to the burial of dead bodies cast on shore, see *ante*, "*Bodies.*"

The burial service.

The burial must take place in the manner and form as is prescribed in the Common Prayer Book. (*Can.* 68.)

Meeting the corpse.

By the rubric, "the priests and clerks meeting the corpse at the entrance of the churchyard, and going before it either into the church or towards the grave, shall say as is there appointed."

Entering the church.

It would seem that the minister may, in his discretion, prevent the corpse being carried into the church, and there may be good reason for this in cases of infection. (*Steers' P. L. by Clive*, 57.)

Mode of burial.

In general, in the absence of any positive law to the contrary, the *mode* of burying the dead is a matter of ecclesiastical cognizance. In a recent case, the Court of Queen's Bench refused a *mandamus* to compel a burial in an iron coffin. (*R.* v. *Coleridge*, *supra.*) The use of iron in the structure of coffins is not, however, unlawful; but they are not to be admitted into the churchyard on the same terms of pecuniary payment as coffins of ordinary wood. (*Gilbert* v. *Buzzard*, 3 *Phil.* 335.)

Iron coffins.

Ringing the bell.

By the 67th canon, after the death of a party there shall be rung no more but one short peal, and one before the burial, and one after it.

The corpse must not be exhumed.

The corpse, when once buried in the churchyard, cannot legally be taken up to be deposited in another place without a license from the ordinary; (*Gibs.* 454;) except, indeed, in cases of violent or supposed violent death, in which the coroner may sometimes have it taken up for the purpose of holding an inquest. (See "*Coroner*," *post*, Vol. II.) As to the stealing of dead bodies, see *ante*, "*Bodies.*"

Burial fees.

If there be an accustomed fee, and that be denied, still the clergyman must bury the body of a parishioner in the churchyard when required so to do. (1 *Burn, Eccl. Law*, 268; *Andrews* v. *Cawthorne*, *Willes*, 536, recognized by Sir W. Scott in *Gilbert* v. *Buzzard*, 2 *Hagg.* 355.)

As regards the amount of the burial fee, it is said that the accustomed fee to the parson for breaking the soil in the churchyard is for the most part 3*s.* 4*d.*, and for the opening of the floor of the chancel 6*s.* 8*d.* (*Degge*, 146.) A libel for subtraction of burial fees was rejected, the fees not being ancient customary fees, nor having been settled and fixed by the vestrymen of the parish (Marylebone) under the local statute 51 Geo. III. c. 151, s. 49, and it was held, that as the vestrymen had not exercised the power given them by the 49th section of the act, to settle and fix a rate of fees for the new burial-ground of the parish (being the fees in question), there were no fees legally existing, although the 50th section of the act declares that the vestrymen shall not be enabled to reduce the rate of fees for the new burial-ground below that for burials in the (then) present cemeteries of the parish. (*Spry* v. *Marylebone*, 2 *Curt.* 5.) Where application is made to the rector for leave to bury in the church, the person giving the license may insist on his own price. (1 *Salk.* 334; *Steers' P. L. by Clive*, 58.)

3. *Churchyard. Burials.*

Burial fees.

As to the party entitled to the burial fee, it belongs in general to the minister of the parish in which the body is buried. It is said that it belongs to the minister of the parish in which the party deceased heard divine service and received sacrament, wheresoever the corpse be buried. (*Gibs.* 452.) It has been held that the vicar is not entitled either by the common or canon law to demand a fee for burying in the churchyard, although such a fee may be due by special custom. (*Cawthorne* v. *Andrews*, *Willes*, 536.) A custom that on the death of a person within one parish and burial within the chancel of another parish, the same fees shall be paid to the parson and churchwardens of the parish in which the death took place, as are payable for burials in that parish, is contrary to reason and void. (*Topsall* v. *Ferrers*, *Hob.* 175; and see 1 *Salk.* 332.) By custom about London, the churchwardens take the money for burying in the church or churchyard, and the parson has nothing but for burial in the chancel. (*Anon.* 2 *Show.* 184.) And by custom the fees may be claimed by the parson and churchwardens in equal moieties. (*Littlewood* v. *Williams*, 1 *Marsh.* 389; 6 *Taunt.* 276, S. C.)

If there be any dispute as to what is the accustomed fee, or to whom it is payable, that is triable in the common law courts. (*Dean and Chapter of Exeter's case*, 1 *Salk.* 334; *Spry* v. *Emperor*, 6 *M. & W.* 639.)

By the 6 & 7 Will. IV. c. 86, relating to the registration of births, deaths, &c., it is provided by the 49th sect., "that nothing herein contained shall affect the registration of baptisms or burials as now by law established, or the right of any officiating minister to receive the fees now usually paid for the performance or registration of any baptism, burial, or marriage." (See "*Registers*," Vol. V.)

IV. Seats and Pews in.

Parishioners a right to in general.

By the general law and of common right all the seats and pews in a parish church are the common property of the parish, they are for the use in common of the parishioners, who are all entitled to be seated orderly and conveniently without payment, so as best to provide for the accommodation of all. (*Blake* v. *Usborne*, 3 *Hagg.* 733; *Fuller* v. *Lane*, 2 *Addams*, 125; *Walter* v. *Sumner*, 1 *Hagg. Rep.* 317; *Wats.* c. 39; *Pettman* v. *Bridger*, 1 *Phill.* 323; *Hawkins* v. *Compeigne*, 3 *Phill.* 11; *Hawkins* v. *Coleman*, 3 *Phill.* 16.)

Non-parishioners.

Non-parishioners, whether extra-parochial or residing in another parish, have no such rights: and directly an occupier of a pew ceases to be a parishioner, his right to the pew, how valid soever during his continuance in the parish, at once ceases and determines. (*Fuller* v. *Lane*, 2 *Addams*, 425; *Byerley* v. *Windus*, 5 *B. & C.* 19; 7 *D. & R.* 564, S. C.; 1 *Gibs. Cod.* 197.)

Free seats.

By the 43 Geo. III. c. 108, s. 5, in every parochial church or chapel hereafter erected, ample provision shall be made for decent and suitable accommodation of all persons soever entitled to resort thither, whose circumstances may render them unable to pay for the same.

The acts 58 Geo. III. c. 45, 59 Geo. III. c. 134, 3 Geo. IV. c. 72, and 1 & 2 Will. IV. c. 38, relating to the building and promoting the building of

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additional churches in populous parishes, have several provisions relating to pews and free seats in such churches. (See 1 *Burn's Ec. Law*, tit. "*Church.*")

Distribution of seats.

Although parishioners have the right to be seated orderly and conveniently, they are not at liberty to choose and take what seats they like, the distribution of seats among them rests in the ordinary or bishop, who may place and displace whomsoever he pleaseth, and which authority he in general exercises by the churchwardens. (See *Wats.* c. 39; 2 *Roll. Ab.* 288; *Reynolds* v. *Monkton*, 2 *M. & Rob.* 384; *Pettman* v. *Bridger*, 1 *Phill.* 316, 323; *Groves* v. *Rector of Hornsey*, 1 *Hagg.* 394.) By custom the churchwardens may have the ordering of the seats, to the exclusion of the ordinary, which custom prevails in London. (*Wats.* c. 39; and see *Presgrave* v. *Churchwardens of Shrewsbury*, 1 *Salk.* 167; 2 *Rol. Rep.* 24; *Gibs.* 198.)

This authority of the churchwardens must be exercised justly and discreetly by them, or they may be corrected by the ordinary. (*Willie* v. *Mott*, 1 *Hagg. Rep.* 33; 3 *Phill.* 516, n.) They should place the parishioners according to their rank and station; (*Pettman* v. *Bridger*, 1 *Phill.* 323;) but in doing this care should be taken not to accommodate the higher classes beyond their real wants to the exclusion of their poorer neighbours, who are equally entitled to accommodation with the rest, though they are not entitled to equal accommodation supposing the seats not to be all equally convenient. (*Fuller* v. *Lane*, 2 *Add. Rep.* 425.)

Where a local statute enacted that the vestrymen of the parish should set out and appropriate such a number of seats for the gratuitous accommodation of the poor of the said parish for the time being, and also of such other pews or seats for the use of the parishioners of the said parish as the said vestrymen should think necessary, proper and convenient, it was held that the enactment was imperative upon the vestrymen, and empowered them to set out and appropriate the pews (other than those for the poor) without restriction, and not subject to the superintendence of the ordinary. (*Spry* v. *Flood*, 2 *Curt.* 356.)

Seats in chancel.

The parson or rector impropriate is in general entitled to the chief seat in the chancel, (*Hall* v. *Ellis*, *Noy*, 133; *Johns.* 264,) unless by prescription it is in another. (*Spry* v. *Flood*, 2 *Curt.* 356.) In some places where the parson repairs the chancel, the vicar by prescription claims a right of a seat for his family there. (*Johns.* 242, 243.) It is a groundless notion with impropriators, that they have the same right in the great chancel that a nobleman hath in a lesser. (1 *Burn, E. L.* 864.) The ordinary may grant permission to other parishioners to have pews in the chancel. (*Per Bayley, J.*, in *Clifford* v. *Wick*, 1 *B. & Ald.* 498; and see *Morgan* v. *Curtis*, 3 *M. & Ry.* 389.)

Where a party has an exclusive right to a pew or seat.

The right of the parishioners to the common use of seats and pews may be excluded, as also the right of the ordinary or churchwardens to dispose of them where an individual has acquired an exclusive right to a seat, or a priority in a seat or to a pew by *faculty*, or by *prescription*, which presupposes a faculty to have existed time out of mind, the faculty itself being lost. (See *Rol. Abr.* 288; *Gibs.* 221; *Wyllie* v. *Mott*, 1 *Hagg. Rep.* 39; *Carleton* v. *Hutton*, *Noy*, 78.) It is plain that by the general law there is no such thing as property in a pew or seat. (See *Hawkins* v. *Compeigne*, 3 *Phil.* 16.)

By faculty.

A faculty cannot, it seems, be granted for a seat or pew to A. and *his heirs* absolutely, or to a person in respect of a particular estate, for the seat or pew does not belong to the person, but to the *house*. (*Brabin* v. *Tradem*, *Poph. R.* 140; *Langley* v. *Chute*, *T. Raym.* 246; 2 *Roll. Ab.* 287; *Gibs.* 221.)

According to one case, a faculty is not good if it goes to the extent of allowing a nonparishioner a pew or seat in the church. (*Fuller* v. *Lane*, 2 *Add. Rep.* 426.) But this, according to another case, is incorrect (See *Lousley* v. *Hayward*, 1 *Y. & J.* 583.) The former decision, however, seems the most satisfactory one, and more particularly if the pew be in the *body* of the church.

There may, it seems, be a faculty for exchanging seats in a church which are annexed to particular houses. (See *per Lord Kenyon*, 1 *T. Rep.* 431.)

At the present day, ordinaries are bound not to issue faculties appropriating

pews to individuals unless under special circumstances. (See *Woollocombe* v. *Ouldridge*, 3 *Add. Rep.* 1.) 4. *Seats and Pews in.*

On the expiration of a faculty, limited to a certain period, the right of the parishioners to the pews, the subject of such faculty, revives. (*Blake* v. *Usborne*, 3 *Hagg. Rep.* 733.)

The exclusive right to a seat or pew by prescription is founded on the supposition that the right was acquired at some distant period out of memory by a faculty, and that the faculty itself has been lost, and the right claimed must be such as could have been granted by a faculty. The right to the seat or pew cannot be claimed by prescription as appendant or belonging to *land*; but it must be laid as belonging to a house, in respect to the inhabitancy thereof. (1 *Wood's Inst.* b. 1, c. 7.) Nor can it be claimed by length of possession only, without claiming it as appurtenant to a *messuage*. (*Stocks* v. *Booth*, 1 *T. R.* 428; *Mainwaring* v. *Giles*, 5 *B. & Ald.* 356; *Woollocombe* v. *Ouldridge*, 3 *Add. Rep.* 6.) It would seem that the prescription act, 2 & 3 Will. IV. c. 71, does not apply to a right to a seat or pew. By prescription.

As to what is sufficient evidence of the prescriptive right, it seems that the strongest proof of it is the building and repairing and using the seat or pew time out of mind; and such proof seems absolutely necessary to support the right against the ordinary, against whom a consideration must be shown. (See *per Lord Stowell*, in *Walter* v. *Gunner*, 1 *Hagg.* 322; *Pettman* v. *Bridger*, 1 *Phil. E. C.* 325; *Woollocombe* v. *Ouldridge*, 3 *Add.* 6; *Gibs.* 221; 2 *Roll. Ab.* 228; *Rogers* v. *Brooks*, 1 *T. R.* 431, n.) What might be the effect of very long occupancy where no repairs have been necessary, seems undecided. (*Pettman* v. *Bridger*, *supra.*) Where the prescription is interrupted, the jury are not bound to presume a faculty from long undisturbed possession. (*Morgan* v. *Curtis*, 3 *M. & Ry.* 389.)

As against a wrong doer, less evidence of the right is required; and it has been held, that proof of possession for thirty-six years, where the pew was claimed as appurtenant to a house, was sufficient. (*Rogers* v. *Brooks*, 1 *T. R.* 431 (*n*)). The church in that case had been rebuilt above thirty years before, and the plaintiff had been put into possession by the clergyman and parish officers, and had locked up the pew. So in another case, uninterrupted possession of a pew in the chancel of the church for thirty years was held presumptive evidence of a prescriptive right to the pew in an action against a wrong doer. (*Griffith* v. *Mathews*, 5 *T. R* 296) But where it appeared that the seat itself had been made thirty-five years ago for the accommodation of the plaintiff, and to put an end to a dispute between two families, this proof was holden to rebut the presumption which would otherwise arise from so long a possession. (*Id.*; and see *Walter* v. *Sumner*, 1 *Hagg Rep.* 322.) An old entry in a vestry book, signed by the churchwardens, stating that a pew had been repaired by A. *in consideration of his using it*, is evidence for a person claiming the pew under A. (*Price* v. *Littlewood*, 3 *Camp.* 288.)

The seats cannot be *sold* nor *let* without a special act of parliament. (*Wyllie* v. *Mott*, 1 *Hagg. Rep.* 29; see *Blake* v. *Usborne*, 3 *Hagg.* 726.) And where a parishioner has a pew allotted to him, he cannot, on his ceasing to be a parishioner, let the pew with, and thus annex it to his house; but it reverts to the disposal of the ordinary. (See *Wyllie* v. *Mott*, *supra.*) And persons having pews appurtenant to their houses cannot let them to non-resident persons, and thus by contract defeat the general right of the parish. (*Walter* v. *Gunner*, 1 *Hagg. Rep.* 317, 319.) But if a faculty be annexed to a messuage, it may be transferred with the messuage to another person. (*Stocks* v. *Booth*, 1 *T. R.* 431.) Selling or letting out, &c., pews.

No gift of a pew is good without a faculty. (*Tattersall* v. *Knight*, 1 *Phil. R.* 237.)

Where a local statute enacted that it should and might be lawful to and for the said vestrymen, if they should think proper, to let the pews, &c., or any of them (save and except the pews or seats to be appropriated for the gratuitous accommodation of the poor of the said parish for the time being as aforesaid), to such persons only who should be inhabitant householders within the

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said parish, it was held that the vestrymen were empowered to let all the pews save those for the poor, and consequently to remove the rector from one of two pews of which he had been in possession from the time of his induction, and to let it to another inhabitant householder. (*Spry* v. *Flood*, 2 *Curt.* 356.)

Apportionment of right to a pew.

The right to sit in a pew may be apportioned; and therefore, where by a faculty reciting, "that A. had applied to have a pew appropriated to him in the parish church in respect of his dwelling-house," a pew was granted to him and his family for ever, and the owners and occupiers of the said dwelling-house; and the dwelling-house was afterwards divided in two, it was held, that the occupier of one of the two (constituting a very small part of the original messuage) had some right to the pew, and in virtue thereof might maintain an action against a wrong doer. (*Harris* v. *Drewe*, 2 *B. & Adol.* 164.)

Building and repairing by parish.

Generally the seats in churches are to be built and repaired, as the church is to be, at the general charge of the parishioners, unless any particular person be chargeable to do the same by faculty or prescription, which presupposes a faculty time out of mind, the faculty itself being lost. (*Degge*, p. 1, c. 12.)

Erecting pew without license.

If any persons of their own heads shall presume to build any seat in the church without license of the ordinary, or consent of the minister and churchwardens, or in any inconvenient place, or too high, it may be pulled down by order of the bishop or his archdeacon, or by the churchwardens, by the consent of the parson.

Though more pews and galleries be necessary, churchwardens cannot erect them of their own head; the ordinary must be consulted. But if the incumbent, churchwardens and parishioners unanimously agree that more pews are necessary, and that they shall be fixed in such a place, there is no necessity for consulting the ordinary. (*Johns.* 163; *Palsgrave* v. *Churchwardens of Shrewsbury*, 1 *Salk.* 167; 1 *Burn's E. L.* 360; and see *Tattersall* v. *Knight*, 1 *Phil. Rep.* 232.)

Pulling down pews.

Pews already erected cannot be pulled down without the consent of the minister and churchwardens, unless after cause shown by a faculty or license from the ordinary. (*Jarratt* v. *Steele*, 3 *Phil.* 170.)

Therefore if any one presume to cut or pull down any seat annexed to the church, the parson may sue in trespass against the wrong doer, though he formerly set it up, if he do it without the parson's consent or order from the ordinary; but if the seat be set loose, he that built it may remove it at his pleasure. (*Degge*, p. 1, c. 12; 1 *Burn's E. L.* 364, 365.)

If any seats annexed to a church be pulled down, the property of the materials is in the parson, and he may make use of them, if they were placed in the church by any one of his own head without legal authority; but for the seats erected by parishioners by good authority, it seemeth that the property in the materials, upon removal, is in the parishioners. (*Degge, P. C.* c. 12; 1 *Burn's E. L.* 364.)

A chapel-warden of a parochial chapelry has not, by virtue of his office, any authority to enter the chapel and remove pews without the consent of the perpetual curate. (*Jones* v. *Ellis*, 2 *Y. & J.* 265.) And the perpetual curate of an augmented parochial chapelry has a sufficient possession whereon to maintain trespass for breaking and entering the chapel and destroying the pews, even against the chapel-warden. (*Id.*)

Trifling alterations in a pew may, it seems, be made without a faculty or license from the ordinary, unless a private right is infringed thereby. (*Patham* v. *Templar*, 3 *Phil.* 527.)

If seats annexed to the church be pulled down, the property of the materials is in the parson, and he may make use of them if they were placed in the church by any one of his own head without legal authority; but for the seats erected by the parishioners, by good authority, it seems that the property of the materials upon removal is in the parishioners. (*Degge*, pt. 1, c. 12.)

Remedies for disturbance of seats and pews.

As we have already seen, *ante*, 630, the distribution of seats amongst the parishioners rests with the ordinary or bishop, who may by himself or the churchwardens place and displace whomsoever he pleaseth, unless in the case

of a party having an exclusive right to the seat. And they may remove persons intruding on seats or pews not appropriated to them. (*Reynolds* v. *Monkston*, 2 *M. & Rob.* 384.) 4. *Seats and Pews in.*

Trespass will not lie by an individual for entering a pew in the body of the church because he has not exclusive possession, the possession of the church being in the parson. (*Stocks* v. *Booth*, 1 *T. R.* 430; 2 *Rol. Rep.* 139.) But an action on the case lies for the disturbance of his right. (*Noy*, 78; *Burton* v. *Bateman*, 1 *Sid.* 88; *Mainwaring* v. *Giles*, 5 *B. & Ald.* 361.) And if the pew be in the chancel, and the freehold be in an individual, then trespass might lie. (See *id.*) So trespass will lie for any injury done to any personal property of the party in possession of the pew.

In all cases of a faculty and prescriptions for seats the matter is solely determinable at the common law; in other cases the Ecclesiastical Court has exclusive jurisdiction. (*Degge*, pt. 1, c. 12; *Wats.* c. 393; *Witcher* v. *Chesham*, 1 *Wils.* 17.) But for a disturbance of a seat a party may sue in the Spiritual Court, where the faculty or prescription is not denied; or the defendant, if he will, may admit the faculty or prescription to be tried there. (See *Jacob* v. *Dallow*, 2 *Salk.* 551; 2 *Ld. Raym.* 755, S. C.; 1 *B. & Ald.* 498.)

A possessory title in a pew is sufficient against a mere intruder. (*Spry* v. *Flood*, 2 *Curt.* 356.) But a person who has permission from the churchwardens to sit in a pew temporarily, and in order, by keeping possession for the future tenant, to carry into effect the conditions of a sale of a house, with which the pew had, for above a century, been held under an expired faculty, has no possession on which he can bring a suit for perturbation against a mere intruder, such permission by the churchwardens being illegal, as confirming the sale of the pew. (*Blake* v. *Usborne*, 3 *Hagg.* 726.)

In a suit in the Ecclesiastical Court for perturbation of a seat, if it appear that the churchwardens have acted properly in displacing the plaintiff, the Court will dismiss them; but will not proceed to confirm the possession of the person seated by them, as it does not form part of the question before the Court, and may be injurious to the parish by taking the pew more out of the power of the churchwardens. (*Wyllie* v. *Mott*, 1 *Hagg. Rep.* 41.)

The Ecclesiastical Court will admonish a wrong-doer not to disturb a person in possession of a pew, although he has no well founded title to it. (*Cross* v. *Salter*, 3 *T. R.* 639.)

As to making or creating a noise or disturbance in a church, and the right to put out the party making it, see *post*, 660; *ante*, 274.

V. Goods and Ornaments of, and Monuments in a Church.

With respect to what goods and ornaments should be provided in a church, see 1 *Burn's E. L.* 368; and as to the power and duty of churchwardens in providing and taking care of them, see *post*, "*Churchwardens*;" as to whom they belong to, see *post*, "*Churchwardens*." Goods and ornaments.

They generally belong to the parishioners, and not to the incumbent; and if they be taken away or broken, the churchwardens may bring an action. (*Wats.* c. 39.)

By the laws of England the goods belonging to a church may be aliened by the churchwardens, with the consent of the parish. (*Wats.* c. 39.)

A person may give or dedicate goods to God's service in such a church, and deliver them into the custody of the churchwardens, and thereby the property is immediately changed. (*Degge*, pt. 1, c. 12.)

And if a person erect a pew in a church, or hang up a bell in the steeple, they thereby become church goods, though they are not expressly given to the church, and he may not afterwards remove them; if he does, the churchwardens may sue him. (1 *Burn's E. L.* 377; *Inter Starky and The Churchwardens of Watlington*, 2 *Salk.* 547.)

In a parish church an organ cannot legally be erected without a faculty, Organ, &c.

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nor will a faculty be granted without a decree with intimation, in order that any of the parishioners may object, on which objection the court, considering all the circumstances of the case, is to decide. (*Pearce* v. *Rector of Clapham*, 3 *Hagg. Rep.* 13.)

In cathedrals, organs may be deemed necessary, and the ordinary may compel their erection by the dean and chapter. In parish churches it is otherwise, and it might be proper to discourage them in small or poor parishes. (*Jay* v. *Webber*, *id.* 8; *Churchwardens of St. John's, Margate*, v. *Parishioners, &c. of same*, 1 *Hagg.* 198.) See *Randall* v. *Collins*, 2 *Lee's Ec. Ca.* 217, where the application for the grant of a faculty to erect an organ in a parish church was refused.

The ordinary is to judge whether the circumstances of the parish offer an objection to the erection of an organ; the parish alone is to decide on any expenses to be incurred. (*Jay* v. *Webber*, 3 *Hagg. R.* 8.)

A faculty directing the performance upon and repairs of an organ in a parish church to be paid out of the parish rates, would be legally objectionable, for the ordinary can only bind the parish to expense for articles absolutely necessary. (*Id.*)

Even if the vestry is unanimous, a clause binding the parish to defray out of the rates future expenses for an article not necessary, ought not to be inserted. (*Id.*)

It is no sufficient objection to the issuing of a decree, with intimation to lead a faculty for erecting an organ in a parish church, that there is no provision for the future repairs, nor for the permanent salary of an organist. (*Pearce* v. *Rector, &c. of Clapham*, 3 *Hagg. R.* 10.)

In *Butterworth and Barker* v. *Walker and Waterhouse*, (3 *Burr.* 1689,) it seems to have been the opinion of the Court of Queen's Bench that the consent of the parish is not necessary to the ordinary's ordering an organ (provided by subscription) to be erected in a church; and in this case a prohibition was denied.

In the case of *The Churchwardens of St. John's, Margate*, v. *The Parishioners, Vicar, &c. of the same*, (1 *Hagg.* 198,) Lord *Stowell* declared that the law respecting church ornaments is now generally understood and settled. It was there said that the consent of the parishioners is not indispensably necessary, unless to charge the parish with any expense for the support of the ornament after it has been put up. But if there be no charge incurred, the approbation of the majority of the parishioners is not necessary, nor the disapprobation binding on the ordinary. He then decreed a faculty for accepting and erecting an organ offered to the church of St. John's, Margate, without a clause against future expenses being charged to the parish, which was rich and populous.

A faculty confirming the erection of an organ binds the parish to nothing prospectively. (*Jay* v. *Webber*, 3 *Hagg. R.* 9.)

Organist. As to when the office of organist is not an annual one, see *R.* v. *St. George*, 2 *Nev. & M.* 505; 5 *B. & Adol.* 571, S. C.

Playing the organ. It may be here added, that the minister who has the right of directing the service may direct when the organ shall be played or not, and when children shall and shall not chaunt, though the organist is paid and the children managed by the churchwardens. (*Hutchins* v. *Denzilow*, 3 *Phil.* 90.)

Superstitious pictures, &c. If any superstitious pictures or images are in a window of a church or aisle, it is not lawful for any to break them without license of the ordinary; and in *Prickett's case*, *Wray*, C. J., bound the offender to good behaviour. (*Francis* v. *Ley*, *Cro. Jac.* 366.)

Monuments. It is lawful to build or erect tombs, sepulchres, or monuments for the deceased in church, chancel, common chapel, or churchyard, provided it be done in a convenient manner; (3 *Inst.* 102;) and by license of the ordinary, or consent of the parson and churchwardens. (*Degge*, p. 1, c. 12; 1 *Stra*, 576, 1000; 3 *Burr.* 1691; *Wood's Inst.* 94.) And a custom for the churchwardens of a parish to set up monuments, &c. in a church without consent of rector or ordinary, is illegal. (*Becwith* v. *Harding*, 1 *B. & Ald.* 508.)

Monuments may be set up in the aisles, belonging to particular persons, without such license or consent. (*Wats.* c. 39.)

5. *Goods, Ornaments and Monuments.*

But then, as in all other cases, they must be set up in a convenient and proper manner, so as not to obstruct divine service in any way. (See 3 *Inst.* 202.)

The ordinary must be allowed the proper judge of that conveniency; and if a monument be erected in an inconvenient or improper manner, he may decree and compel a removal or defacement, without any danger of an action at law. (See *Gibs.* 453, 454; *Hopper* v. *Davis*, 1 *Lee's Ec. Ca.* 648; *Wilson* v. *M'Muth*, 3 *Phil.* 92.)

It seems that even the rector cannot grant a vault in the church, but only leave to bury there in each particular instance. (*Bryan* v. *Whistler*, 8 *B. & Cres.* 288; 2 *Man. & R.* 318, S.C.; *ante*, 628.)

And the lay rector is not entitled as of right to make a vault or affix tablets in the chancel without leave of the ordinary, nor is he entitled to a faculty for such purposes, without laying before the ordinary such particulars as will afford the vicar and parishioners an opportunity of judging of it, and satisfy the ordinary that such vaults or tablets will not interrupt the parishioners in the use and enjoyment of the chancel: nor has the vicar an absolute veto, though he may show cause against the grant of a faculty. *Semble*, that the consent of the lay rector must precede the leave of the ordinary for the construction of a vault or the erection of tablets in the chancel. (*Rich* v. *Bushnell, Clerk*, 4 *Hagg. Rep.* 164.)

There is not at common law a right to erect even a flat gravestone, for mere protection of the grave, in a churchyard, without legal authority of the ordinary, except a custom that the churchwardens shall give leave for that purpose be shown to obtain. (*Bardin* v. *Calcott*, 1 *Hagg. Rep.* 14—20.)

Repair of monuments.

Monuments once erected may be repaired; for this is of public consequence, when their importance in tracing family descents, &c. is considered. It may be proper to apply to the churchwardens, as the agents of the ordinary, for leave to do so, but they are bound to grant it as far as their authority extends; and if they do not, they will be liable to the censure of the Ecclesiastical Court. If parties are not at liberty to repair, the object of obtaining liberty to erect would be defeated: it is rather the duty of churchwardens to encourage parishioners to provide that monuments may be put in repair, than to obstruct others in doing it; for decency and propriety require that they should not remain in a state of ruin and decay. (*Id.*)

Defacing, &c.

The defacing of monuments is punishable by the common law. (*Year Book*, 9 Edw. IV. 14, *Lady Wiche's* case.) And so it was agreed by the whole court; M. 10 Jac., in the Common Pleas, between *Corven* and *Pym*, (1 *Burn's E. L.* 379): and for the defacing thereof, they that build or erect the same may sue at law during their lives, (as the Lady Wiche had in the case of the 9 Edw. IV); and after their deceases, the heirs of the deceased may bring the action. (See *Cro. Jac.* 367.)

And in a recent case it was held, that though the freehold of the churchyard is in the parson, trespass lies by the erector of a tombstone against a person who wrongfully removes it from the churchyard, and erases the inscription. (*Spooner* v. *Brewster*, 3 *Bingh.* 136.)

So gravestones, windingsheets, coats of arms, pennons, or other ensigns of honour, hanged up, laid or placed in memory of the dead, the property remains in the executors, and they may have actions against such as break, deface, or carry them away. (3 *Inst.* 110; *Co. Litt.* 18 b; and see *Hitchcock* v. *Wolford*, 5 *Scott*, 792.)

It has been said that the churchwardens may sue for defacing a monument. (*Godb.* 279; 1 *Burn's E. L.* 373.)

If monuments be put up without the ordinary's consent, he may remove them. (*Palmer* v. *Bishop of Exeter*, 1 *Stra.* 576.)

VI. Repairs of Church.

And herein, as to

1. *Who is to Repair.*
2. *Who may compel Repairs.*

---

1. Who to Repair.

Who to repair.

Bishops.

Formerly the bishops had the whole tithes of the diocese, a fourth part of which in every parish was to be applied to the repairs of the church, but upon a release of this interest to the rectors, they were consequently acquitted of the repairs of the churches. (*Degge*, pt. 1, c. 12.)

Rectors.

And by the canon law the repair of the church belongeth to him who receiveth this fourth part; that is, to the rector, and not to the parishioners. (1 *Salk.* 164.)

Inhabitants.

But custom (that is the common law) transferreth the burden of reparation, at least of the nave of the church, upon the parishioners, and likewise sometimes of the chancel, as particularly in the city of London in many churches there, and this custom the parishioners may be compelled to observe where such custom is. (*Lindw.* 53; *Bishop of Ely* v. *Gibbons*, 4 *Hagg.* 156.)

It seems, however, if a church fall down, the parishioners are not bound to repair it. (*Read's Church Service, Anon.* 1 *Ventr.* 367.)

Who to repair chancel

But generally the parson is bound to repair the *chancel;* not because the freehold is in him, for so is the freehold of the church, but by the custom of England, which hath allotted the repairs of the chancel to the parson, and the repairs of the church to the parishioners. (1 *Burn's E. L.* 350.)

By custom, however, the parishioners or the owner of an estate may be liable to repair the chancel. (*Gibs.* 199; *Leger* v. *Dean and Chapter of Chichester*, 4 *Hagg.* 162; 3 *Phil.* 90.)

Where there is both rector and vicar in the same church, and no custom or order to the contrary, they shall contribute in proportion to their benefice. (*Lindw.* 253.)

And as rectors or spiritual persons, so also impropriators are bound of common right to repair the church. (*Gibs.* 199; *Anon.* 3 *Keb.* 829.)

The sequestrator of a rectory is bound to repair the chancel. (*Bishop of Ely* v. *Gibbons*, 1 *Consist.* 312; and see 1 & 2 Vict. c. 106, s. 54.)

And an impropriator of a rectory or parsonage, though bound to repair the chancel, is also bound to contribute to the reparation of the church, in case he hath lands in the parish which are not parcel of the rectory. (*Davie's case, Gibs.* 197, 221-3.)

Generally, however, the repairing of the chancel is a discharge from contributing to the repairs of the church. (*Gibs.* 199, 200.)

Church spire.

In *Viscount Maynard* v. *Brand*, (3 *Phil.* 501), a monition was issued against churchwardens to repair and reinstate in its original form the spire of a church, which had been destroyed by lightning.

Foundation.

It is said, that the patron of a church, as in right of the founder, may prescribe that, in respect of the foundation, he and his tenants have been freed from the charge of repairing the church. (*Degge*, pt. 1, c. 12.)

Repairing a chapel of ease, when a discharge.

If there be a chapel of ease within a parish, and some part of the parish have used time out of mind, alone, without others of the parishioners, to repair the chapel of ease, and there to hear service, and to marry, and all other things, but only they bury at the mother church; yet they shall not be discharged of the reparation of the mother church, but ought to contribute thereto, for the chapel was ordained only for their ease. (2 *Roll's Abr.* 289, l. 50; *Parish of Aston* v. *Castle Birmidge Chapel, Hob.* 66; 3 *Mod.* 284.)

So, in the like case, if the inhabitants who have used to repair the chapel prescribe that they have time out of mind used to repair the chapel, and by

reason thereof have been discharged of the reparation of the mother church; yet this shall not discharge them of the reparation of the mother church, for that is not any direct prescription to be discharged thereof, but is by reason thereof a prescription for the reparation of the chapel. (2 *Roll's Abr.* 290.)

6. *Repairs of Church.*

If the chapel be three miles distant from the mother church, and the inhabitants who have used to come to the chapel, have used always to repair the chapel, and there marry and bury, and have never within sixty years been charged to the repair of the mother church; yet this is not any cause to have a prohibition, but they ought to show in the spiritual court their exemption, if they have any, upon the endowment. (2 *Roll's Abr.* 290, l. 10; *sed vid. Ball* v. *Cross*, 1 *Salk.* 165.)

But if the inhabitants of a chapelry prescribe to be discharged *time out of mind* of the reparation of the mother church, a prohibition lieth upon this surmise. (2 *Roll. Abr.* 290, l. 22; *Parish of Aston* v. *Castle Birmidge Chapel*, *Hob.* 67; *Brown* v. *Palfry*, 2 *Levinz*, 102.)

If there be a parish church and chapel of ease within the same parish, and the chapel of ease hath time out of mind had all spiritual rights except sepulture, and this hath been used to be done at the parish church, and therefore they who have used to go to the chapel of ease have used time out of mind to repair a part of the wall of the churchyard of the parish church, and in consideration thereof, and because that they who are of the chapel of ease have used time out of mind to repair the chapel of ease at their own costs, they have been time out of mind discharged of the reparation of the parish church; this is a good description; and therefore if they be sued in the spiritual court to repair the parish church a prohibition lieth. (2 *Roll. Abr.* 290, l. 30; see 1 *Burn's E. L.* 353-4.)

If two churches be united, the repairs of the several churches shall be made as they were before the union. (*Degge*, pt. 1, c. 12; *ante*, 623.)

Churches united, how to be repaired.

See further as to who may be rated for repairs, *post*, 642, &c.

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2. Who may compel Repairs and how compellable.

By Canon 86, every dean, dean and chapter, archdeacon and others, which have authority to hold ecclesiastical visitations by composition, law or prescription, shall survey the churches of his or their jurisdiction once in every three years, in his own person, or cause the same to be done.

Who may compel repairs.

And by the said Canon they were required from time to time to certify the high commissioners for causes ecclesiastical every year, of such defects in any the said churches, as he or they should find to remain unrepaired, and the names and surnames of the parties faulty therein. Upon which certificate the high commissioners were desired by the said Canon *ex officio mero*, to send for such parties and compel them to obey the just and lawful decrees of the ecclesiastical ordinaries making such certificates.

But by the 16 Car. I. c. 11, the high commission court was abolished; so that the cognizance thereof now resteth solely upon the ecclesiastical judge, who has undoubted cognizance of neglect of repair of the church, churchyard, &c. (3 *Bla. Com.* 92; 5 *Rep* 66.)

By Canon 85, the churchwardens or questmen shall take care and provide that the churches be well and sufficiently repaired, and so from time to time kept and maintained, that the windows be well glazed, and that the floors be kept paved, plain and even.

Churchwardens' duty thereon.

And although churchwardens are not generally charged with the repairs of the *chancel*, yet they are charged with the supervisal thereof, to see that it be not permitted to dilapidate or fall into decay: and when any such dilapidations shall happen, if no care be taken to repair the same, they are to make presentment thereof at the next visitation. (1 *Burn's E. L.* 357.)

The cognizance of the repairs of the church and churchyard belong to the spiritual court; (3 *Bla. Com.* 92; 5 *Rep.* 66;) and the parishioners may be compelled by that court to repair the body of the church, and they might

Proceedings to compel repairs.

6. *Repairs of Church.*

be excommunicated until it is repaired, except those who are willing to contribute. (*Read's Church Service; Rogers* v. *Davenant*, 1 *Mod.* 194, 236.)

Mandamus.

As the cognizance of the repairs of the church and churchyard thus belong to the spiritual court, the Court of Queen's Bench will not grant a *mandamus* to churchwardens to make a church rate. (*R.* v. *Churchwardens of St. Peter's, Thetford*, 5 *T. R.* 364; *R.* v. *Wilson*, 5 *D. & Ry.* 602, S. P.)

But it lies to the churchwardens to assemble a meeting to inquire whether it be fit to make a rate. (*R.* v. *Churchwardens, &c. St. Margaret's, Westminster*, 4 *M. & Sel.* 250; *post*, 639.) And the churchwardens may be sued and censured, or perhaps indicted, if they improperly neglect or refuse to call a meeting to make the rate.

And a mandamus lies to make church rates under the act for building new churches, noticed *post*, 654. (*R.* v. *Churchwardens of St. Mary, Lambeth*, 3 *B. & Adol.* 651, *post*, 655.)

VII. Church Rates.

Church rates.

This subject will be treated of under the following division, viz.

1. *Who may make them, and the Steps preliminary to the making*, 638.
2. *Who and what to be Assessed, and the Manner of making and levying the Assessments*, 642.
3. *Form of the Rate*, 649.
4. *Mode of levying it*, 649.
5. *Appeal against it*, 653.
6. *Church Rates under Acts for building New Churches*, 654.

1. Who may make, and steps preliminary to making.

Parishioners are bound to repair body of church.

The obligation by which the parishioners, that is, the actual residents within, or the occupiers of lands and tenements in, every parish, are bound to repair the body of the parish church whenever necessary, and to provide all things essential to the performance of divine service therein, is an obligation imposed on them by the common *law* of the land. (*Per Tindal*, C. J., in the case of *Veley* v. *Burder*, in error, 12 *Ad. & Ell.* 301.) Such being the law, it follows, as a necessary consequence, that the repair of the fabric of the church is a *duty* which the parishioners are compellable to perform; not a mere *voluntary act*, which they may perform, or decline, at their own discretion; that the law is imperative upon them absolutely, that they do repair the church: not binding on them in a qualified limited manner only, that they may repair or not, as they think fit. (*Ibid.*)

Who may make rate.

The mode of carrying the law into effect, and that the usual and ordinary mode, which is free from all possible exception, is this, viz. that the churchwardens, whose duty it is to raise the money for the repair of the church, and to make the repairs, should convene the parishioners together by due notice, and that the majority of those who are so assembled should make an order for a rate, which will bind the whole parish. (*Ibid.* p. 303.)

Notice for such vestry, how to be made.

By the 7 Will. IV. & 1 Vict. c. 45, s. 2, all proclamations and notices heretofore made or given in churches or chapels during or after divine service shall be reduced into writing, and copies thereof, either in writing or in print, or partly in writing and partly in print, shall previously to the commencement of divine service on the several days on which such notices have heretofore been made or given in the church or chapel of any parish or place, or at the door of any church or chapel, be affixed on or near to the doors of all the churches and chapels within such parish or place; and by sect. 3, no

notice of holding a vestry shall be affixed on the principal door of such church or chapel unless the same shall previously have been signed by a churchwarden of such church or chapel, or by the rector, vicar or curate of such parish, or by an overseer of the poor of such parish; but that every such notice so signed shall be affixed on or near to the principal door of such church.

7. *Church Rates.*

Notice to specify the place, hour, and special purpose, three days before vestry meeting.

This notice under Sturges Bourne's Act, (which however does not apply to the city of London, the borough of Southwark, nor to any vestry held by virtue of any special act, or of any ancient and special usage or custom,) must, in addition to the notification of the holding of a vestry, likewise specify the place and hour at which the same is to be held, and the *special purpose* thereof, three days at the least before the day to be appointed for holding such vestry. (See 58 Geo. III. c. 69, s. 1; *post*, tit. *Vestries*, Vol. VI. p. 330)

At a vestry meeting certain plans were produced for improving the parish church, and were referred to a committee. At a subsequent vestry their report, recommending an enlargement, was received and adopted, and a resolution passed for borrowing money on the parish rates under the statutes 58 Geo. III. c. 45, and 59 Geo. III. c. 134, to carry the plans into execution. The notice of holding the latter vestry, published in pursuance of stat. 58 Geo. III. c. 69, s. 1, stated the purpose of it to be to receive a report from the church committee, and to adopt such measures as may appear necessary for carrying that report into execution. This was held a sufficient notice of the intention to propose borrowing money on the church rates for the purpose of executing the plans. (*Blunt* v. *Harwood*, 8 *Ad. & Ell.* 610, and see *Butt* v. *Fellows*, 6 *Jur.* 19.)

Who may be compelled to levy a rate.

Where an act of parliament directs a body, created by the act, to levy church rates as often as required, the Court will compel them by mandamus to levy the rate, and will not confine the writ to ordering the body to assemble for the purpose of determining whether they will levy the rate or not. And this, although the act contains a clause reserving all ecclesiastical jurisdiction, if it appear, from the rest of the act, that the temporal Court was intended to have at least concurrent jurisdiction. (*Reg.* v. *St. Margaret's, Leicester* (*Select Vestry*), 8 *Ad. & E.* 889.) But such a body is not compellable to make a church rate upon demand, while the churchwardens refused to state the necessary amount, or to furnish any estimate of it, or to give to the vestry any information whereby they might ascertain it. (*Reg.* v. *St. Margaret, Leicester* (*Select Vestry*), 10 *Ad. & E.* 730.)

But, in general, a mandamus does not lie to churchwardens to compel them to make a church rate. (*Rex* v. *The Churchwardens of St. Peter's, Thetford*, 5 *T. R.* 364; *Rex* v. *Wilson*, 9 *B. & C.* 859.) Though the court has granted a mandamus to assemble for the purpose of considering a rate. (*Rex* v. *The Churchwardens of St. Margaret*, 4 *M. & Sel.* 250.)

Notice having been given of a meeting in vestry for the purpose of granting a church rate, and that, if a poll should be demanded, the meeting would be immediately adjourned to the town hall; the meeting being held and the poll demanded, the chairman immediately adjourned the meeting to the town hall, where the poll was taken. It was held, that the proceeding was regular, no business having been interrupted by it, and the adjournment being part of the original appointment. The town hall was not an improper place to take the poll, by reason of its being private property, no person having been prevented from voting on that account. The time for taking the poll being limited to eleven hours, such time was sufficient, if due diligence had been used, 785 persons being the greatest number proved to have voted on any occasion. (*Baker* v. *Wood*, 1 *Curt.* 507.)

Chairman of.

The minister of the parish, if present, has a right to preside at the meeting; though he is not an essential part of the vestry. (See authorities cited, *post*, tit. "*Vestries*," Vol. VI. p. 331.) As to the power of the chairman at the meeting, see *post*, Vol. VI. p. 335.

Voting at, qualification for.

For the necessary qualification to give inhabitants a right of voting, see tit. "*Vestries*," Vol. VI. p. 331, *et seq.*

7. *Church Rates.*

By custom there may be select vestries of a certain number of persons or delegates chosen by vestry, elected yearly to make rates, and manage the concerns of the parish for that year: and such custom is a good custom. (*Read's Church Service; Gibs.* 246; *Str.* 428; and see *Golding* v. *Fenn*, 7 *B. & Cres.* 765; *Still* v. *Palfrey*, 2 *Curt.* 902; and further as to select vestries, "*Vestries,*" Vol. VI.)

As to vestries under the acts for building, &c. new churches, see *post*, 654.

Proceedings at vestry.

At the time and place of meeting, the minister and churchwardens ought to attend; and when the parishioners are assembled, the minister in such case is the proper party to preside. Owing, however, to the differences which have of late years occasionally occurred in vestries, called for the purpose of imposing a church rate, it becomes a very important question to consider what the present state of the law upon the subject is.

From the elaborate judgment of Tindal, C. J., in *Veley* v. *Burder*, 12 *Ad. & Ell.* 300, the law on several points will be found clearly laid down, and which may be thus briefly stated.

Only one point to be deliberated and determined on at vestry.

By the Common Law of the land, the repair of the fabric of the church is *a duty* which the parishioners are compellable to perform: not a mere *voluntary* act: where, therefore, it so happens that the fabric of the church stands in need of repair, the *only question* upon which the parishioners, when convened together to make a rate, can by law deliberate and determine is, how and in what manner the common law obligation, so binding them, may be best and most effectually, and at the same time most conveniently and fairly, between themselves, performed and carried into effect. (*Ibid.* p. 302.) (*a*)

Rate by majority present, good.

No one disputes the validity of a rate imposed by the majority of the parishioners for the repairs of the church at a meeting duly convened, and the payment of each man's proportion thereof might be enforced by a suit in the Ecclesiastical Court. (*Ibid.* p. 305.)

So a rate by churchwardens, if no other parishioners present.

So a rate imposed by the churchwardens alone where a meeting of the parishioners has been duly convened in vestry for the purpose of making such a rate, but where none of the parishioners have thought fit to attend and express an opinion: for in this state of circumstances the churchwardens, who may be assumed to be parishioners themselves, do in effect constitute the majority, or more properly speaking the whole of the parishioners who are assembled. (*Ibid.* p. 305.)

After refusal by majority present, churchwardens cannot by themselves afterwards and not at parish meeting, make a rate.

But the churchwardens of a parish, after a rate for the necessary repairs of the parish church has been proposed by them to the parishioners at a vestry meeting duly convened for that purpose, and has been refused by a majority of the parishioners there assembled, cannot, of their own sole authority, at a subsequent time, by themselves, and not at any parish meeting, impose a valid rate on the parishioners. (*Ibid.* p. 300.) (*c*)

Whether a rate be valid, if made by churchwardens themselves at same vestry where majority present have refused.

The main question, however, whether any effectual course can be taken to compel a refractory parish to make a rate, is still left in an unsettled state. It is now in the course of judicial investigation. It will suffice briefly to allude to it as follows:

"With respect to the case of *Gaudern* v. *Selby*, (*d*) observes *Tindal*, C. J.,

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(*a*) The true principle which governs this subject is, that the parish ought not to be involved in expenditure without its privity, and that the parish ought to have the opportunity of seeing that the burthen is *fairly* laid. (*Per* Sir J. *Nicholl*, in *Clutton* v. *Cherry*, 2 *Phillimore*, 384. See *Regina* v. *Thomas*, 6 *Jurist*, 1122.)

(*c*) It was also held (*Ibid.*) that under such circumstances a prohibition from a Court of Common Law could be issued to stay proceedings taken by the churchwardens in the Ecclesiastical Court to enforce payment of such rate: as the rate itself was illegal and void.

(*d*) *Gaudern* v. *Selby* (Arches Court, Hil. T. 1799, from Dr. Arnold's notes, *cited* in Dr. Nicholl's pamphlet on Church Rates, 1837, p. 35), which was an appeal from the Consistory Court of Peterborough, and in which case Sir William Wynne, in the course of his judgment, thus broadly and unhesita-

7. *Church Rates.*

in his judgment in *Veley* v. *Burder*, 12 *Ad. & Ell.* p. 308, "one observation that arises is, that the church rate in that case was made by the churchwardens at the *same* vestry meeting, which had been duly summoned, and at which it had been refused by the majority of the parishioners there present: a fact which forms a most important distinction between that and the present case. The churchwarden in that case required a rate at a larger sum, and a majority of the parishioners present refused it for that sum, though they were willing to grant it for a smaller: and the churchwarden nevertheless made the rate, against the consent of the majority, for the larger sum. We do not enter into the discussion, whether a rate so made by the churchwardens at the parish meeting where the parishioners were then met, would have been valid or not: or how far such case may be analogous to that of the members of a corporation aggregate, who being assembled together for the purpose of choosing an officer of the corporation, the majority protest against, and refuse altogether to proceed to, any election: in which case they have been held to throw away their votes, and the minority, who have performed their duty by voting, have been held to represent the whole number. It is obvious, indeed, that there is a wide and substantial difference between the churchwardens alone, or the churchwardens and minority together, making a rate *at the meeting* of the parishioners where the refusal takes place, and the churchwardens possessing the power of rating the parish by themselves at any future time however distant."

The latter of these points having been decided against the churchwardens by the Exchequer Chamber, it was resolved to try the validity of the former description of rate. This case, then, under the name of *Veley and another* v. *Gosling* (see 6 *Jur.* 739), came, in the first instance, before the Consistory Court, the question being as to the admissibility of the libel in a suit for subtraction of church rates, in the parish of Braintree, Essex; the facts of which were as follows:—"A decree issued from this Court, founded on an affidavit setting forth that the church was out of repair; that rates had been for several years refused: the libel also setting forth the prohibition which had emanated in the former case from the Court of Queen's Bench. That decree called upon the churchwardens and parishioners to show cause why a monition should not be granted to the churchwardens to take the proper steps to put the church into repair, and to call a vestry for a certain day for the purpose of making a rate, and directing the parishioners to attend and make such a rate. The churchwardens (only) appeared, and declared their readiness to submit themselves to the lawful commands of the Court. A monition then issued to the churchwardens and parishioners to the effect of the decree: the vestry met on the 15th June last; the rate was proposed: an amendment, refusing the rate, was moved; and, on a show of hands, the vicar, who was in the chair, declared the amendment carried: no poll was demanded. The churchwardens, with several others, then signed the present rate, which was not put again to the meeting. The question was, whether a rate so made is legal and valid? The learned judge having, at considerable length, taken a review of the law upon the subject, and being of opinion that the rate was not supported by any authority, and that the supposed analogy between this proceeding and elections corporate or parliamentary did not apply, consequently decided the rate to be invalid, and rejected the libel."

The above judgment of the Consistory Court, however, has been subsequently reversed by the Court of Arches. (See 7 *Jurist*, 286.) And the case, it would appear, is now before the Judicial Committee of the Privy Council, so that pending their lordships' decision, the question whether the church-

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tingly states the law:—"The law is, in that case (viz. that being called together to make an assessment, the parishioners refuse to make it), that if the parishioners will not make a rate, the churchwarden has a right to make it himself: he cannot without calling upon them: but if he calls, and they refuse, saying, they think that the repairs were not necessary, not denying that they were done, he has a power to make a rate himself, and the law will justify him." (And see 1 *Curt. Ecc. Rep.* p. 394, S. C.)

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wardens and the minority together (*a*) may make a rate at the meeting of the parishioners, notwithstanding the refusal by the majority present, must be still considered a question undecided.

Rate may be made for pulling down or enlarging church.

If a church be so much out of repair that it is necessary to pull it down, or if it be so small that it needs to be enlarged, the consent of the ordinary to do what is needful having first been obtained, at a meeting duly convened, a rate may be made for new building or enlarging, as there shall be occasion. (*Blackett* v. *Blizard*, 9 *B. & C.* 850.)

If the major part of the parishioners of a parish where there are four bells, agree that there shall be made a fifth bell, and this is made accordingly, and they make a rate for paying for the same, this shall bind the lesser part of the parishioners, although they agree not to it; for otherwise any obstinate person may hinder any thing intended to be done for the ornament of the church. (2 *Roll. Abr.* 291.) Bells, however, are not mere ornaments, for they are as necessary as the steeple itself. (*Woodward* v. *Makepeace*, 1 *Salk.* 164.)

If a rate be illegally imposed by a commission from the bishop, which he has no authority to direct, (*Gibs.* 196; 1 *Bac. Abr.* 373,) or otherwise, without the parishioners' consent, yet if it be afterwards assented to and confirmed by the major part of the parishioners, that will make it good. (*Wats.* c. 39.)

License from ordinary.

To erect or add any thing *new* in the church, as a new gallery where there was none before, it seems that a license from the ordinary as well as the consent of the major part of the parishioners is necessary. (*Groves* v. *Rector, &c. of Hornsey*, 1 *Hagg.* 188.)

Rate to be made.

After the churchwardens and parishioners have agreed as to what sum is fit for the repairs, they are to make an equal rate for collecting it.

Confirmation by ordinary.

The proper practice, after the rate has been made, is to apply to the ordinary to confirm the rate. (*Per* Sir *J. Nicholl*, in *Lee* v. *Calcraft*, 3 *Phil. Ec. Ca.* 648.)

It seems, however, that such confirmation is not essential to the validity of the rate; and the circumstance of its not being so confirmed is no obstacle to its being sued upon in the Ecclesiastical Court. (*Knight* v. *Gloyne*, 3 *Add. Ec. Ca.* 53.)

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2. Who and what to be assessed, and Mode of laying Assessment.

Mode of laying the assessment in general.

An order and direction set down by Dr. King, Dr. Lewin, Dr. Lyndsey, Dr. Hoane, Dr. Sweite, Dr. Steward, and others, doctors of the civil law, to the number of thirteen in all, assembled together in the common dining hall of Doctors' Commons in London, touching a course to be observed by the assessors in their taxation for the repairs of the church and walls of the churchyard of Wrotham, in Kent; and to be applied generally upon occasion of the like reparations to all places in England whatsoever:—

1. Every inhabitant dwelling within the parish is to be charged according to his ability, whether in land or living within the same parish, or for his goods there; that is to say, for the best of them but not for both.

2. Every farmer dwelling out of the parish, and having lands and living

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(*a*) "The churchwardens and the minority." It will be seen, that it was in this form that the case of *Veley and another* v. *Gosling*, came before the Consistory Court and Court of Arches. But it is submitted, that should the Privy Council confirm Sir H. Jenner's decision in the Arches Court, it would likewise in effect decide, that it would be an equally valid rate, in the case of the opposing majority to consist of the whole body of parishioners present, and the two churchwardens alone were to form the minority—for in such case "the only question on which the meeting can deliberate and determine is," to use *Tindal*, C. J.'s words, "How and in what manner the common law obligation, so binding them, may be best and most effectually, and at the same time most conveniently and fairly between themselves, performed and carried into effect?" And if so, the churchwardens would be the majority, since they in fact would be the only parties performing their duty by voting in answer to such question, and consequently would rightly be deemed as representing the whole number: and the opposing party, as having thrown away their votes.

within the said parish, in his own occupation, is to be charged to the value of the same lands or living, or else to the value of the stock thereupon; even for the best, but not for both. 7. *Church Rates.*

3. Every farmer dwelling out of the parish, and having lands and living within the parish, in the occupation of any farmer or farmers, is not to be charged; but the farmer or farmers thereof are to be charged in particularity, every one according to the value of the land which he occupieth, or according to the stock thereupon; even for the best, but not for both.

4. Every inhabitant and farmer occupying arable land within the parish, and feeding his cattle out of the parish is to be charged for the arable lands within the parish, although his cattle be fed out of the parish.

5. Every farmer of any mill within the parish, is to be charged for that mill; and the owner thereof (if he be an inhabitant) is to be charged for his liability in the same parish besides the mill.

6. Every owner of lands, tenements, copyholds, or other hereditaments, inhabiting within the parish, is to be taxed according to his wealth in regard of a parishioner, although he occupy none of them himself; and his farmer or farmers also are to be taxed for occupying only.

7. The assessors are not to tax themselves, but to leave the taxation of them to the residue of the parish. (*God. Append.* 10, 11.)

The party to be assessed may be collected from the foregoing seven rules. Parties not liable to the repairs for which the rate is made must not be assessed, and as to who such parties are, see *ante*, 636. Who to be assessed.

In *Jeffery's case*, (5 *Rep.* 67,) it was solemnly adjudged that the rates for the repair of the church shall be laid upon every occupier of lands in the parish, although such occupier live in another parish; and such person may come to the vestries of the parishioners, and vote in making a rate; but he shall not be charged towards the ornaments of the church, as for bells, repair of seats, bread and wine, clerks' wages, visitation charges, and the like, by reason of such lands; for that the personal estates of the inhabitants are chargeable with every thing that doth not relate to the fabric of the church, or repairs of the fences of the churchyard, or such other things as concern the freehold. (And see *Paget* v. *Crumpton*, *Cro. El.* 657, 659; 2 *Roll.* 289, 1, 20; *Lndw.* 255; and see Lord *Tenterden's* judgment in *R.* v. *Adlard*, 4 *B. & Cres.* 778, *post*, "*Constable.*") Non-residents, &c.

The law requires that all property should be rated. (*Chesterton and another* v. *Farlar*, 1 *Curt.* 361.) Houses and lands, and all property of that description, are *primâ facie* liable to church-rate. (*Smith, &c.* v. *Keats*, 4 *Hagg* 279.) And it has been recently said to be consonant to reason as well as to law that the rate to be paid by the occupiers in the parish should be made according to the value of their several occupations. (*Gathercole, &c.* v. *Wade*, May 27, 1839, cited in *Phillimore's Burn's Ecc. Law*, 9th ed. Vol. I. p. 381.) To be according to value of occupations.

No man should be charged to repair of the church in respect of land which he has in another parish. (5 *Rep.* 67; 2 *Roll. Abr.* 289, l. 30.)

Nor in respect of a lighthouse. (*Rebow* v. *Bickerton*, *Bunbury*, 81.) Lighthouse.

Where lands are in farm, not the lessor, but the tenant, shall be rated and pay. (*Gibs.* 221; 4 *Mod.* 148.) Lands leased.

It is said that the patron of a church as in right of the founder may prescribe that in respect of the foundation he and his tenants have been freed from the charge of repairing the church. (*Degge, P. L.* c. 12.) Patron, &c.

The rectory, or vicarage which is derived out of it, are not chargeable to the repair of the body of the church, steeple, public chapels or ornaments; being at the whole charge of repairing the chancel. (*Degge, P. L.* c. 12.) But an impropriator of a rectory or parsonage, though bound to repair the chancel, must contribute to the reparation of the church in case he hath lands in the parish, which are not parcel of the rectory. (*Gibs.* 197.) Rector, &c.

The inhabitants of a precinct wherein is a chapel, though it is a parochial chapel, and though they do repair that chapel, are nevertheless of common right contributory to the repairs of the mother church. If they have seats at the mother church, to go thither when they please, or receive sacraments, or Inhabitants of chapelry, how far exempt.

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sacramentals, or marry, christen, or bury at it, there can be no pretence for a discharge. Nor can any thing support that plea, but that they have time out of mind been discharged, (which also is doubted whether it be of itself a full discharge; or that in consideration thereof they have paid so much to the repair of the church, or the wall of the churchyard, or the keeping of a bell, or the like compositions, (which are clearly a discharge). (*Gibs.* 197; 1 *Burn's E. L.* 9th ed. by *Phillimore*, p. 383.)

An inhabitant of the parish of W. was libelled for non-payment of rates imposed for the repair of the parish church, and of certain chapels built within the parish, under stats. 58 Geo. III. c. 45; 59 Geo. III. c. 134; and 3 Geo. IV. c. 72. He declared in prohibition, alleging that the rate was improperly levied on a part of the parish only, excluding the township of H. To this it was pleaded, that the chapels were built in aid of the parish church; that there has immemorially been a chapel in H., at which the inhabitants of H. have received all divine rites and services; that the costs of repairing the chapel have been immemorially defrayed by the inhabitants of H., and no others; that from time, &c. no rate for repairing the parish church has been laid on any person in H.; and that the inhabitants of H. have from time, &c. been exempt from contributing to the repairs of the parish church. The plea concluded with a traverse of the allegation of liability of the four townships to contribute to the repair of the parish church, and the plaintiff joined issue thereon. A verdict having been given for the defendants, it was held on motion for judgment *non obstante veredicto*, that the Court must, after verdict, intend the chapel to have been coeval with the church, although that fact was not pleaded; and that the chapel and church being coeval, and the inhabitants having always been exempt from the church-rate, no rate for repairing the church could now be imposed upon them. (*Craven* v. *Sanderson*, 7 *Ad. & Ell.* 880; 2 *Nev. & P.* 641.)

Houses rateable as well as land.

Houses and property of that description as well as lands are chargeable, and in some places houses only, as in cities and large towns where there are only houses and no lands to be charged. (*Hetl.* 130; 2 *Lutw.* 1019; *Smith* v. *Keats*, 4 *Hagg.* 275.)

If a parish plead a custom for it to be laid only for lands, and not for houses; or to be laid only for arable lands, and to be excused for their pastures; or to be laid only for their sheepwalks and not for the rest; the custom cannot be good, for by the law all lands and houses are to be equally rated; and their paying for some part can be no good cause for the discharge of the rest. (*Hetl.* 130; *Latch.* 203.)

Persons living out of the parish and having lands within the parish, as we have already seen, should be rated for the same in respect of *real* charges but not of *personal* charges. (*Lindw.* 255, *ante*, 643.)

Where tithes held rateable.

Where a local act empowered the trustees, therein named, to raise a sum of money for rebuilding a parish church, and to make a rate for defraying the principal and interest of the sum borrowed on the "houses, warehouses, shops, buildings, lands, tenements and hereditaments rated or rateable to the poor:" it was held, that tithes were rateable under these words. (*Rex* v. *Buckinghamshire* (*Justices*), 1 *Nev. & P.* 503; 6 *Ad. & Ell.* 988.)

Pew owner.

A rate made by chapelwardens, and assessed on pew-owners, in respect of their personal property in the pews of the chapel, is bad, for there cannot be a permanent property in the pews. (*Hawkins* v. *Compeigne*, 3 *Phil. Rep.* 11.)

Hall of a company.

The hall of a company being rated to the repairs of a church, the Spiritual Court in case of non-payment may proceed against the master and wardens of such company. (*T. Jones*, 187.)

Stall of a market.

If a petty chapman take a standing, for rent to be paid by him, in the waste of the manor within the market, for two or three hours every market day, to sell his commodities, the market being holden there one day every week, but he inhabiteth in another parish, he may not be rated to the reparation of the church for this standing. (2 *Roll. Abr.* 289.)

Greenwich Hospital.

The governor of Greenwich Hospital, founded in 1694, and part of an ancient royal demesne, to which an unconsecrated chapel, chaplains and a burial ground are attached, but the officers of which occasionally bury, christen, and

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marry, have pews at and resort to the parish church, and vote at the vestry, is liable to be assessed to church rate for premises in his beneficial occupation as governor, having never been so before, but no valid ground of exemption being shown to found a prescription. (*Smith and Moxe* v. *Keats*, 4 *Hagg.* 275.)

Property in actual possession of the crown.

Where property is in the Queen's own occupation directly or indirectly, there can be no doubt, I think, that it is exempt from church rate, *honoris gratiâ*. (Per Dr. *Lushington*, *ibid.* p. 476.)

Places of public worship.

Stat. 3 & 4 Will. IV. c. 30, exempts from poor and church rates all churches, chapels, and other places of public worship. (See the enactment, "*Poor*," Vol. IV.)

Rectory, how far exempted.

The rectory, or vicarage which is derived out of it, are not chargeable to the repair of the body of the church, steeple, public chapels, or ornaments, being at the whole charge of repairing the chancel. (*Weekes* v. *Oxenden*, *Freem. R.* 301; 17 *Vin.* 577.)

Though *aliter* with an impropriator of a rectory or parsonage, in case he hath lands in the parish which are not parcel of the rectory. (*Serjeant Davies' case*, *Degge*, part 1, c. 12.)

But where the London Missionary Society occupied a house under a lease for religious and charitable purposes. The treasurer attended at the house one day in the week to superintend the society's affairs, but no person ever slept there. The treasurer received no remuneration for his services, and neither did he, nor any other person connected with the society, derive any profit from the occupation of the premises: it was held, that the treasurer was properly assessed to a church-rate, under an act extinguishing tithes in the parish, and authorising a yearly church-rate to be made, in order to raise money for the purpose of compensation to the parson in lieu of tithes, and for the repairs of the church, upon all inhabitants and occupiers, because beneficial occupation was not material in this case. (*Reg.* v. *Wilson*, 4 *Per. & D.* 130.)

Liability of stock in trade to be rated.

The liability of stock in trade to be rated was admitted by the Delegates in the case of *The Parish of Great Canford and Poole*. The rate was ultimately overthrown, because the Delegates were of opinion that if stock in trade was taxable to the church, so must shipping be, and this had been omitted, although in fact it was liable to poor rates. The Delegates advised a new rate to be made, including both shipping and stock. (See *Miller* v. *Bloomfield*, 1 *Add.* 409; and 2 *Add.* 30.)

Rule of assessment and equality.

A taxation by the pound rate is the most equitable mode of assessing it, and not according to the quantity of land, &c. (See *Lindw.* 255; *Wood's Inst.* b. 1, c. 7.)

Poor rates, how far a criterion for church-rate.

A poor rate assessed on the same principle over the whole parish, though affording a fairer criterion than the queen's taxes, is but adminicular evidence of the equality or inequality of a church rate. A valuation by competent judges, and founded on the rent a tenant would pay for the premises, is the proper test. (*Lambert, &c.*, v. *Weall*, 4 *Hagg.* 96.) So Sir W. Wynne—"I think, from what is said of the rule here, that the church rate made according to the poor rate is just and prudent; but it is true also, that decisions applying to poor rates at common law are not binding in cases of church rate. The poor rates are a great, heavy, and constant charge: church rates are not so; they are seldom heavy, and there is no reason to be so precise respecting them." (1 *Burn*, *Ecc. L.* 9th ed. 378 a.)

The property and parishioners should be equally rated. (*Hetl.* 130, and *Latch.* 203.)

Tenant should be rated.

The tenant should be rated, and not the landlord. (*Jeffrey's case*, 5 *Rep.* 66; *Gibs.* 197.) But where a person was wrongly assessed for a small portion of the rate as landlord (erroneously under a local statute), the Court allowed the libel to be reformed, holding that the rate was not bad *in toto*. (*Hawes* v. *Pellatt*, 2 *Curt.* 476.) But where the occupiers are assessed, it is unimportant by whom the payment is made. (*Varty* v. *Nunn*, 2 *Curt.* 898.)

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Several vills, &c.

If a parish consists of several vills, and there is a custom to levy the rate in certain proportions, they must pursue it, whether reasonable or not. (*Burton* v. *Wileday*, *Andrews*, 32.)

A custom in the parish to pay the church rate by divisions is good; and an allegation in an action for a false return to a *mandamus*, of a custom of payment by the chapelwardens of A. to the churchwardens of B. may be supported by evidence of a custom of payment to officers acting only for the township of B. not co-extensive with the parish of B., but who have always been described as the churchwardens of B., for being merely a name of description, it is sufficient, though it be not their legal name. (*Stead* v. *Heaton*, 4 *T. R.* 669.)

Lessees of market.

The lessees of a market are to be assessed according to the real produce of the tolls, and not according to the rent only. (*Sewell* v. *Twyford*, 2 *Lee's Ecc. Ca.* 150.)

Assessors not to tax themselves.

The assessors are not to tax themselves, but to leave the taxation of them to the residue of the parish. (*Godb. App.* 10, 11.)

Time of assessment.

The rate should be made before the expense is incurred, because the propriety and extent of the repairs should be determined before they are undertaken.

Retrospective rate bad.

And it is a general rule with respect to parish rates, founded on obvious principles of policy and justice, that they are not to be made *retrospectively*. The payers being a fluctuating body, nothing, generally speaking, is more just or more likely to conduce to economy, than to hold that they who create a charge shall themselves bear it. (*Per Curiam*, in *R.* v. *Churchwardens of Dursley*, 6 *Nev. & M.* 339; 5 *A. & E.* 10, S. C.; and *R.* v. *Chapelwardens of Haworth*, 12 *East*, 556, *infra*; *Chesterton* v. *Farlar*, 1 *Curt.* 354; 7 *Ad. & Ell.* 713.)

A rate, therefore, to reimburse churchwardens such sums as they have expended, or may hereafter expend, is bad on the face of it, as in part retrospective.

A church-rate was regular on the face of it, but appeared (by affidavit) to have been voted by the parishioners in vestry for the purpose of meeting past disbursements: it was held that the rate was not therefore bad, whatever objection might be raised to a retrospective application of the money on passing the churchwardens' accounts. (*R.* v. *Sillifant*, 4 *Ad. & Ell.* 354.) But in answer to a libel for subtraction of church-rate, it is competent to a party to plead that the rate was intended to be retrospective, although the rate was not on the face of it retrospective. (*Chesterton* v. *Farlar*, 1 *Curt.* 354.)

A declaration in prohibition stated that the plaintiff having been libelled in the Spiritual Court for non-payment of a church-rate, had pleaded in his defensive allegation, that the rate, though good on the face of it, was asked for and intended to be applied to the payment of antecedent debts, and that the Court had admitted to proof a responsive allegation, which alleged that the churchwardens of a prior year had necessarily incurred debts, in consequence of the parish refusing to make a rate, and that the retrospective rate subsequently became necessary, in order to discharge the said debts: it was held, that, whether the rate, being good in form, was or was not vitiated by any design to apply it retrospectively, and whether the rate, under the circumstances, was or was not bad, it being retrospective, the suit itself was a matter of ecclesiastical cognizance, and the objection to the rate was such as the Ecclesiastical Court was able to give effect to, if valid; and that it was to be presumed that it would correctly administer the law; and that therefore the plaintiff was not entitled to prohibition. (*Griffin* v. *Ellis*, 3 *Per. & D.* 398; 11 *Ad. & Ell.* 743, S. C.; and see *Reg.* v *The Privy Council*, 3 *N. & P.* 15.)

R. v. *Chapelwardens of the Township of Haworth*, 12 *East*, 556. Motion for a *mandamus* to these defendants, to make a rate upon the inhabitants of their township for levying 50*l.*, being one-fifth part of a church-rate charged upon the parish at large, for *reimbursing* the churchwardens of the town of Bradford such sums as they had expended, or might hereafter expend, on the parish church of Bradford, and to pay the said 50*l.* when raised to those

churchwardens. The relators' affidavit stated that the parish of Bradford consisted of fifteen townships, of which Haworth is one, and that there is an immemorial custom in the parish, that each of the townships should contribute to the church-rates in certain proportions stated, of which the proportion of Haworth was one-fifth; that at a vestry held in the parish church on the 4th of April last, after regular notice, it was ordered that the churchwardens of Bradford should collect the rate in question of 250*l.* for *reimbursing* themselves such sums as they had expended, or might hereafter expend, on the parish church of Bradford, and then stated a demand and refusal of the proportion of the rate payable by the defendants. In answer, it was objected, first, That any custom for fixing on a part of a parish a certain proportion of a church-rate, which ought to be equally distributed on all the parishioners, was bad upon the face of it, as making that certain and invariable which, in its very nature, was variable and fluctuating, unequal and unjust. This question, it was said, was not decided in *Stead* v. *Heaton*, 4 *T. R.* 669, which turned on another point as to the evidence of the custom. Lord *Ellenborough*, C. J., "We shall not decide this question upon affidavits, but shall for this purpose assume the custom to be good; the point, however, did not pass without consideration in *Stead* v. *Heaton*." Secondly, that no rate could be made to reimburse churchwardens, for they were not bound, nor ought they to lay out money till they had collected it in hand; *non constat*, that it is to reimburse them what they have expended within the same year. And *Dawson* v. *Wilkinson*, *Andr.* 11, and *Cas. temp. Hardw.* 381; and *Tawney's case*, 2 *Ld. Raym.* 1009, were cited as negativing the power of churchwardens to make a rate to reimburse themselves or former churchwardens. Lord *Ellenborough*, C. J. "The regular way is for the churchwardens to raise the money beforehand, by a rate made in the regular form for the repairs of the church, in order that the money may be paid by the existing inhabitants at the time, on whom the burden ought properly to fall. It will, indeed, sometimes happen, that more may be required to be expended at the time than the actual sum collected will cover, but still it is admitted that the inconvenience has been gotten rid of in such cases by an evasion, for the rate has been made in the common form, and when the churchwardens have collected the money, they have repaid themselves what they had disbursed for the parish. But we cannot now grant the *mandamus* to make a rate in the common form, for the demand made upon the defendants was to make a rate in the form in which the rule is drawn up, to reimburse the churchwardens of Bradford for money which they had expended, as well as for what they might expend, and the refusal of the defendants to make such a rate applies to the form of the demand, and we cannot now qualify their refusal; at present it appears that the rate prayed for in this form would be bad, and therefore we cannot enforce it by *mandamus*." (And see *Lord Maynard* v. *Brand*, 3 *Phil. E. C.* 501.)

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The regular course is to raise the rate before repairs are commenced.

Even a court of equity will not decree a church rate to be made to reimburse a former churchwarden moneys laid out while in office, though in pursuance of an order of vestry. (*Lanchester* v. *Thompson and others*, 5 *Madd.* 64.)

Court of equity cannot order a rate to reimburse

Indeed if the churchwardens defer to make or collect their rate until they are out of their office, they are deprived of all legal authority of doing either; but they may present the persons in arrear at the Easter visitation when they go out of their office, and the judge will cause justice to be done therein, or their successors may prosecute for the same. (1 *Bac. Abr.* 376, tit. *Churchwardens, et seq.*)

Churchwardens without remedy.

And the fact of the repairs being authorised by a vestry meeting does not absolve churchwardens from the consequences of neglecting to make a prospective rate to charge the expense; and although where the parishioners who attended such vestry signed the resolutions for the repairs, it was held, that would not make them individually liable, as they merely acted in their character of vestrymen, without any intention to render themselves personally liable or separately from the rest of the parishioners. (*Lanchester* v. *Tricker*, 1 *Bing.* 201; 8 *Moore*, 20, S. C.)

Vestry cannot legalize such a rate and churchwardens liable for consequences.

And although one who attended and signed afterwards, directed the mode

7 *Church Rates.*

in which certain parts of the repairs should be effected, this was held not sufficient to imply a contract by him (*Lanchester* v. *Frewer*, 9 *Moore*, 688, 2 *Bing.* 361, S C)

The 58 Geo III. c 45, and 59 Geo III. c 134, empowers churchwardens to borrow monies and raise rates for the building, &c. of new churches. (See the enactments, *post*, 654, 655.)

Not more than necessary should be raised

If the rate is made only for the repairs of a church, it is illegal to raise more than is wanted for that purpose (*Brettel* v *Wilmot*, 2 *Lee's Ecc. Ca.* 548.)

It seems that the Ecclesiastical Court cannot decide on the quantum of a rate, and therefore that parishioners, who do not contumaciously refuse to make a rate, but grant one not manifestly collusive, are not liable to be articled for refusing a sufficient rate. (*Greenwood* v. *Greaves, Clay and others*, 4 *Hagg* 77)

Therefore, in a case of emergency, it would be a good answer to any proceeding in the Ecclesiastical Court against a churchwarden for not repairing, for him to say that he had no funds, and that there had not been time to make a rate (*Northwaite* v. *Bennett*, 2 *Crom & M* 316)

Trifling omissions.

The rate is not invalid by reason of omissions of an inconsiderable amount; it is a question of degree, and in the present case, where the rateable property was 8622*l*, and property was omitted amounting to 200*l*., the Court pronounced for the rate, but without costs. (*White* v *Beard*, 2 *Curt* 486)

Rate should not be excessive

An allegation in a suit for subtraction of church-rate having been admitted, pleading that the rate in question of ninepence in the pound was excessive; an allegation in reply stating that upon a sixpenny rate being proposed by the churchwardens for absolute necessaries, an increased rate of ninepence in the pound was moved and carried for the purpose of repairing the church bells, upon a calculation made at the time, was admitted as a sufficient explanation of such increased rate: and it was held that a church-rate made upon the same assessment as the poor rate is a valid assessment. (*Smith* v. *Dixon*, 2 *Curt.* 268.)

A church rate made avowedly larger than was necessary for the current year, for the purpose of enabling the churchwardens to liquidate a debt incurred in former years, is excessive, and therefore illegal (*Farlar* v. *Chesterton*, 2 *E T. Moore*, 330)

Rate valid without faculty.

A church-rate for defraying the expense of the consecration of a church rebuilt under the statute 59 Geo. 3, c. 134, s. 40, valid, although no faculty had been granted. (*Warner* v *Gater*, 2 *Curt.* 315)

Minister's salary should not be included in rate.

That the salary of the minister is among the items of the rate is fatal to its validity, but the minister must be paid. *Semble*, he may bring a suit for ecclesiastical dues against the parishioners (*Still* v *Palfrey*, 2 *Curt.* 902.)

Under two local acts of parliament, the power of making church-rates was vested in certain church trustees. A rate was made in June, 1835, but not signed till November. It did not appear that the persons who made the rate were the same with those who signed it, and there was no evidence that the signers of the rate were church trustees it was held that the rate was good upon the face of it. (*R* v *Douglas*, 1 *Jur* 983)

Setting aside or disputing rate.

The ecclesiastical court has not, upon an original proceeding by an individual rate payer, power to set aside a rate on the ground of inequality in the assessment, the remedy for the party unequally assessed is to enter a caveat against the confirmation by the ordinary, or to refuse the payment of the rate. (*Walney* v. *Lambert*, 4 *Hag* 84, and see *Greenwood* v. *Greaves*, 4 *Hag.* 77)

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3 Form of Assessment.

Form of the assessment.

The form of the church rate may be thus —

We, the churchwardens and other parishioners of the parish of , in the county of , and diocese of , whose names are hereunto subscribed, do hereby this day of , in the year , at our vestry meeting for that purpose assembled, rate and tax all and every the inhabitants and parishioners of the

parish aforesaid, hereunder mentioned, for and towards the repairs of the church of the said parish for this present year, the several sums following, viz.. 7. *Church Rates.*

	£.	s.	d.
A. B.	1	2	0
C. D.	0	3	0
E. F.	0	2	6
&c.			

A. B., *C. D.* } *Churchwardens.*

E. F., *G. H.*, *I. K.*, *&c.* } *Parishioners.*

In strictness where a rate is required for the repairs of the fabric and another for the repairs of the ornaments of the church, two distinct rates should be made; by the practice, however, now in vogue, only one rate is made for all purposes, which is certainly a more easy and convenient proceeding, and may be sanctioned. (*Shaw's P. L.* 92.) Separate rates for ornaments.

In some of the earlier authorities it is contended that a separate rate must be made for the *ornaments* of the church, and that it is purely a personal charge, not referable to the land occupied, (2 *Roll. Abr.* 291), and that therefore persons having lands in the parish, but residing out of it, are not liable to contribute towards the ornaments of the church; (*Lindw.* 255; *Gibs.* 196;) but Sir Simon Degge says that the foreigner who holds lands in the parish is as much obliged to pay towards the bells, seats, and ornaments, as to the repairs of the church. (*Steer's P. L. by Clive*, p. 421.)

A church-rate being passed by a resolution of the vestry, it is no objection to such rate that the heading was subsequently inserted. (*White* v. *Beard*, 2 *Curt.* 486.) Heading subsequently made.

The parishioners in vestry assembled having passed a resolution that a rate should be made, the fact of the rate itself not being then made, but drawn up subsequently by the churchwardens alone, will not vitiate the rate. (*Scale* v. *Veley*, 5 *Jur.* 1017.) Confirmation of rate.

See the decisions and observations as to form of a poor rate, title "*Poor*," Vol. IV.

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4. Mode of Levying the Rate.

If any of the parishioners refuse to pay their rates, being demanded by the churchwardens, they may be sued for and recovered in the ecclesiastical courts, and not elsewhere, (*Degge*, p. 1, c. 12,) unless the amount to be recovered does not exceed 10*l.*, in which case they are now, by the statutes presently mentioned, recoverable by summary proceedings before justices, *post*, 650. For the cognizance of rates made for the reparation of churches and church-yards belongs to the spiritual courts. (*Gibs.* 195; 5 *Rep.* 66.) As regards tithes, Easter offerings, other offerings, obligations or compositions not exceeding 10*l.* per annum, they are recoverable summarily before two justices, under 7 & 8 Will. III. c. 6; 7 Geo. IV. c. 15; and 5 & 6 Will. IV. c. 74.; see "*Tithes*," Vol. VI. By suit in ecclesiastical Court.

If a suit be instituted in the ecclesiastical court for a church rate, and a custom pleaded of a certain sum or of something done in lieu of the rate, and that plea is admitted, they may proceed to try that custom in the same manner as a *modus*; but if the custom be denied, it will be a proper ground for a prohibition for defect of trial in the ecclesiastical court, for the trying of the custom is the province of the common law. (*Dun* v. *Coates*, 1 *Atk.* 289.)

So if the bounds of the parish come into dispute in the ecclesiastical court, that is, if the party assessed aver that the land for which he is assessed lies in another parish and not in the parish where it is assessed; if the party be contentious, he may have a prohibition, and try it at common law. (*Degge*, p. 1, c. 12)

In questions of subtraction of church rate, the Court having jurisdiction on the subject matter, is bound, unless stopped by a prohibition, to proceed to the trial of a select vestry by which the rate was made. (*Goodall* v. *Whitmore*, 2 *Hagg. Rep.* 372.)

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In a suit for subtraction of church rate, the Court will not, at the prayer of the defendant, issue a monition for the production of parish books, which are not shown to apply immediately to the question at issue, and on the merits, the rate being pronounced for, the defendants condemned in costs. (*Goodall* v. *Whitmore*, 2 *Hagg. Rep.* 369.)

Costs, though in the discretion of the Court, are in its legal discretion guided by former precedents, and are almost universally decreed in suits for church rates, where the rate is pronounced to be subtracted. (*Goodall* v. *Whitmore*, 2 *Hagg. Rep.* 375.)

By proceedings before justices.

Stat. 53 Geo. III. c. 127, s. 7, for the more easily and speedily recovering church rates or chapel rates of limited amount, enacts, that "if any one duly rated to a church rate or chapel rate, the validity whereof has not been questioned in any ecclesiastical court, shall refuse or neglect to pay the same sum at which he is so rated, it shall and may be lawful for any one justice of the peace of the same county, riding, city, liberty or town corporate, where the church or chapel is situated, in respect whereof such rate shall have been made, upon the complaint (*a*) of any churchwarden or churchwardens, chapelwarden or chapelwardens, who ought to receive and collect the same, by warrant (*a*) under the hand and seal of such justice, to convene before any two or more such justices of the peace any person so refusing or neglecting to pay such rate, and to examine upon oath (which oath the said justices are hereby empowered to administer) into the merits of the said complaint, and by order (*a*) under their hands and seals to direct the payment of what is due and payable in respect to such rate, so as the sum ordered and directed to be paid as aforesaid do not exceed 10*l.* over and above the reasonable costs and charges, to be ascertained by such justices; and upon refusal or neglect of such party to pay according to such order, it shall and may be lawful for any one of such justices, by warrant (*b*) under his hand and seal, to levy the money thereby ordered to be paid, together with the amount of such costs and charges, by distress and sale of the goods of such offender, his executors or administrators, rendering only the overplus to him or her, the necessary charges of distraining being thereout first deducted and allowed by the said justices; [see stat. 54 Geo. III. c. 170, s. 12, *infra*;] and any person finding him or herself aggrieved by any judgment given by two or more such justices, may appeal to the next general quarter sessions to be held for the county, riding, city, liberty or town corporate wherein the church or chapel is situated, in respect whereof such rate shall have been made, and the justices of the peace there present, or the major part of them, shall proceed finally to hear and determine the matter, and to reverse the said judgment if they shall see cause; and if the justices then present, or the major part of them, shall find cause to affirm the judgment given by the first two or more justices, the same shall be decreed by order of sessions, with costs, against the appellant, to be levied by distress and sale of the goods and chattels of the said party appellant: provided always, that in case any such appeal be made as aforesaid, no warrant of distress shall be granted until after such appeal be determined: provided also, that nothing herein contained shall extend to alter or interfere with the jurisdiction of the ecclesiastical courts to hear and determine causes touching the validity of any church rate or chapel rate, or from proceeding to enforce the payment of any such rate, if the same shall exceed the sum of 10*l.* from the party proceeding against: provided likewise, that if the validity of such rate, or the liability of the person from whom it is demanded to pay the same, be disputed, and the party disputing the same give notice thereof to the justices, the justices shall forbear giving judgment thereupon, and the person or person demanding the same may then proceed to the recovery of their demand, according to due course of law, as heretofore used and accustomed: provided likewise, that nothing herein contained shall affect any regulations that may have been made by authority of parliament, respecting the church rates or chapel rates of any particular parishes or districts."

Appeal.

In case of appeal distress not to issue.

Saving of ecclesiastical jurisdiction, if rate exceed 10*l.*

(*a*) See form, *post*, 677. (*b*) See form, *post*, 678.

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Distress may be made in any district, &c. in same county, &c.

Backing warrant of distress to other counties.

And by 54 Geo. III. c. 170, s. 12, the goods and chattels of any person neglecting to pay any sum legally assessed on him for any churches for seven days after demand made, may be distrained, not only within the district, parish, township or hamlet, in which it is made, but also within any other district, parish, &c. within the same county, riding, division or jurisdiction; and if sufficient distress cannot be found within such county, &c. then, on oath thereof made before any one or more justice or justices of the peace for any other county, &c. in which any of the goods or chattels of such person shall be found, (which oath such justice or justices shall administer and certify by indorsing his or their name or names on the warrant granted to make such distress,) such goods, &c. shall be liable to such distress and sale in such other county, &c. and may under such warrant and certificate be distrained and sold, as if found within the district, parish, &c. in or for which the rate was due.

Costs of distress.

By the 7 & 8 Geo. IV. c. 17, the provisions of the 57 Geo. III. c. 93, regulating the costs of distresses for rent, &c. are extended to distresses for church rates, &c. By that act of Geo. IV. it is enacted, that "all the rules, regulations, clauses, provisions, penalties, matters and things in the said act contained, shall extend and be construed to extend, and shall be applied and put in execution, so far as the same are applicable and capable of being put in execution, with respect to any distress or levy which shall be made for any land tax, assessed taxes, poor rates, church rates, tithes, highway rates, sewer rates, or any other rates, taxes, impositions or assessments whatever, in all cases where the sum demanded and due for or in respect of such taxes, rates, tithes, assessments or impositions shall not exceed the sum of 20*l.*, and in all cases where the whole of the several sums sought to be levied by distresses taken for different purposes at the same time shall not exceed the sum of 20*l*; and that such costs and charges, and no other, shall be taken and payable as the costs and charges of the levy and disposition of such distresses; and that all such proceedings shall and may be had and taken against any and every person transgressing the regulations of the said act in the levying or distraining for any such taxes, rates, impositions or assessments, and all such persons shall be liable to and shall incur such and the like penalties, as by the said act are directed, required and imposed with respect to persons making any distress for rent contrary to the directions of the said act; and that in any order or judgment of any justices before whom any complaint shall be preferred in consequence of this act, such order shall be expressed to be made upon a complaint for the breach of the said recited act as amended by this act; and that the said recited act and this act shall be taken and construed together as one act, to all intents and purposes whatsoever."

Observations and decisions as to proceedings before justices.

Before the passing of 53 Geo. III. c. 127, s. 7, considerable delay and expense were incurred in the recovery of church rates. That act, as we have seen, *ante*, 650, provides a summary remedy, by application to justices of peace in cases of withholding church rates not exceeding 10*l.* where the party does not dispute the obligation to pay them, but does not invest justices with the power which belongs exclusively to the Ecclesiastical Court, *viz.* the power of deciding on the validity of the rate or the liability of the person to pay it. The justice cannot issue his warrant unless it be made affirmatively to appear before him that the amount does not exceed 10*l*, and that no question is made on the rate in the Ecclesiastical Court. If neither of these preliminary exceptions have place, the party may give notice to the two justices before whom he is summoned to appear, that he disputes the validity of the rate or his liability to pay it, though no proceeding is actually commenced in the Ecclesiastical Court: and any expression by him, manifesting that he disputes the rate *bonâ fide*, will be a sufficient notice to make a *cesser* of the proceedings before the justices. (*R.* v. *The Chapelwardens of Milnrow*, 5 *M. & Sel.* 248.)

But a mere statement to the justices by the party complained of, that he disputes the rate, and that he has entered a caveat in the Ecclesiastical Court against its being allowed, does not deprive the justices of jurisdiction; they must still hear and examine to ascertain whether the rate is *bonâ fide* disputed. (*R.* v. *Wrottesley*, 1 *B. & Adol.* 648; *R.* v. *Sillifant*, 4 *Ad. & Ell.* 354.)

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Notwithstanding this enactment the ecclesiastical courts have jurisdiction to enforce the payment of a church rate under 10*l.* where the validity of the rate is questioned by the party rated. (*Boddenham* v. *Ricketts*, 4 *Ad. & Ell.* 433.) But where neither the validity of the rate nor the liability of the party has been questioned, the jurisdiction of the Ecclesiastical Court in such cases is taken away. (*Richards* v. *Dyke*, 2 *Gale & D.* 493.) And, therefore, where a party not having been summoned before justices was libelled in the Consistory Court for church rates, and appeared thereto, and objected to the jurisdiction of the Court, that the suit was brought for church rates under 10*l.*, the validity of which had not been disputed or denied by him, but the Court proceeded to hold jurisdiction in the suit, the Court of Queen's Bench granted a prohibition. (*Ib.*) It seems, however, that it is still competent to institute a suit in that Court for payment of a sum under 10*l.* due upon a church rate, because, until the defendant has appeared in such a suit, there may be no means of knowing whether the validity or liability is in dispute or not. Therefore, where a significavit, as recited in the return to a writ of habeas corpus, stated that the prisoner had been pronounced guilty of contumacy for non-payment of a sum of 2*l.* 5*s.* to certain churchwardens, with their costs of suit, pursuant to a motion duly issued in a certain cause of subtraction of church rate, the proceedings wherein were carried on in pain of the contumacy of the prisoner, who, though duly cited with the usual intimation, had not appeared; an objection, that the cause was not sufficiently described, for want of an averment that the validity of the rate or the liability of the party was in dispute, was overruled. (*In re* v. *Baines*, 1 *Cr. & Ph.* 31.) The jurisdiction of the justices is not ousted by the fact of a suit having been commenced for the rate in the Consistorial Court by the churchwardens, where the suit had been abandoned before the complaint was made. (*Reg.* v. *St. Clements* (*Inhabitants*), 12 *Ad. & Ell.* 177.)

The justices may act upon the complaint of one churchwarden, though in a parish having ten. (*Reg.* v. *Fenton*, 1 *Ad. & Ell., N. S.*, 480.) And churchwardens *de facto*, though not *de jure*, may proceed for the recovery of church rates by complaint to a justice of the peace, under the above statute. (*Reg.* v. *St. Clements* (*Inhabitants*), 3 *Per. & D.* 481; 12 *Ad. & Ell.* 177.) It seems also that the complaint may be made and proceeded upon by one churchwarden against another if he refuses to pay the rate. (See *Skingley* v. *Surridge*, 11 *M. & Wels.* 503.)

Where a constable, having a warrant of distress under 53 Geo. III. c. 127, s. 7, broke the outer door of and entered plaintiff's dwelling-house, it was held, that although he thereby exceeded his authority, yet as it was not shown that he acted with any other intention than that of executing the authority delegated to him by the warrant, no action could be maintained after the expiration of three calendar months after the fact committed. (*Theobald* v. *Crichmore*, 1 *B. & Ald.* 227; and see s. 12 of the act.)

A party appealing against an order of justices for payment of a church rate, under the above statute, need not give notice of appeal to the justices making the order; it is sufficient to give it to the churchwardens. And if such notice to the justices were necessary, service of it upon one of the justices would suffice. (*Rex* v. *Staffordshire* (*Justices*), 4 *Ad. & Ell.* 842.)

By a local act, a church rate was to be levied on the landlords, tenants, occupiers or enjoyers of houses and land, and a form of a warrant was given in a schedule, and no distress was to issue before demand of payment by the collector, and proved before the justice required to issue the warrant. A warrant of distress was issued, containing merely the name of the individual, his place of abode, and the sum at which he was rated. No demand of the rate appeared to have been made, nor was there any statement in the warrant. It was held, that the warrant was not bad by reason of its not stating the character in which the individual was rated; and on the trial of an indictment in which the validity of the warrant was raised, that an allegation on the warrant of a demand, and proof of that fact were not necessary, as it must be presumed that they are established to the satisfaction of the magistrate who issued the warrant. (*Rex* v. *Douglas*, 1 *Jur.* 783.)

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Proceedings against Quakers refusing to pay.

Also a Quaker refusing to pay church rates may be sued, as other parishioners, in the Ecclesiastical Court; or he may be proceeded against before the justices of the peace, in the same manner as for his tithes. (See "*Tithes*," Vol. VI.)

53 Geo. 3, c. 127. 7 & 8 W. 3, c. 34.

And by stat. 53 Geo. III. c. 127, s. 6, reciting, that "by stat. 7 & 8 Will. III. it is enacted, where any Quaker shall refuse to pay for or compound for his great or small tithes, or to pay any church rates, two or more of his majesty's justices of the peace are authorised to hear and determine the same, not exceeding the value of 10*l.*: and that by a statute made and passed in the first year of King George the First the said act is extended to other objects; and that it is become expedient to enlarge the said sum;" it is enacted, that "from and after the passing of this act, all the provisions of the said acts of King William and King George shall be deemed and taken to extend to any value not exceeding 50*l.*: provided always nevertheless, that from and after the passing of this act, one justice of the peace shall be competent to receive the original complaint, and to summon the parties to appear before two or more justices of the peace, as in the said act is set forth."

5 & 6 W. 4, c. 74.

And by the 5 & 6 Will. IV. c. 74, no proceedings are to be taken against Quakers in respect of a church rate under 50*l*, except under the stat. 7 & 8 Will. III. c. 34, and the 53 Geo. III. c. 127. (See this statute of 5 & 6 Will. IV. fully noticed under title "*Tithes*," Vol. VI.)

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5. Appeal, &c. against Rate.

Appeal against the rates.

If any person find himself aggrieved by the inequality of the assessment, his appeal must be to the ecclesiastical judge. (*Degge*, 172; see *Lambert* v. *Weal*, 4 *Hagg. Ec. Ca.* 96.) Unless the amount of assessment does not exceed the sum of 10*l.*, in which case he may appeal to the quarter sessions by stat. 53 Geo. III. c. 127, s. 7. (*Ante*, 650.)

And in such case, if he will be relieved, he must show that he is illegally or unequally taxed in respect of the quantity of his land, as being rated for more than he has, or that the land which he hath is over-rated, or that the rate was needless, or that some lands in the parish are omitted in the rate. (1 *Wood's Inst.* b. 1, c. 7; see *Lee* v. *Chalcraft*, 3 *Phil. Rep.* 639.)

The Ecclesiastical Court has not, upon an original proceeding by an individual rate payer, power to set aside a rate on the ground of inequality in the assessment; the remedy for the party unequally assessed is to enter a caveat against the confirmation by the ordinary, or to refuse the payment of the rate. (*Watney* v. *Lambert*, 4 *Hagg.* 84; and see *Greenwood* v. *Greaves*, *id.* 77.)

Unless the rate be wholly a nullity and void, its legality cannot be disputed in an action for levying it under a distress authorised by a magistrate's warrant.

Proceedings under 3 & 4 Vict. c. 93, for rates under 5*l.*

By the 3 & 4 Vict. c. 93, in cases of subtraction of church rates for an amount not exceeding 5*l.* the ecclesiastical judge may discharge the party in contempt, without the consent of the other parties to the suit, where he has suffered imprisonment for six months, on payment of the sum for which he may have been cited with costs. And it seems that by this costs in the Ecclesiastical Court only are intended. (*Baker* v. *Thorogood*, 2 *Curt.* 632.)

In case of marsh lands, &c.

By the 17 Geo. II. c. 37, where there shall be any dispute in what parish or place improved wastes and drained and improved marsh lands lie and ought to be rated, the occupiers of such lands or houses built thereon, tithes arising therefrom, mines therein and saleable underwoods, shall be rated to this and all other parish rates within such parish or place as lies nearest to such lands; and if on application to the officers of such parish or place to have them rated as aforesaid any dispute shall arise, the justices of the peace at the next sessions after such application made, and after notice given to the officers of the several parishes and places adjoining to such lands, and to all others interested therein, may hear and determine the same on the appeal of any person interested, and may cause the same to be equally assessed, whose

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determination therein shall be final. But this shall not determine the boundaries of any parish or place other than for the purpose of rating such lands to the parochial rates as aforesaid.

Exciting people to resist the payment of church rates.

An attempt to excite resistance to the payment of church rates, or to render odious those who collect them, is illegal. (*Bond* v. *Douglas*, 7 *C. & P.* 626.)

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6. Church Rates under Acts for Building New Churches.

The power of churchwardens with regard to church rates has been extended by the Church Building Acts; in some instances they have express authority of themselves to make a rate without a faculty, and the Court will interfere by mandamus whenever the right of the lender to have his money is apparent. (See 58 Geo. III. c. 45, s. 59, and 59 Geo. III. c. 134, ss. 14 and 40; *Regina* v. *Brancaster*, 7 *Ad. & Ell.* 458; *R.* v. *St. Michael's, Pembroke*, 5 *Ad. & Ell.* 603; *Warner* v. *Gates*, 2 *Curt.* 315.)

Sums expended in purchasing sites, or advanced to parishes by commissioners, to be charged upon and paid out of church rates.

All money expended in purchasing sites, and advanced by commissioners to any parish under the act, or paid by commissioners in cases of neglect to provide sites, and all sums expended or advanced under the act in carrying the purposes thereof into execution, shall be charged on the church rates, and the churchwardens are required and empowered to make sufficient rates for repaying such expenses and advances, within the periods or at the times specified by the commissioners. (58 Geo. III. c. 45, s. 56.)

In what cases rates may be raised by justices in extra-parochial places for purposes of act.

Where money shall have been expended in purchasing sites, or advanced by commissioners under the act for extra parochial places in which no church rate shall be made, any justice on the requisition of the commissioners shall appoint two or more persons to make and levy rates for making all payments and repayments as may be required under the act, who shall have the same powers as churchwardens; and all such rates shall be deemed church rates, and all laws relative to church rates shall be applicable thereto. (*Id.* s. 57.)

Churchwardens may borrow money on credit of rates.

Power is given to churchwardens in parishes with consent of the vestry, and persons appointed in extra parochial places with consent of the majority of persons who would be entitled to vote in a vestry, with notice given in the church or chapel therein or nearest thereto, to borrow money on the rates, and to raise by rates money sufficient to pay the interest and one twentieth of the principal, until the whole money borrowed shall be repaid. (*Id.* s. 58.)

And also money for enlarging existing churches, &c.

Fund for payment.

Power is given to churchwardens with consent of vestry and of the bishop and incumbent to borrow and raise on the rates money necessary for or towards defraying the expense of enlarging or extending the accommodation in any then existing church or chapel, and to make rates for payment of the interest, and providing a fund of not less than the interest for repayment of the principal, or repaying the principal in such other manner as shall be agreed on. Provided that one-half of the additional accommodation shall be allotted to uninclosed or free seats. (*Id.* s. 59.)

No application to be made for building, &c. by means of rates without consent of majority of inhabitants paying poor rates; or, where a select vestry, without the consent of a certain portion thereof.

No application to build or enlarge any church or chapel, wholly or in part, by means of rates, shall be made unless the major part of the inhabitants and occupiers assessed to the poor, in vestry assembled, shall consent thereto, or, where the parish shall be under the care of a select vestry or body, with the consent of four-fifths thereof, such consents to be certified to some justice by an overseer of the poor; nor unless two-thirds in value of the proprietors of lands within such parish, whether for estates of freehold or copyhold, or by virtue of leases for terms of not less than fifteen years absolute or determinable upon a life or lives, shall have consented thereto, such consents to be given by writing under the hands of all persons and corporations sole, and of the president or head member of corporations aggregate, and of the husbands, guardians, committees, trustees, attornies or agents of femes covert, minors, insane persons and persons out of the kingdom, and of the major part of the trustees for any charitable or other purpose. (58 Geo. III. c. 45, s. 60.) See further the 59 Geo. III. c. 135, s. 24, *infra*.

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Churchwardens of parish where church, &c. built may raise rates for the purpose.

Power is given to churchwardens of any parish or place in which any church or chapel shall be built, on such application as aforesaid (s. 60), to make rates for raising the sum or portion of the sum proposed to be defrayed by rates, or to borrow any such sums on the credit of such rates; and in every such case to make rates for payment of the interest of any monies advanced for building any church or chapel on credit of the rate, and for providing a fund of not less than the amount of the interest for repayment of the principal, or for repaying such principal in such manner as shall be agreed upon. (*Id.* s. 61.)

59 Geo. 3, c. 134. Churchwardens, &c. empowered to levy rates.

By 59 Geo. III. c. 134, s. 23, any church or chapel warden of any parish or division, or consolidated or district chapelry, in which rates shall be made under said act or this act, may recover such rates by all such ways and means as church rates may be recovered by, as fully as if they were hereby specially given; provided that church or chapel wardens appointed under said act or this act shall not in virtue of such office be deemed overseers of the poor.

No application to build or enlarge church, &c. made if certain number of parishioners dissent.

Districts to be separate parishes for all ecclesiastical purposes.

Sect. 24, after reciting so much of sect. 60 of 58 Geo. III. c. 45, as requires the consent of two-thirds in value of the proprietors, enacts, that such recited provision shall be repealed: and that no application to build or enlarge any church or chapel wholly or in part shall be made, nor shall any church or chapel be built, rebuilt, or enlarged, or any purchase made of any new or additional burial ground, by means of rates on any parish where one-third in value (to be ascertained by an average of the poor's rate for the preceding three years) of the proprietors of tenements in such parish, whether for estates of freehold or copyhold, or for terms of years absolute, whereof fifteen years shall be unexpired or determinable on a life or lives, shall dissent therefrom; such dissent to be entered in the book containing the proceedings of the vestry, and to be signified, in case of any future vestry, within two months after the resolution; and in case of any such resolution already passed, within two months from passing this act, under the hands of such proprietors as aforesaid, and of the president, head or chief member of any corporations aggregate, and of the husbands, guardians, committees, trustees, attornies, or agents of any femes covert, minors, persons insane, or absent from the kingdom, and the major part of the trustees of any charitable institution, or of any part of them authorised to act in the trusts. (See *R.* v. *Churchwardens of St. Mary, Lambeth*, 3 *B. & Adol.* 651; *R.* v. *Churchwardens of Dursley*, 6 *Nev. & M.* 333; 5 *A. & E.* 50, S. C. *post*, 656, 657.)

A church rate may be made by the churchwardens of a parish divided under the Church Building Acts, for that division of the parish only; and churchwardens chosen by the inhabitants of that division are legal churchwardens for the purposes of church rate. (*Varty* v. *Nunn*, 5 *Jur.* 1138; 2 *Curt.* 898.)

Rate not exceeding 1s. in pound in any one year, or 5s. in the whole, may be raised for building or enlarging church or chapel without such proportion of consents of proprietors, &c. as is required by 58 Geo. 3, c. 45, s. 60.

Proviso as to dissent in case of a larger rate.

Order to raise rate imperative.

By sect. 25, it shall be lawful for the inhabitants of any parish assembled at any vestry, or the major part of the inhabitants so assembled, of which notice shall have been given on two successive Sundays preceding, or for two-third parts of such of the persons exercising the powers of vestry as shall be assembled at any meeting of which notice shall have been given as notices for assembling such persons are given, to order and direct the making and raising of any rate not exceeding one shilling in the pound in any one year, or five shillings in the pound in the whole, upon the annual value of the property in the parish, for the purpose of building or enlarging any church or chapel, either wholly or in part, by means of rates, without any further, or other, or greater number of consents of any number of inhabitants, or proprietors or occupiers, or other persons; provided that no larger rate than aforesaid shall be directed to be raised in relation to any application to build or enlarge any church or chapel, either wholly or in part, by means of rates, if any such proportion of dissents, as in sect. 24 is specified, are signified as there directed; and every such direction shall be imperative upon the church or chapel wardens, who shall forthwith make and raise the rate so ordered; and every such rate shall be made, raised, levied, and accounted for in like

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manner and with all such powers and under such penalties as are in law applicable to church rate.

58 Geo. 3, c. 45. Rates may be laid on any parish, for rebuilding or enlarging the church.

When any parish shall be desirous of increasing the accommodation in the parish church, and it shall be expedient to take down the existing church and to rebuild it on the same or a more convenient site, it shall be lawful for the churchwardens, with the consent of the vestry, or persons possessing the powers of vestry, and of the ordinary, patron, incumbent, and lay impropriator, if any, to take down such existing church, and to rebuild it on same, or a new site, and the churchwardens may borrow on credit of the church rates, or any rates made under said act, or this act, money necessary for defraying all or any part of the expense of taking down and rebuilding such church, and make rates for paying the interest of the money so borrowed, and for providing a fund not less than the amount of the interest for repaying the principal, or for repaying such principal at such times and in such manner and proportions as shall be agreed upon by the lenders: provided that no church shall be so taken down and rebuilt by means of rates, if such proportions of dissents as in sect. 25 specified are signified in writing as thereby directed; and such church, when consecrated, shall be the parish church for celebrating divine offices and solemnizing marriages: provided that one half of the additional accommodation obtained by rebuilding such church shall be set apart for free and open sittings, and that persons enjoying pews or sittings in the church, held in virtue of any faculty or prescription, shall have pews or sittings as near as may be in the same situation, and of like dimensions, allotted to them in the said new church, and that all tombstones, monuments, and monumental inscriptions in the old church, shall be carefully preserved by the churchwardens, and shall be set up by them at the charge of the parish in the new church, as near as circumstances will admit, in the situations from whence they were removed in the old church. (58 Geo. III. c. 45, s. 40.)

Money may be borrowed upon rates, &c.

No church taken down, &c. if dissent signified as herein mentioned.

Proviso for free and open sittings, and for situation and dimensions of new pews, and for tombstone, &c.

Where A. lent to the churchwardens of B., under the above clause, 1000*l.* at 5 per cent., and agreed not to call in the principal for twenty years: it was held that the act was compulsory on the churchwardens to raise annually a sum equal to the amount of the interest, as a fund for the repayment of the principal, although A. could not compel the repayment of the principal until the expiration of the twenty years. (*R. v. St. Michael's, Pembroke (Churchwardens)*, 1 *Nev. & Per.* 69; 5 *Ad. & Ell.* 603, S. C.)

Repairs of district churches to be made by rates upon the district.

The repairs of district churches or chapels shall be made by the districts to which they belong, by rates to be raised within the districts in like manner as repairs of churches by parishes, and such district shall be deemed a separate parish for that purpose; and the repairs of chapels not made district churches shall be made by the parish in or for which the chapels shall be built. (*Id.* s. 70.)

District to remain liable for repairs of parish church for 20 years.

Districts shall be made subject to the repair of the original parish church for twenty years after the district church shall be consecrated, after which the parish church shall be repaired by the remainder of the parish, and each district shall afterwards make separate rates for such repairs, as if separate parishes. (*Id. s.* 71.)

Under this section the inhabitants of the district are liable for twenty years to the incidental expenses, in the same manner as to the repairs of the mother church. (*Chesterton* v. *Farlar*, 1 *Curt.* 356.)

59 Geo. 3, c. 134. Churchwardens, with consent of vestry, &c. may raise money upon credit of rates for repair of churches, &c.

It shall be lawful for the churchwardens of any parish, with the consent of the vestry, bishop, and incumbent, to borrow and raise on credit of the church rates, or any rate made under said act or this act, money necessary for defraying the expense of repairing any churches or chapels, and where such money shall have been borrowed, to raise by rate a sum sufficient from time to time to pay the interest of the money so borrowed, and not less than ten per cent. of the principal, out of the produce of such rates, until the whole money borrowed shall be repaid. (59 Geo. III. c. 134, s. 14.)

This enactment has to a certain extent modified the general rule noticed *ante*, 646, as to the illegality of retrospective rates, but it only authorises the borrowing of money upon the credit of the church rates for *future* expenses

only, and not for such as have been already incurred. (*R.* v. *Churchwardens of Dursley*, 6 *Nev. & M.* 333; 5 *Ad. & Ell.* 10, S. C.)

7. *Church Rates.*

And when money is borrowed by churchwardens under this statute, the instalments of not less than £10 per cent. of the principal sum borrowed ought to be *annual* payments. (*Id.*)

A *mandamus* may be obtained to compel churchwardens to make a church-rate for the repayment of a loan obtained by the inhabitants of the parish from the commissioners for building new churches, conformably to the above enactments of 58 Geo. III. c. 45, ss. 14 & 60, and 59 Geo. III. c. 134, s. 21, for the making of such a rate is not a matter of ecclesiastical cognizance. (*R.* v. *Churchwardens of St. Mary, Lambeth*, 3 *B. & Adol.* 651.)

As to the notice of the vestry called to carry into effect the provisions of this clause, see *Blunt* v. *Harwood*, *ante*, 639; and S. C. 1 *Curt.* 648.

3 Geo 4, c. 72. Chapels belonging to parishes, with or without districts assigned, to be repaired by the parishioners at large, in the same manner as the church of the parish.

All chapels acquired and appropriated, or built or enlarged and improved under said acts, or under any local acts wherein no provision is made relating thereto, in aid of the churches of the parishes or places in which they shall be situated (whether or not any districts of such parishes shall have been assigned to such chapels for ecclesiastical purposes), shall be repaired by the parishes or places at large to which such chapel shall belong, and rates shall be raised for that purpose in like manner as for the repair of the churches of such parishes or places, and all the laws in force for making and raising rates for the repair of churches shall be applied for making and raising rates for the repair of such chapels. (3 Geo. IV. c. 72, s. 20; see *Craven* v. *Sanderson*, 7 *Ad. & Ell.* 880.)

58 Geo. 3, c. 45. District to remain liable to repairs of parish church for 20 years.

Parishes may, &c.

It shall be lawful for the commissioners, in any case in which any division of a parish previously divided under the acts should be again divided, and on which any church or chapel shall be built or acquired, and appropriated for the use of such new division, by any instrument under the seal of the commissioners, to declare that all liability to repair the church or chapel of the division from which such new division shall be made, shall cease from the period specified in such instrument; and after such period the new division shall be liable only to repair the church or chapel built therein, and to repair the church of the original parish for the then residue of the twenty years, under 58 Geo. III. c. 45, st. 71, s. 21.

59 Geo. 3, c. 134. Appointment by commissioners of select vestry for management of new churches.

Such vestry to appoint church or chapel wardens.

In every district, parish, or division of a parish, or district chapelry, in which any church or chapel shall be built, acquired, or appropriated under said act or this act, in which there shall not be a distinct vestry, a select vestry of so many persons as the commissioners shall direct shall be appointed by the commissioners, with the advice of the bishop, out of the substantial inhabitants, for the care and management of the church or chapel, and all matters relating thereto, and such select vestry shall annually elect the church or chapel warden on the part of the parish or chapelry, and shall elect new members of such vestry as vacancies shall arise by death, resignation, or ceasing to inhabit the parish, and proper pews shall be provided for the use of the church or chapel wardens. (59 Geo. III. c. 134, s. 30.)

A select vestry appointed pursuant to this provision of the act has no power to raise a rate for the repair of the district church. (*Cockburn* v. *Harvey*, 2 *B. & Adol.* 797.)

What a sufficient vestry meeting.

The commissioners for building and enlarging churches having, pursuant to the 58 Geo. III. c. 45, and 59 Geo. III. c. 134, s. 30, appointed twenty-six persons to be a select vestry for the care and management of a church and all matters relating thereto; it was held, that in order to constitute a good assembly of the select vestry so appointed, there must be present a majority of the number (viz. fourteen) named in the appointment; and therefore that a rate for the repair of the church, made at a meeting where there was not such a majority, was illegal, and that payment of such a rate could not be enforced in the Ecclesiastical Court. (*Blacket* v. *Blizard*, 9 *B & Cres.* 851.)

In cases of division of parish, vestrymen resident in district left to original parish church, to

Where any parish or place shall be divided into separate parishes for ecclesiastical purposes, or into separate districts or chapelries in which select vestries shall be appointed by the commissioners, all members of the select vestry of the original parish who shall reside in the district or division of the

7. *Church Rates.*

continue to act for ecclesiastical purposes.

Vestrymen to act only in division of their residence.

How deficiency of vestrymen to be supplied.

original church or chapel, shall continue to act as the vestry of such district or division in all matters relating to such church or chapel, and the repairs thereof, or to any other ecclesiastical matters or things, or in the distribution of any proportion of any bequest, gifts, or charities which may under this act be assigned to any such district or division: provided that no member of any select vestry shall, after such division, act in any manner relating to any church or chapel, or any other ecclesiastical matters or things, except such as relate to the division in which he shall reside; and if by reason of such division a sufficient number of such members of select vestry shall not remain resident in the division within which the original church or chapel shall be situate, according to the proportion fixed by the commissioners (regard being had to the population of such division, and its relative population to that of the whole parish or place), all such deficiencies shall be filled up as vacancies have before been filled up therein: provided that no person shall vote in supplying such deficiencies unless resident within the division for which the members are to be chosen; provided that the persons chosen shall not thereby be members of the vestry for any other purposes than such as relate to the division for which they shall be chosen, or for the distribution of any charitable gifts therein; provided that all the members of the select vestry of any such parish or place resident in any other divisions thereof shall be members of such vestries as shall be appointed under the acts for the divisions in which they shall reside. (3 Geo. IV. c. 72, s. 10.)

VIII. Church Dues.

Christening fee.

A christening fee is not due to a parson who does not christen a child, although he be the parson of the parish. (1 *Lee's Ec. Ca.* 341, 396.) The 6 & 7 Will. IV. c. 36, s. 49, the act for the registration of baptisms and burials, provides that nothing therein contained shall affect the officiating minister's right to receive the fees now usually paid for the performance or registration of baptism. (See "*Register*," Vol. V.)

Marriage fee.

A fee is not due to a parson who does not perform the ceremony of marriage, though the parties married be his parishioners. (*Id.* 397.)

Burial fee.

As to burial fees, see *ante*, 628, 629.

Easter offerings and tithes.

As to Easter offerings and tithes, see "*Easter Offerings*," Vol. II.; "*Tithes*," Vol. VI.

By the 1 & 2 Will. IV. c. 38, s. 14 (being one of the acts for the building of new churches), all fees, dues, offerings, and emoluments, as heretofore payable, &c., are to be payable, &c., in respect of the new churches.

IX. Profanation of, and Offences relative to Churches.

As to the offence of breaking into and stealing in churches, see "*Sacrilege*," Vol. V.

As to the burning of, see *ante*, "*Burning*."

As to riotously pulling down a church, see "*Riot*," Vol. V.

As to disturbing dissenting congregations, see "*Dissenters*," Vol. II.

As to not going to church, holding fairs, places of entertainment, travelling, taking and exercising ordinary callings, killing game, and serving process, &c., on a Sunday, and other profanations of that day, see "*Lord's Day*," Vol. III.

Herein of,—

1st. *Arresting Clergyman attending Divine Service.*
2dly. *Holding Fairs, Plays, &c., in.*
3rdly. *Quarrelling or Brawling, &c., in.*
4thly. *Assaults, &c., in.*

1. Arresting a Clergyman performing Divine Service or in going or returning.

Arresting clergyman.

By stat. 9 Geo. IV. c. 31, s. 23, "if any person shall arrest any clergyman

upon any civil process while he shall be performing divine service, or shall with the knowledge of such person be going to perform the same, or returning from the performance thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall suffer by fine or imprisonment, or by both, as the court shall award." 9. *Profanation of, &c.*

The act applies to week days as well as Sundays and holidays. (*Wats.* c. 34.) The arrest, though it may be punished, is still good in law, unless on a Sunday, so that if a rescous be made, and thereby any person shall be killed, the killing is murder. (*Wats.* c. 34.) In a modern case, however, the Court of Common Pleas discharged a clergyman arrested on his way to the altar, but refused to give him the costs of the application, it not appearing that the arrest was with the concurrence of the plaintiff or his attorney. (*Goddard* v. *Harris*, 7 *Bing.* 320; 5 *M. & P.* 122, S.C.)

2. Holding Fairs, Plays, &c. in.

Fairs used in former times to be kept in church-yards, and even in churches, till the indecency and scandal was so great as to want a reformation (*Burn's E. L.* 340); and accordingly, by 13 Edw. I. st. 2, c. 6, no fairs nor markets shall be kept in church-yards. Fairs in.

By canon 88, plays are not suffered in churches, chapels, or church-yards, nor feasts, &c., or any other profane purposes, nor musters. Plays, &c.

3. Quarrelling or Brawling, &c., in.

By stat. 5 & 6 Edw. VI. c. 4, s. 1, "if any person shall by words only quarrel, chide, or brawl in any church or church-yard, the ordinary (on proof of two witnesses) may suspend every layman, being an offender, *ab ingressu ecclesiæ*, and every clergyman from the ministration of his office so long as he shall think meet." Brawling in churches.

By the 27 Geo. III. c. 44, the suit must be brought within eight calendar months from the committing of the offence.

Brawling was not, it seems, made an offence by this statute, but was previously cognizable by the Spiritual Courts, which still have jurisdiction independently of the statute. (See *Exp. Williams*, 6 *D. & R.* 373; 4 *B. & Cres.* 313, S.C.; *Hutchins* v. *Denziloe*, 1 *Consist.* 181; *Taylor* v. *Thorley*, 1 *Curt.* 482.) The act was not intended to abridge the ecclesiastical jurisdiction. (See *Jenkins* v. *Barrett*, 1 *Hagg.* 15.)

The act extends to cathedral churches and their yards. (*Dethick's case*, 1 *Leon.* 248.)

The offence may be committed by expostulations and remonstrances uttered to a clergyman about to ascend the pulpit for the purpose of preaching. (*Clinton* v. *Hatchard*, 1 *Add.* 96.)

Provocation is no defence to a suit for brawling. (*Huet* v. *Dash*, 2 *Lee's Ec. Ca.* 514; *Jarman* v. *Bagster*, 3 *Hagg.* 356; *Jenkins* v. *Barrett*, 1 *Hagg. Rep.* 15; and see *Frances* v. *Ley*, *Cro. Jac.* 367; 1 *Hawk. P. C.* c. 63, s. 28.) But where irritating expressions were used by the promoter, the Court would not condemn the defendant in the whole costs. (*Williams* v. *Hall*, 1 *Curt.* 517.)

The Court will consider time and place in cases of chiding, quarrelling, and brawling; that may be "chiding" or "brawling" in the church, which would not be so in the vestry. The vestry is a place for parish business, and the Court would not interfere further than might be necessary for the preservation of due order and decorum. (1 *Hagg. Rep.* 184, 185.)

In a vestry meeting for civil purposes, as a full latitude of discussion must be allowed, mere coarse expressions do not constitute "brawling:" but on proof of an act of "smiting" the Court is bound, whatever may be the origin of the dispute, to proceed to award punishment under the statutes. (*Hoile* v. *Scales*, 2 *Hagg. R.* 566.)

Brawling and smiting at a vestry, attended only by five persons, and held in a room situate within the church-yard, are, *ratione loci*, offences within

9. *Profanation of, &c.*

the statute, though of a very slight ecclesiastical character. In such a case, where the promoter, a private individual, was proceeding vindictively, and had in the articles exaggerated the smiting, and suppressed his own brawling expressions, which provoked the smiting, the Court directed the matter to stand over for private arrangement; but that failing, on a subsequent day pronounced the brawling and smiting proved, decreed the defendant to be suspended *ab ingressu ecclesiæ* for a week for brawling, and to be imprisoned twenty-four hours for smiting, and ultimately condemned him in costs. (*Lee* v. *Matthews*, 3 *Hagg. R.* 169.)

Any person may institute the suit. (*Huet* v. *Dash*, 2 *Lee's Ec. Ca.* 514.)

The proof must not admit of a doubt. (*Scales* v. *Hoiles*, 3 *Hagg. R.* 371.)

The proceedings must be supported by two witnesses on the specific charge, or they will be dismissed. (*Hutchins* v. *Denziloe*, 1 *Hagg. R.* 181.)

The statute leaves nothing to the discretion of the judge but the duration of suspension *ab ingressu ecclesiæ*.

Six weeks is the common term of suspension for this offence. (*Huet* v. *Dash*, 2 *Lee's Ec. Ca.* 514.) Suspension of a parishioner *ab ingressu ecclesiæ* prescribed by the above act, 5 & 6 Edw. VI. was limited to a month only under certain circumstances; (*Clinton* v. *Hatchard*, 1 *Add. Rep.* 96;) and in another case, (*Canning* v. *Sawkins*, 2 *Phil. Rep.* 293,) for brawling in a church, it was limited to three weeks, with notification in the church of such suspension in the latter case, and costs in both. In *Cox* v. *Goodday*, 2 *Hagg.* 138, a clergyman was suspended for a fortnight for words spoken during divine service by way of admonition of a passionate tenor, though expressed without any tone of passion. And in *North* v. *Dickson*, 1 *Hagg. Rep.* 730, the defendant was suspended for a fortnight and condemned in costs. On proof of violent conduct and great personal abuse at a vestry, held in a room within the church, the Court suspended the defendant *ab ingressu ecclesiæ* for fourteen days, but under the circumstances condemned him only in 35*l.*, *nomine expensarum*. (*Jarman* v. *Wise*, 3 *Hagg. Rep.* 360.)

On debating the admissibility of articles in a suit for brawling, the question is whether they contain a substantive charge of brawling and riot in a sacred place: the Court cannot listen to a suggestion that the articles do not truly detail the circumstances. (*Jarman* v. *Bagster*, 3 *Hagg. Rep.* 356.)

This being a criminal proceeding, the office of the judge wrongly promoted, by misnomer of the judge in a copy of the articles for this offence, is fatal. (*Williams* v. *Bott*, 1 *Hagg. Rep.* 1.) And it seems the articles should be in his name as vicar general and official principal, for the vicarial jurisdiction of their offices seems in some degree concurrent. The omission, however, of the latter description is fatal. (*Thorpe* v. *Mansell*, 1 *Hagg. Rep.* 4.)

The particular words of *brawling* must be set forth in the articles. (*Jenkins* v. *Barrett*, 1 *Hagg. Rep.* 14.)

As to turning the offender out of the church, see *Williams* v. *Glennister*, 4 *D. & Ry.* 217; 2 *B. & Cres.* 699, S. C.; *Buston* v. *Henson*, 10 *M. & W.* 105; *ante*, 274.

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4. Assaults, &c. in.

Affrays in.

Affrays in a church or church-yard have been always looked upon as heinous offences. (See 1 *Hawk.* c. 63, s. 23, *ante*, "*Affray*.")

Assaulting clergymen.

Beating clerks in orders was punishable under the *Articuli Cleri*, 9 Edw. II. s. 1, c. 3, but so much of that act relating thereto is repealed by 9 Geo. IV. c. 31. The 5 & 6 Edw. VI. c. 4, s. 3, so far as the same relates to striking, or drawing any weapon with intent to strike, in churches, &c. is repealed by the 9 Geo. IV. c. 31, except so far as it is punishable under ecclesiastical censures.

Assaults, &c. in churches.

The enactment of 5 & 6 Edw. VI. c. 4, s. 2, which is still in force, is, "if any shall smite or lay any violent hands on another in any church or church-yard, he shall be deemed *ipso facto* excommunicate, and be excluded from the fellowship and company of Christ's congregation."

Lay any violent Hands.]—But churchwardens, or perhaps private persons, who whip boys for playing in the church, or pull off the hats of those who obstinately refuse to take them off themselves, or gently lay their hands on those who disturb the performance of any part of divine service, and turn them out of the church, are not within the meaning of the statute. (1 *Hawk.* c. 63, s. 29.) 9. *Profanation of, &c.*

A threatening posture is not a smiting within the act. (*Jenkins* v. *Barrett*, 1 *Hagg. Rep.* 15.)

It is no excuse for the striking that the defendant was first assaulted. 1 *Hawk. P. C.* c. 63, s. 28; *ante*, 659.)

Shall be deemed ipso facto excommunicate.]—And he shall not excuse himself by showing that the other assaulted him. (1 *Hawk.* c. 63, s. 28.)

Ipso facto]—Nevertheless in this and other like cases, there ought either to be a precedent conviction at law, which must be transmitted to the bishop; or else the excommunication must be declared in the Spiritual Court upon a proper proof of the offence there; for it is implied in every penal law that no one shall incur the penalty thereof till he be found guilty upon a lawful trial. (1 *Hawk.* c. 63, s. 27.)

As to excommunication, *vide* stat. 53 Geo. III. c. 127, s. 1, 2, 3, which abolishes excommunication in all cases except in definitive sentences, or interlocutory decrees having force of definitive sentences, and pronounced as spiritual censures for offences of ecclesiastical cognizance; and enacts that persons excommunicated shall in no case incur any civil penalty or disability; and see also 2 & 3 Will. IV. c. 93, an act for enforcing the process upon contempts in the ecclesiastical courts.

Churchwardens.

I. *Nature of Office, &c., and necessity for, and who may be elected*, 661.
II. *Who exempt from Serving it*, 662.
III. *Who to elect Churchwardens*, 663.
IV. *Time and Mode of Election*, 666.
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VI. *The Duties of, in general*, 670 *to* 673.
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IX. *Punishment, &c., of, for Misbehaviour, &c.* 675.
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XI. *Sidesmen, Vestry Clerks, &c.* 676.
XII. *Forms*, 677.

I. Nature of Office, &c., and necessity for, and who may be elected.

CHURCHWARDENS are the guardians or keepers of the church, and representatives of the body of the church. (1 *Bla. Com.* 394.) Nature of office.

How far they are overseers, *post*, 669, 670, and tit. "*Poor*," Vol. IV. pp. 10, 21.

Where a return to a *mandamus* stated an immemorial custom in the parish Custom to have no

1. *Nature of Office.*

churchwarden bad.

to have no churchwardens, and that the duties appertaining by law to the office of churchwardens had been from time out of mind discharged by the overseers of the poor, it was held that, inasmuch as overseers of the poor had not existed time out of mind, and as there were necessary duties appertaining to churchwardens, and there must have been some persons bound by law to discharge those duties, the custom set out in the return was bad. (*R.* v. *Wix*, 2 *B. & Adol.* 197.)

Duties in general.

Their duties were originally confined to the care of the ecclesiastical property of the parish, over which they exercised discretionary power for specific purposes. (1 *Hagg.* 173.)

They are to a certain degree the guardians of the moral character and public decency of their respective parishes. (*Griffiths* v. *Read*, 1 *Hagg. Rep.* 208; *St. Thomas's Hospital* v. *Treherne*, 1 *Phil. Ec. Ca.* 129.)

Number of, and who may be elected.

In general the number of churchwardens is two. (2 *Stra.* 1246.) And although it has been said that the parishioners may choose and trust whom they think fit, without limitation (*Morgan* v. *Archdeacon of Cardigan*, 1 *Salk.* 166), yet this doctrine must not be taken to be correct in its largest sense; for although it is the duty of the ordinary not to make slight objections, he is bound to take care that an election in his opinion void in itself should have no legal effect; and this is a duty which he owes to the parish and to the general law of the country. (*Anthony* v. *Seger*, 1 *Hagg. Old Series*, 10; *Steers' P. L.* 83.)

By custom there may be but one churchwarden. (See *R.* v. *Catesby*, 4 *D. & R.* 434; 2 *B. & Cres.* 817, S. C.; *Woodcock* v. *Gibson*, 4 *B. & C.* 463.)

If a parish return an alien, or a papist, or a Jew, or a child of ten years of age, or a person convicted of felony (none of whom are qualified for the office), "I conceive the ordinary would be bound to reject." (Per *Sir W. Scott*, 1 *Hagg.* 10.)

But poverty is no disqualification; and therefore, where to a *mandamus* to swear in a churchwarden, the return was that he was *pauper lactarius et servus minus habilis* (a poor dairyman and unqualified for the office), the Court held the return insufficient, and a peremptory *mandamus* issued; for it is at the peril of the parishioners who elect him, if he misconduct himself. The ecclesiastical judge cannot control the election. (1 *Salk.* 166; *R.* v. *Simpson*, 1 *Stra.* 609.)

As to non-residents, see *post*, 663.

Churchwardens a body corporate.

Churchwardens, when they have made the declaration required by the 5 & 6 Will. IV. c. 62, s. 9, *post*, 677, and sworn in, are so far incorporated by law as to sue for the goods of the church, and to bring an action of trespass for them; and also to purchase goods for the use of the parish. They may take money or goods by gift or legacy for the benefit of the church. (*Att.-Gen.* v. *Ruper*, 2 *P. Wms.* 125); but they are not a corporation in such sort as to purchase lands, or take by grant, except in London by custom; (*Gibs. Cod.* 241; 1 *Bla. Com.* 394; 2 *Saund.* 47 c.); or under the provisions of the 59 Geo. III. c. 12, *post*, 669 And where certain churchwardens and overseers contracted for themselves and their successors, churchwardens and overseers, and provided that nothing in the contract should be construed to extend to any personal covenant, or in anywise to affect them in their private capacity: it was held that, although the churchwardens and overseers might be a corporation, yet having no common seal of office, they could not bind their successors; that the contract therefore constituted a personal covenant, and that the proviso being repugnant to it, was void. (*Furnival* v. *Coombs*, 7 *Jur.* 399.)

Power of attorney by

Churchwardens and overseers, having no corporate seal, have no power to execute a power of attorney, authorizing a party to continue to receive the dividends of stock, notwithstanding fluctuations in the number and identity of the members of the corporation. (*Ex parte Annesley*, 2 *Y. & C.* 350.)

II. Who are Exempt from Serving it.

Peers, clergymen,

All peers of the realm, by reason of their dignity; so all clergymen, by

reason of their order; and also all parliament men, by reason of their privilege, are exempted from the office of churchwardens. (*Gibs.* 215.)

2. *Who exempt.*

A counsellor or attorney ought not to be chosen churchwarden; and if he be, he may have a prohibition by reason of his attendance on the courts at Westminster (2 *Rol. Abr.* 272; *Montgomery* v. *Bean*, 2 *Scho. & Lef.* 136; 9 *Ves.* 257; *Willes*, 426; *Bac. Ab. Prohibition*): or clerks in court. (1 *Rol. Rep.* 368.)

and members of parliament.

Counsellors or attorneys.

Apothecaries who have served seven years shall be exempted from the office of churchwarden. (6 & 7 Will. III. c. 4.)

Apothecaries and surgeons.

Freemen of the Corporation of Surgeons in London are exempted from being churchwardens. (18 Geo. II. c. 15.)

Dissenting teachers or preachers in holy orders, or pretended holy orders, being duly qualified, are exempted from the office of churchwardens. (1 Will. III. sess. 1, c. 18; 52 Geo. III. c. 155, s. 9.)

Dissenting ministers.

Other dissenters, and Roman Catholics, scrupling to take upon them the office, may execute the same by a sufficient deputy, to be approved of in like manner as other churchwardens. (1 Will. III. sess. 1, c. 18; 31 Geo. III. c. 32, s. 7; 52 Geo. III. c. 155.)

Other dissenters to execute by deputy.

A Quaker would not be compelled to undertake the office. (*Adey* v. *Theobald*, 1 *Curt.* 447.)

Quakers.

Every Roman Catholic minister on taking the oath, and conforming to the regulations therein specified, shall be exempted from the office of churchwarden. (31 Geo. III. c. 32, s. 8.)

Roman Catholic ministers.

By the 10 & 11 Will. III. c. 23, s. 2, all persons who prosecuted felons to conviction were exempted from the office of churchwardens in the parish where the offence was committed But the 7 Geo. IV. c. 64, having repealed this provision of the statute of William, this is no longer an exemption.

Persons having convicted a felon not exempt.

No serjeant, corporal, or drummer of the militia, nor any private man, from the time of his enrolment until his discharge, shall be liable to serve as a peace or parish officer. (42 Geo. III. c. 90, s. 174)

Militia.

By stat. 7 & 8 Geo. IV. c. 58, s. 11, and 3 & 4 Will. IV. c. 51, s. 12, no commissioner or officer of, or person employed by, the excise or customs, shall be compelled to serve in any parochial office.

Excise and custom officers.

No persons living out of the parish can be chosen churchwarden, although they occupy lands within it. (*Gibs.* 215; 1 *Hagg.* 10; 18 Geo. II c. 15; 6 & 7 Will. III. c. 4.)

Non-residents.

But persons, although not personally resident in a parish, if partners of a house of trade situate within it, are not exempted from serving the office. (*Stevenson* v. *Langston*, 1 *Hagg. Rep.* 379; see *Brook* v. *Owen*, 3 *Phil. Ec. Ca.* 517, *n.*; *R.* v. *Poynder*, 1 *B. & Cres.* 178; 2 *D. & R.* 258, S. C.; *R.* v. *Hall*, 1 *B. & Cres.* 123; 2 *D. & R.* 241, S. C.; *R.* v. *Pinney*, 2 *B. & Cres.* 322; 3 *D. & R.* 578, S. C.; title "*Poor*," Vol. IV.)

If any one having privilege be chosen, a writ may go to the Ecclesiastical Court, though he be not sworn. (*Palm.* 392.)

Mode of taking advantage of privilege.

III. Who to elect Churchwardens.

Churchwardens are sometimes appointed by the minister, and sometimes by the parishioners, sometimes by both together, or by a select vestry or a particular number of parishioners (*Hard.* 379; 1 *Mod.* 181), according as the custom of the place directs. (1 *Bla. Com.* 394; 2 *Atk.* 650; *Hubbard* v. *Penrice*, 2 *Stra.* 1246; 1 *Ventr.* 167; 2 *Roll.* 234, l. 15; *Cro. Jac.* 532.) Where it was the custom for the old churchwardens to choose one of the new, and they could not agree, the custom is avoided by this disagreement, and the election must be according to the canon. (*Catten* v. *Barwick*, *Stra.* 145.)

Who to elect.

In most of the parishes in London the parishioners choose both churchwardens by custom; yet in all the new erected parishes, under 9 Anne, c. 22, the *canon* shall take place (unless the particular act in virtue of which any church was erected shall have specially provided that the parishioners shall

3. *Who to elect.* choose both), inasmuch as no *custom* can be pleaded in such new parishes. (*Gibs.* 215; *Co. Litt.* 113.)

Where there is no such custom, the election must then be according to the directions of the canons of the church; and canons 89, 90, direct, that all churchwardens or questmen in every parish shall be chosen by the joint consent of the minister and parishioners, if it may be; but if they cannot agree upon such choice, then the minister is to choose one and the parishioners another, and without such joint or several choice none shall take upon themselves to be churchwardens. (*Gibs.* 241; *Catten* v. *Barwick*, 1 *Stra.* 145; *Hubbard* v. *Penrice*, 2 *Stra.* 1246; *sed vide Bac. Abr. Churchwardens*, A.)

In some cases the lord of the manor prescribeth for the appointment of churchwardens. (*God.* 158; 2 *Inst.* 653; 1 *H. Bla.* 28.)

A curate is included under the word parson. (*Hubbard* v. *Penrice*, 2 *Stra.* 1246.)

If the parson or vicar, who has by custom a right to choose one churchwarden, be under sentence of deprivation, the right of choosing both churchwardens results to the parishioners. (*Carth.* 118.)

The parson cannot intermeddle in the choice of that churchwarden which it is the right of the parishioners by custom to elect. (*Stoughton* v. *Reynolds*, 2 *Stra.* 1045.)

Nor can the archdeacon, or any others who by virtue of their offices are to receive the declarations of and admit churchwardens, control the election; such offices are purely ministerial. (*Bac. Abr. Churchwardens*, A.) The spiritual court cannot generally control or examine into the election. (*Morgan* v. *Archdeacon of Cardigan*, 1 *Salk.* 166; 1 *Ld. Raym.* 138, S. C.; *post*, 667.)

Nor can the patron, unless it can be shown that the parishioners have no right to elect churchwardens, and that the churchwardens of the particular parish are exempt from the jurisdiction of the ordinary. (*The Governors of St. Thomas's Hospital*, 1 *Lee's Ec. Ca.* 126.)

Although the parishioners neglect ever so long to choose churchwardens, yet the ordinary hath no power of appointing them. (*Stutter* v. *Freston*, 1 *Stra.* 52.)

Choice by select vestry, &c.

By custom churchwardens may be chosen by a select vestry, or by a particular number of the parishioners. (See *Evelin's case*, *Jones*, 439; *Cro. Car.* 551, S. C.; *Hard.* 378; 1 *Mod.* 181; *Com. Dig. Eglise*, F. 1, and see *Golding* v. *Fenn*, 7 *B. & Cres.* 765.)

Appointment, &c. of, under acts for building new churches.

By 58 Geo. III. c. 45, s. 73, intituled "*An Act for Building and promoting the Building of additional Churches in populous Parishes*," it is enacted, "that two fit and proper persons shall be appointed to act as churchwardens for every church or chapel built or appropriated under the provisions of this act, at the usual period of appointing parish officers in every year, and shall be chosen, one by the incumbent of the church or chapel for the time being, and the other by the inhabitant householders entitled to vote in the election of churchwardens residing in the district to which the church or chapel shall belong, and of any extra-parochial place by such inhabitant householders as would be entitled to vote in the election of churchwardens if such extra-parochial place had been a parish; and the two persons, when so elected churchwardens, shall appear and be admitted and sworn according to law, and shall collect and receive the rents of the seats and pews, and pay the stipends or salaries appointed by the commissioners to be paid to the minister and clerk of and belonging to the church or chapel for the time being, and also shall do, perform, and execute all lawful acts, matters, and things necessary and requisite for and concerning the repairs, management, good order, and decency of behaviour to be kept and observed in the church or chapel by the congregation thereof; and the persons so to be appointed or chosen churchwardens shall continue in their said office until others shall be chosen in like manner in their stead; and all the persons so chosen churchwardens are hereby authorized and empowered, in case of non-payment of the rents of the seats and pews of the church or chapel for which they shall be appointed, to enter upon and sell the same, or else to sue for and recover the same by action or actions, for such rents, in the names of 'the churchwardens of the

church or chapel of [describing the same],' as the case shall or may require, without specifying the christian or surnames of such churchwardens; and no such action shall abate by reason of the death or removal or going out of office of any such churchwarden."

3. *Who to elect.*

By sect. 74 the churchwardens of every parish in which any additional chapel shall be built or provided under any of the provisions of this act, without making any division thereof into separate parishes or district parishes, shall be and are hereby authorised and required to execute and do all such things as the churchwardens to be appointed under the provisions of this act are authorised and required to do.

Churchwardens to act in parishes where additional chapels shall be built.

Although by stat. 59 Geo. III. c. 134, s. 30, "In every district, parish, or division of any parish or district, chapelry or consolidated chapelry, in which any church or chapel shall be built, acquired or appropriated under the provisions of the said recited act or this act, in which there shall not be a distinct vestry belonging to such district or division, a select vestry, consisting of so many persons as shall be directed by the commissioners in that behalf, shall be appointed by the commissioners, with the advice of the bishop of the diocese, out of the substantial inhabitants of the district or division, or district chapelry or consolidated chapelry, for the care and management of the concerns of the church or chapel, and all matters and things relating thereto; and such select vestry shall annually elect or appoint the churchwarden or chapelwarden to be named on the part of the parish or chapelry, and shall elect new members of such vestry, as vacancies may arise by death, resignation, or ceasing to inhabit the parish; and proper pews shall be assigned and provided in every such church and chapel for the use of the church or chapelwardens thereof"

Appointment by commissioners of select vestry for management of new churches.

Such vestry to appoint church or chapel wardens.

The 1 & 2 Will. IV. c. 38, s. 16, enacts, that two fit persons are to be appointed as churchwardens for every church or chapel built or appropriated under the provisions of that act, one by the incumbent and the other by the renters of pews, and these duties are specified by the act.

Appointment of churchwardens under stat. 1 & 2 Will. 4, c. 38.

And in cases of new parishes formed according to sect. 23 of the above statute, the appointment of churchwardens for such parishes must be in the mode pointed out in sect. 25.

The like for new parishes formed under that act.

At an election of churchwardens in open vestry, a poll of the parishioners was demanded, under Sturges Bourne's Act, 58 Geo. III. c. 69:—It was held, that this was a legal demand, and meant a poll of such parishioners as were entitled to vote, and not of all the parishioners. Upon the poll being demanded, it was resolved that it should be confined to the persons who were present at the show of hands which had already been made, and not to be extended to the other parishioners who were entitled to vote; but it was held, that this, though illegal, could only render the election void, in case persons entitled to vote were prevented from voting; and that not being shown, the election with locked doors was held a valid election, though if any had been excluded the Court would not have considered their probable number with reference to the effect which their votes might have had on the result of the election. (*Reg.* v. *St. Mary's, Lambeth*, 8 *Ad. & Ell.* 356.)

One of two candidates for the office of churchwarden was elected at a vestry and subscribed the declaration of office, but the election was alleged to have been so improperly conducted that the proceedings were void. To give the parties impugning the election an opportunity of trying its validity, the Court (considering a *primâ facie* case to be presented) granted a *mandamus* calling on the rector and churchwardens to convene a vestry for electing a churchwarden for the remainder of the year. At an election in vestry where the right of voting is regulated by the 58 Geo. III. c. 69, s. 3, it is no objection to the proceedings that the chairman directed a poll without first taking a show of hands, although a show of hands was demanded, and the poll was not demanded, but was objected to. (*Rex* v. *The Rector and Churchwardens of Birmingham*, 7 *Ad. & Ell.* 254.)

See also similar enactments in the stat. 1 & 2 Will. IV. c. 38, s. 16, respecting the appointment of churchwardens for churches or chapels built by pri-

3. *Who to elect.* vate individuals under the provisions of that act, but the election is to be by the incumbent and the pew renters.

IV. Time and Mode of Election, and Duration of Office.

Time of election. They are to be chosen every Easter week. (*Can.* 90.)

Returning officer. The churchwardens whose office is about to expire are properly the returning officers at the election of their successors. (*Anthony* v. *Seger*, 1 *Hagg. Old Series*, 9.)

Mode of summoning meeting. As to the mode of summoning the meeting and mode of proceeding at vestries in general, see *ante*, 638, and "*Vestries*," Vol. VI.

The election. In the election of churchwardens by the parishioners, the majority of those who meet at the vestry, upon a written notice given for that purpose, will bind the parish. (*St. Saviour's, Southwark, case, Lane's Rep.* 21.)

The election is by show of hands or by poll. (See *Faulkner* v. *Elger*, 4 *B. & Cres.* 449; 6 *D. & R.* 517, S. C.) And the fact of the election having been always by show of hands, is no evidence to exclude the granting of a poll when properly demanded. (*Campbell* v. *Maund*, 5 *Ad. & Ell.* 865.)

If after a show of hands a poll is demanded, it destroys the previous voting by a show of hands, and every thing anterior is not of the substance of the election, nor to be so received; and consequently where one of three candidates had many hands held up in his favour but afterwards did not poll any votes, he could not be taken as elected, upon one of the persons returned being afterwards found ineligible. (*Anthony* v. *Seger*, 1 *Hagg. Old Series*, 9.)

Every rated inhabitant, whether previously present at the vestry or not, has a right to come in and vote; and the closing of the vestry doors during the poll, so as to exclude voters, is illegal. (*Reg.* v. *St. Mary's, Lambeth*, 3 *N. & P.* 416; 8 *Ad. & Ell.* 356, S. C.)

If there be a custom to conclude a poll for the election of churchwardens at a certain time, that being a reasonable time, the voters must tender their votes within it. (*R.* v. *Commissary of the Bishop of Winchester*, 7 *East*, 573.)

The right of adjourning the poll or business in progress at a meeting is vested in the voters, and not in the chairman, unless perhaps there be a custom to the contrary. (See *Stoughton* v. *Reynolds*, 2 *Stra.* 1045; *R.* v. *Archdeacon of Chester*, 3 *Nev. & Man.* 413; 1 *Ad. & Ell.* 342, S. C.)

Where a meeting for the election of churchwardens takes place in the parish church, and that in case a poll should be demanded the meeting would be immediately adjourned to the town hall, the chairman may, upon a poll being demanded, adjourn the meeting to the town hall, although a majority of the voters present object to such adjournment. (*R.* v. *Archdeacon of Chester*, *supra.*)

An attempt to disturb the election may be punishable in the Ecclesiastical Court, see *ante*, 659.

Declaration to be taken after election. After the election of the churchwardens they had formerly, before the 5 & 6 Will. IV. c. 62, to take an oath to execute the office truly and faithfully; (see *Gibs.* 243; *Ward*, 364;) and they should not have executed their office till they were sworn. (*Gibs.* 243; *Shaw's P. L.* 70.) But they might execute it: and the fact of their not having taken the oath did not invalidate their acts. (*Anon.* 1 *Ventr.* 267; *R.* v. *Corfe Mullen*, 1 *B. & Adol.* 219.) This oath was administered by the archdeacon or ordinary of the diocese, and if he refused, a *mandamus* would lie to compel him. (*Com. Dig. Mandamus*, (A.); *Bac. Abr. Churchwardens*, (A).) No fee could be demanded for swearing the churchwardens or taking their presentments. (*Goslin* v. *Ellison*, 1 *Salk.* 330.) By the 5 & 6 Will. IV. c. 62, s. 9, a declaration is substituted for an oath; (see title "*Oaths*," Vol. V. p. 261;) but the obligation of the churchwardens to make and liability for not making such declaration is the same as it was with respect to the taking the oath before that act.

Refusing to take office. A churchwarden duly elected may be directed by the Spiritual Court to take the declaration of office before the proper ordinary or officer; (*Cooper* v. *Allnut*, 3 *Phil. Rep.* 166;) and if he refuse to take his office and declaration

he may be excommunicated for the refusal, and no prohibition will lie. (*Gibs.* 216, 243, 961; *Rogers* v. *Davenant*, 1 *Mod.* 194.)

4. *Time of Election.*

Where person first elected pays a fine and is excused.

Where the person first elected churchwarden had on payment of a fine been excused, a person elected in his place at the same vestry meeting is bound to serve unless some exemption be shown. (*Birnie* v. *Weller*, 3 *Hagg.* 474.)

Double return.

Should there be a contest as to the right of making the election, and two sets of churchwardens are chosen, the ordinary or other officer is, it seems, bound to swear them all; and a *mandamus* lies to compel him to do so, in order that both parties may be capable to try the right. (See *Williams* v. *Vaughan*, 1 *Bla. Rep.* 28; 2 *Roll. Abr.* 287; *R.* v. *Harris*, 3 *Burr.* 1420.)

Mandamus to elect.

If the persons who ought to choose churchwardens neglect to do so, the Ecclesiastical Court has no jurisdiction to interfere; but those who ought to elect may be compelled to do so by *mandamus*. (*R.* v. *Wix*, 2 *B. & Adol.* 197; *Stutter* v. *Preston*, *Stra.* 52; *R.* v. *Churchwardens of Birmingham*, 7 *Ad. & Ell.* 254, *ante*, 665.)

Mandamus to admit and swear in.

The Court, in a case before the above stat. of 5 & 6 Will. IV. granted a rule absolute in the first instance for a *mandamus* to the archdeacon to swear in a party as churchwarden on an affidavit of due election, demand and refusal, and of notice to the archdeacon of the application to the Court, the ground of refusal not appearing by the affidavit in support of the rule. (*Exp. Winfield*, 3 *Adol. & Ell.* 614.)

And in another case the Court granted a *mandamus* by rule absolute in the first instance to compel the official to administer the oath or declaration to a party claiming to have been elected as chapel warden of a chapel (under a local act conferring upon the officer elected the power of a churchwarden for the purposes of the chapel), though other parties claim to have been elected. (*Exp. Duffield*, 3 *Adol. & Ell.* 617.)

Also in another case a rule *nisi* having been obtained for a *mandamus* to an archdeacon and surrogate to swear in certain persons as churchwardens and sidesman of a parish, it appeared by affidavit that the parties were colourably elected, but that the validity of the election was disputed, that there was an usage in the archdeaconry to swear in the parties elected on a certain day subsequent to the election appointed annually by the archdeacon, and that the surrogate being applied to immediately after the election to swear in the parties, had said that they must wait till the day appointed, but that he would not disobey a *mandamus* from this Court: Held, that this was a refusal, and that the usage, if a good one, should be returned to the *mandamus*, and the Court made the rule absolute without entering into the question of the validity of the election. (*R.* v. *Archdeacon of Middlesex*, 3 *Adol. & Ell.* 615; and see *Exp. Lowe*, 1 *Dowl. P. C.* 15.)

In the case of *R.* v. *Williams*, 3 *Man. & R.* 402; 8 *B. & Cres.* 681, S. C.; to a *mandamus* to admit A. B. into the office of churchwarden, reciting that he had been duly elected, a return that A. B. *was not duly elected* was held good. (See also *Anthony* v. *Lege*, 1 *Hagg.* 10.)

Validity of election, &c. how tried.

The courts of common law are the proper ones for deciding the validity of the custom of choosing churchwardens, like of all other customs of the realm, and not the spiritual courts. (*Evelin's case*, *Cro. Car.* 552; *Bac. Abr. Churchwardens*, (A.); 1 *Salk.* 160.) So also the common law is to determine the legality of the votes given on the election. (*R.* v. *Dr. Harris*, *Burr.* 1420.) When two churchwardens are sworn in, the right is to be settled in an action. (*Williams* v. *Vaughan*, 1 *Bla. Rep.* 38.) But the customary right to elect churchwardens as well as the fact of election has been frequently tried on a feigned issue. (*Golding* v. *Fenn*, 7 *B. & C.* 765.)

The Spiritual Court, however, may become the means of trying the validity of the election by a return of "not elected," "not duly elected," or any other return that answers the writ and affords an opportunity of trying the right in an action for a false return. (*R.* v. *Rice*, 1 *Ld. Raym.* 138; 3 *Salk.* 90, S. C.; *R.* v. *Simpson*, 1 *Stra.* 609; 2 *Ld. Raym.* 1379, S. C.; *R.* v. *Harwood*, *id.* 1405; *R.* v. *Mayor, &c. of Ripon*, 2 *Salk.* 433; 1 *Ld. Raym.* 563, S. C.; *R.* v. *Churchwardens of Taunton St. James*, *Cowp.* 413.)

4. *Time of Election.*

A *quo warranto* will not be granted, as the office does not concern the rights or prerogatives of the crown. (*R.* v. *Daubeney*, 2 *Stra.* 1196; *R.* v. *Shepherd*, 4 *T. R.* 381.)

Duration of office.

With respect to the time they are to continue in office, by canon 89 they are not to continue longer than one year except they be chosen again, but by canon 188, the office of churchwardens is to continue till the new churchwardens be sworn. (*Nolan's P. L.* 4th ed. 44.)

It seems that they may be removed for misconduct by those who appointed them, and others chosen in their stead, before the expiration of the year. (1 *Blu. Com.* 394; *Com. Dig. Eglise*, 1.)

Acts of, admitted and sworn in, though not duly elected, valid.

Where parties are unduly elected churchwardens, but are admitted, and sworn in, and act, they may convene a vestry for laying a church-rate; and a rate laid at such a vestry is valid. (*Reg.* v. *St. Clement's* (*Inhabs.*), 12 *Ad. & E.* 177.)

V. Their Interest and Power over things of the Church, &c. Contracts and Actions by.

Interest and power of churchwardens over things of the church, and contracts by.

The churchwardens, when chosen, are a corporation entrusted with the care and management of the *goods* belonging to the church, which they are to order for the best advantage of the parishioners; they are likewise enabled to take goods for the benefit of the church, but cannot dispose of them without the consent of the parishioners. (*Bac. Abr. Churchwardens*, (B.))

But churchwardens have nothing but to the use of the parish, and the corporation consists of both, and one only cannot release or give away the goods of the church; (*Starkey* v. *Berton*, *Cro. Jac.* 234; *Yelv.* 173, S. C.;) nor can both churchwardens without the consent of the parishioners. (1 *Roll. Abr.* 393; 1 *Ventr.* 189.) Such consent should be given in vestry, and the license of the ordinary, it is said, is necessary. (*Prid. Direct.* 78.) They have not officially the custody of the title-deeds of the advowson, though kept in a chest in the church, as they are not the goods of the church. (*Gardiner* v. *Parker*, 4 *T. R.* 351.)

Although, however, the goods belong to the parishioners, the churchwardens are the corporation in whom they are vested, and, consequently, if they improperly dispose of them, the parishioners cannot sue thereupon either to recover them or otherwise, but they must wait till new churchwardens are chosen, who have a right to call their predecessors to account before the ordinary, and commence suit against them for any damage done to the parish by their violation of the trust reposed in them. (*Prid. Direct.* 78.)

In the case of *Jackson* v. *Adams*, (2 *Bing. N. C.* 402,) it was held, that the property of the bell ropes of a parish church was in the churchwardens, and consequently that it was not actionable to say of a churchwarden that he stole the bell ropes of his own parish.

Contracts by.

It has been laid down as a general rule, that an agreement by parish officers in the course of their official duties, which is beneficial to the parish, is binding on it and succeeding churchwardens. (See 2 *P. Wms.* 266; 1 *Powell on Contr.* 114; 1 *Com. Contr.* 396)

It has been held a party cannot recover against several overseers of a parish for money lent to one of them in his capacity of overseer, unless the rest have expressly promised repayment. (3 *Stark. Rep.* 65.)

A churchwarden has no authority to pledge the credit of his co-churchwardens for the repairs of the church. If he orders such repairs without the knowledge of the other churchwarden, he is liable individually. (*Northwaite* v. *Bennett*, 2 *C. & M.* 316; see *Furnival* v. *Coombs*, *ante*, 662.)

Freehold.

Churchwardens have no right to or interest in the *freehold* and inheritance of the church, which belongs solely to the parson or incumbent. (*Bac. Abr. Churchwardens*, (B.))

Burial fee.

Therefore they cannot grant a license for burying in the church. (*Frances* v. *Ley*, *Cro. Jac.* 366.) Though by custom they may have a fee for burying in the church itself. (*Anon. Ventr.* 271; *Andrews* v. *Simons*, 3 *Keb.* 504.)

We have already seen what power and interest the churchwardens have with respect to the *seats* in the church, (*ante*, pp. 631, 632.) If any of them be taken or injured, the churchwardens may sue. (*Bac. Abr. Churchwardens*, (B.))

5. *Their Interest, &c.*

Seats in church.

Churchwardens themselves or any others cannot take down arms in windows, or deface gravestones or monuments erected in the church or churchyard, and if they do, an action lies by the heirs or executors of the parties for whom they were erected. (*Roll. Abr.* 625; and see *ante*, p. 635.)

Ornaments, &c.

A custom for the churchwardens of a parish to set up monuments, &c. in a church, without the consent of the rector or ordinary, is illegal. (*Beckwith* v. *Harding*, 1 *B. & Ald.* 508.)

Purchasing land, leases by, &c.

Churchwardens cannot, in general, purchase land for the use of the church or parish, except in London by custom. (*Jones*, 439; *Gibs.* 215; *Mar.* 22, 67.) If land be given to the parish for the use of the church, it must not be to the churchwardens and their successors, but it should be to feoffees in trust to the use intended, which must from time to time be renewed as the trustees die away. (*Gibs.* 215.) As to whether churchwardens and overseers have power to mortgage lands devised to the parish for the repair of the church, to reimburse the rector the sums expended by him in such repairs at the request of the inhabitants, see *Wrench* v. *Lord*, 4 *Scott*, 381.

By the 59 Geo. III. c. 12, s. 9 to 17, various powers are given to churchwardens and overseers to purchase and sue for, &c. lands for the use of the poor, with the consent of the inhabitants. (See "*Poor*," Vol. IV.; 5 *B. & Cres.* 433; 2 *D. & R.* 708, S. C.; *Doe* d. *Jackson* v. *Hiley*, 10 *B. & Cres.* 885.) And the 5 & 6 Will. IV. c. 69, does not transfer the legal estate in parish property thus vested in the churchwardens and overseers to the guardians. (*Doe* v. *Webster*, 12 *Ad. & Ell.* 442.) It was held, that in order to constitute the body intended by the act of Geo. III. there must be two overseers, and a churchwarden or churchwardens, and that where there were two overseers appointed, one of whom was afterwards appointed by custom sole churchwarden, the act did not vest the parish property in them. (*Woodcock* v. *Gibson*, 4 *B. & Cres.* 462; 6 *D. & R.* 524.)

The churchwardens and overseers are not, by this act, made a complete body corporate, but are only empowered "*to* accept, take and hold in the nature of a body corporate;" and therefore it is not necessary that the acceptance of a demise of lands by them should be an instrument under a common seal; (*Smith* v. *Adkins*, 8 *M. & W.* 236;) and it is competent for any one of the churchwardens or overseers, without the consent of the majority, to authorise a distress for rent in arrear. (*Gouldsworth* v. *Knights*, 12 *Law J. Rep.* (*N. S.*), *Exch.* 282; 11 *M & Wels.* 337, S. C.)

By the 1 & 2 Will. IV. c. 59, churchwardens, with the consent of the treasury, may enclose crown lands not exceeding 50 acres, but persons renting such lands are not to gain a settlement.

They cannot make a lease of lands given to feoffees for the use of the parishioners; (12 Hen. VII. 29 a; 13 Hen. VII 10 a;) nor maintain trespass or other action for entry upon, or taking the profits of such land. (12 Hen. VII. 29 a.)

Before the 59 Geo. III. c. 12, leases by the churchwardens of parish property passed no legal interest, and the churchwardens and overseers may, after the statute, treat such lessees as tenants from year to year only, and recover the premises on giving notice to quit. (*Doe* v. *Terry*, 4 *Ad. & Ell.* 271; *Doe* v. *Cockell*, 4 *Ad. & Ell.* 478; *Gouldsworth* v. *Knights*, *Law J. Rep.* (*N. S.*), *Exch.* 282.) Since the statute, a lease of parish land granted by the *churchwardens alone* is invalid. (*Phillips* v. *Pearce*, 5 *B. & Cres.* 483; 8 *D. & Ry.* 43, S. C.)

Churchwardens, where additional chapel built.

Churchwardens of every parish in which any additional chapel shall be built or provided under the act, without making any division thereof into separate parishes or district parishes, shall do all such things as churchwardens to be appointed under the act are authorised and required to do. (58 Geo. III. c. 45, s. 74; and see 1 & 2 Will. IV. c. 38, s. 25.)

Actions by.

The churchwardens have such a special property in the organ, bells, parish books, bible, chalice, surplice, &c. and other *goods* belonging to the church,

5. *Their Interest, &c. in things of Church, &c.*

that for the taking away, or for any damage done any of these, they may bring an action at law, laying the damage to them or the parishioners; (*Wats.* c. 29;) and therefore the parson cannot sue for them in the spiritual court. (*Bac. Abr. Churchwardens*, (B.)) So they may indict the offender. (*Id.*)

They cannot sue at law for a legacy, or a thing never in their possession. (*Com. Dig. Eglise*, (F. 3.))

They may bring their action against their predecessors for money remaining in their hands; and they are not bound to make all the present or the late churchwardens plaintiffs or defendants. (*Astle* v. *Thomas*, 2 *B. & Cres.* 271; 3 *D. & Ry.* 492, S. C.; *Turner* v. *Baynes*, 2 *H. Bla.* 559.)

They cannot bring actions as such after the expiration of their office; (*Stra.* 852; *Bac. Abr.* tit. *Churchwardens;*) but their successors must do it; (*Wats.* c. 39 (*u*);) and if any of the goods of the church be detained or not delivered by the predecessors, the successors may bring an action against him also, laying the damage to the parishioners; (*Gibs.* 216;) but if the action be commenced within the year, they may proceed in it after the year. (*Id. F. N. B.* 91 k; 2 *P. Wms.* 126; *Dent* v. *Prudence*, 2 *Stra.* 852.)

A suit in the Court of Chancery by the churchwardens of a parish, to restrain a person from pulling down the churchyard wall, is maintainable; and the churchwardens, notwithstanding their office has ceased, may file a supplemental bill for the purpose of stating facts occurred since the filing of the original bill, and may join their successors as co-plaintiffs with them in the supplemental suit. (*Marriott* v. *Turpley*, 9 *Sim.* 279.)

When an obligation is made to churchwardens and their successors, and they die, their executors shall bring the action, and not their successors. (*Vin. Abr. Churchwardens*, (D.))

The 58 Geo. III. c. 45, s. 73, and 1 & 2 Will. IV. c. 38, s. 26, relating to the building of additional churches, empowers churchwardens to sue for and recover pew rents.

In actions brought under the 59 Geo. III. c.12, s .9, the churchwardens and overseers should sue in their own names, describing themselves as churchwardens and overseers of the parish for which they act. (*Doe* v. *Roe*, 1 *T. & G.* 1084.) All actions must be brought in the joint names, and a release or discharge improperly given by one is void. One cannot act for the rest except in presentments, for he may know of an offence of which the others are ignorant. If the damage for which the action is brought were done in their own time they may lay the damage either *in damnum parochianorum* or *in damnum ipsorum*, but if in the time of their predecessors then it should be *in damnum parochianorum*. (*Hadman* v. *Ringwood*, *Cro. Eliz.* 179; *Att.-Gen.* v. *Ruper*, 2 *P. Wms.* 125; 6 *Bac. Abr.* 565.)

VI. Duties of, in general.

Repairs. Rates. Pews. Poor.

We have already noticed several important duties of churchwardens relating to the repair of churches, the assessing and collecting of church rates, and the disposition of pews, &c.

By 43 Eliz. c. 2, s. 1, every churchwarden is an overseer of the poor, though every overseer of the poor is not a churchwarden. The duties and liabilities of churchwardens as such overseers will be found fully considered, *post*, "*Poor*," Vol. IV. under 59 Geo. III. c. 12, s. 17, 18. (*Phillips* v. *Pearce*, 5 *B. & Cres.* 433; 8 *D. & R.* 43, S. C.; *Woodcock* v. *Gibson*, 4 *B. & Cres.* 462; 6 *D. & R.* 524, S. C.)

The 55 Geo. III. c. 137, s. 6, prohibits churchwardens, overseers, and persons having the management of the poor, from being concerned in contracts, &c. for the supplying for their own profit, goods, &c. for the use of the poor or workhouse, &c. under the heavy penalty of 100*l.* unless a certificate of two justices be obtained, &c. (See "*Poor*," Vol. IV.)

As to contracts by the churchwardens and overseers for lodging or employing of the poor, see 45 Geo. III. c. 54, s. 1, 2, "*Poor*," Vol. IV.

By 9 Geo. III. c. 37, churchwardens for paying the poor otherwise than in lawful money are to forfeit to the poor not less than 10*s.* nor more than 20*s.* (See *post*, "*Coin.*")

6. *Duties of, in general.*

As constables are in civil affairs, so the churchwardens are the officers of a parish in ecclesiastical matters. In modern times, however, they are relieved from many of their somewhat invidious duties, viz. enforcing attendance upon services of religion, presenting absentees from the church to ecclesiastical censures, and excluding the excommunicated from entering the sacred edifice. They are, however, bound to keep due decorum in the time of divine service, they may exercise a reasonable discretion in directing where the congregation shall sit, and may remove a person from one seat to another, provided no unnecessary force be used, and the removal can be effected without public scandal or the disturbance of divine service. (*Reynolds* v. *Monkton*, 2 *Moo. & R.* 384; and see *Burton* v. *Henson*, 10 *M. & W.* 105.)

Are ecclesiastical officers, duties of, as such.

Churchwardens are required by the canons to see that curates are duly licensed by the bishop; and that strangers, unless duly qualified, shall not preach in the church. They are also to present the minister for non-residence, or for irregular and incontinent living, or any other excess or irregularity calculated to bring disgrace upon their sacred office. (*Steers' P. L.* 90; see *Bennett* v. *Bonaker*, 2 *Hagg.* 25.)

Duty respecting curates and ministers.

If a minister introduces any irregularity into the service, the churchwardens have no authority to interfere; but they may and ought to repress all indecent interruption of the service by others, and they desert their duty if they do not. And if a case could be imagined in which even a preacher himself were guilty of any act grossly offensive, either from natural infirmity or from disorderly habits, it seems that the churchwardens, and even private persons, may interfere to preserve the decorum of public worship; but that is a case of instant and overbearing necessity that supersedes all ordinary rules. In cases which fall short of such a singular pressure, and can await the remedy of a proper legal complaint, and a private and decent application to the minister himself fails in preventing repetition of the irregularity, the churchwardens may complain to the ordinary. (*Hutchins* v. *Denziloe*, 1 *Hagg.* 174; *Burton* v. *Henson*, 10 *M. & W.* 106.)

Churchwardens have the care of a benefice during its vacancy. Having first taken out a sequestration from the spiritual court, they are to manage all the profits and expenses of the benefice for him that shall next succeed; plough and sow his glebe; take in the crop; collect tithes; thrash out and sell corn; repair houses and fences, and the like. And they shall take care that during the vacancy the church shall be duly served by a curate approved by the bishop, whom they are to pay out of the profits of the benefice. And if the successor thinks himself aggrieved by them, he may appeal to the ecclesiastical judge. (*Par. L.* 99; *Com. Par. Off.* 90.)

Vacancy.

The death or avoidance of the spiritual person who was the incumbent of the church of any parish or place, in which any separated parish or district church or chapel shall be consecrated, at the time of consecration shall be notified by the bishop under his hand and seal to the spiritual person then serving the church or chapel, and the churchwardens of the parish or place; and such notification shall be preserved with, and copies thereof entered in the books of registers of marriages, births and burials, of the church of the parish or place, and in the books of registers to be provided for entering the publication of bans and the solemnization of marriages, and the baptisms and burials in such chapel, and such entries shall be authenticated by the churchwardens, and shall be sufficient evidence of the period of commencement of such service under this act of the publication of bans and solemnization of marriages and baptisms, and performance of burials, in any such chapel, or any cemetery thereof. (58 Geo. III. c. 45, s. 29.)

Death, &c. of incumbent.

They are officers to inspect the morals and behaviour of the parishioners. (*The Governors of St. Thomas's Hospital* v. *Trehorne*, 1 *Phil. Ec. Ca.* 129; *Griffiths* v. *Read*, 1 *Hagg.* 208.)

Morals of inhabitants.

They (or the constable) shall levy the penalties for persons exercising their worldly callings on the Lord's Day. (29 Car. II. c. 7.)

Trading on Sunday.

6. *Duties of, in general.*

They shall suffer no plays, feasts, banquets, suppers, church-ales, drinkings, temporal courts or leets, lay juries, musters, or any profane usage, to be kept in the church or church-yard. (*Can.* 88.)

Profanation of the church.

And Sir *William Scott*, in the case of *Cox* v. *Goodday* (2 *Hag. Rep.* 141,) said, "the duty of maintaining order and decorum in the church lies *immediately* upon the churchwardens; and if they are not present, or being present do not repress any indecency, they desert their proper duty."

They may justify the taking off the hat of a person who has it on in the church, if he refuse to remove it on request. (*Hall* v. *Plauner*, 1 *Lev.* 197.)

And where a parish clerk having been dismissed from his office by the rector through irregularity, and another appointed, the former entered the church before divine service had commenced, and took possession of the clerk's seat: it was held that the churchwardens were justified in removing him from the clerk's desk, and also out of the church, if they had reasonable grounds for believing that he would offer interruption during the celebration of divine service. (*Burton* v. *Henson*, 10 *M. & W.* 105.)

Loitering in churchyard.

They shall not suffer any idle persons to abide either in the churchyard or church-porch during the time of divine service or preaching; but shall cause them to come in or to depart. (*Can.* 19.)

Sports on Sunday.

They (or the constable) shall levy the penalty of 3*s.* 4*d.* for using unlawful pastimes on the Lord's Day. (1 Car. c. 1.)

Church way.

They are to see that the church ways be well kept and repaired. And the right to a church way may be claimed and maintained by a libel in the spiritual court. (2 *Roll. Abr.* 287.)

Ornaments of church.

They shall take care to have in the church a large Bible, a book of Common Prayer, book of Homilies, a font of stone, a decent communion table, with proper coverings, the Ten Commandments set up at the east end, and other chosen sentences upon the walls, reading desk, and pulpit, and chest for alms; all at the charge of the parish. (*Can.* 80 to 84; and see *Governors of St. Thomas's Hospital* v. *Trehorne*, *Lee's Ec. Ca.* 120.)

Key of church.

The minister has, in the first instance, the right to the possession of the key of the church, and the churchwardens have only the custody of the church under him; and if he refuses access to the church on fitting occasions, complaint must be made to higher authorities. (*Lee* v. *Mathews*, 3 *Hagg. R.* 173.)

Bells.

They ought to keep the keys of the belfry, and to take care that the bells be not rung without good cause, to be allowed by the minister and themselves. (*Can.* 88.) The property of the bell ropes of a parish church is in the churchwardens. (*Jackson* v. *Adams*, 2 *Bing. N. C.* 402.)

Registers.

Churchwardens or chapelwardens of every parish or chapelry are from time to time to furnish register books, adapted to the forms given by the act, at the expense of the parish or chapelry, whenever required by the rector, vicar, curate, or officiating minister to provide the same. And such books are to be of paper, unless required to be of parchment, by such churchwardens or chapelwardens respectively. (Stat. 52 Geo. III. c. 146, s. 2. See the act in full, "*Parish Registers*," Vol. V.)

Iron chest.

They are to provide and securely keep, at the expense of the parish or chapelry, a dry well-painted iron chest for the keeping such register-books, either at the rector's, &c. house, or in the church. (Sect. 5.)

Copies of registers, &c.

They are to make fair copies, if required so to do by the rector, &c. of all the entries in the register book annually, at the expiration of two months after the end of each year, and to attest the verification of the same by the rector, &c. (Sect. 6.)

They are to transmit such annual copies to the register of the diocese, by the post, on or before the 1st of June in every year. (Sect. 7.)

In case of neglect or refusal of the officiating minister to verify copies of the register books, they are to certify the default to the registrar of the diocese. (Sect. 9. See these enactments in full, "*Registers*," Vol. V.)

And such register, being carefully preserved, is good evidence; and the falsifying of it is punishable at the common law. (*Gibs.* 229. See "*Evidence*," Vol. II. p. 45.)

They shall at the charge of the parish, with the advice and direction of the minister, provide bread and wine against the communion. (*Can.* 20.) 6 *Duties of, in general.*

They (or the overseers) shall levy the penalty of 5*l.* for an incumbent not reading the common prayer once a month. (13 & 14 Car. II. c. 4, s. 7; and see further, *ante*, 671, as to their proceeding against the clergyman for improper conduct.) Communion. Incumbent not reading prayers.

Alms collected in chapels as well as in parish churches during the reading of the offertory are, by the direction of the rubric, at the disposal of the incumbent of the parish and the churchwardens thereof, and not of the minister or proprietors of the chapel. (*Moysey* v. *Hillcoat*, 2 *Hagg. R.* 56.) Alms.

They shall not suffer any strangers to preach but such as shall appear qualified on showing their licence; and they shall see that such preachers register and subscribe their names in a book to be kept for that purpose, with the day when they preached, and the bishop's name who granted the license. (*Can.* 50, 52.) Strange preachers.

Persons who murder themselves, or die excommunicated, are denied Christian burial; and therefore the churchwardens are not to suffer them to be buried in the church or church-yard, without special license from the bishop; (*Degge*, 183;) but now a *felo de se* may be buried in the church-yard, though he is still denied Christian burial. (See the 4 Geo. IV. c. 52, s. 2, "*Homicide*," Vol. III.; and see *ante*, 627.) Persons denied Christian burial.

The churchwardens, together with the minister, are to sign certificates for the out-pensioners of Greenwich Hospital residing within their parish, with respect to the identity of their persons, in order to the receiving of their pensions. (10 Geo. IV. c. 26.) Greenwich Hospital.

They (or the overseers) shall pay to the high constables the general county rate out of their money collected for the poor. (12 Geo. II. c. 29, s. 2; and see 57 Geo. III. c. 91, s. 5; *post*, "*County Rate*," Vol. II.) County rate.

They shall receive the penalty for servants carelessly firing houses; (6 Anne, c. 31; see *ante*, 511;) and (*id.* s. 1) pay rewards to turncocks and engine keepers. (See also 7 Anne, c. 17, s. 2.) Servants firing houses.

They are, on notice from a justice of the peace, to prosecute pawnbrokers offending against the 39 & 40 Geo III. c 99, at the expense of the parish. (*Id.* s. 28; "*Pawnbrokers*," Vol. V.) Pawnbrokers.

They are to prosecute disorderly houses. (See "*Disorderly House*," Vol. II.) Disorderly houses.

They are to preserve and deliver over the population accounts to their successors; (1 Geo. IV. c. 94, s. 9;) and as to their other accounts, see *post*, 674. Population accounts.

They are to make out lists of persons qualified to serve on juries, and to fix them on church doors, and keep them for inspection. (6 Geo. IV. c. 50, s. 8, 9; "*Jurors*," Vol. III.) Juries.

As to their duty as sequestrators, see *Steer's Parish Law*, 2nd ed., 110. Sequestrators.

There are numerous other instances in which churchwardens are appointed by statute to receive certain penalties, &c., and to act in other matters, but it is not necessary to state them here. Other duties.

VII. Of Presentments by.

At the Easter visitation, when the churchwardens go out of office, and before their successors are sworn in, they must make their presentments of all things amiss within their parish. (4 *Burn's E. L.* 25.) Presentments by.

Churchwardens by their declaration are to present or certify to the bishop, or his officer, all things presentable by the ecclesiastical laws, which relate to the church, minister, and parishioners.

The articles delivered to them for their direction are for the most part founded on the book of canons made in the year 1603, and the rubrics of the Common Prayer. Book of articles.

They may present as often as they please, but shall not be obliged above When to present.

7. *Presentment by.*

once a year where it hath so been used, and not above twice any where; except it be at the bishop's visitation. (*Can.* 116, 117.)

Fees on.

For the presentments of any church or chapel for one year the register shall have only 4*d*. (*Can.* 116.)

Presentment, by whom.

The minister may present where the churchwardens neglect. (*Can.* 113.) But such presentment ought to be upon oath. (*Grove* v. *Elliott*, 2 *Vent.* 42.)

One churchwarden may present without the others, *ante*, 670.

VIII. Their Accounts.

Their accounts.

We have already seen, in various parts of our considerations on matters relating to the church and churchwardens, what disbursements and receipts may be made and given by churchwardens.

When to account.

At the end of the year, or within a month after at most, they shall before the minister and parishioners (at a vestry) give up a just account of such money as they have received, and also what they have particularly bestowed in reparations and otherwise for the use of the church; and shall deliver up to the parishioners the money and parish goods in their hands, to be delivered over by them to the next churchwardens by bill indented. (*Can.* 89.)

Accounting to a select vestry.

If the custom of the parish is for a certain number of persons to have the government thereof, and the account is given up to them, the custom is a good custom, and the account given to them a good account. (*Gibs.* 242.)

Vouchers.

Mr. *Barlow* says, that for disbursements of any sum not above 40*s*. their own oath is held sufficient proof; but for all sums above, receipts must be produced. But it may be more satisfactory if receipts be produced for all. (*Barl.* 105.)

Inspection.

The churchwardens are bound, under the 17 Geo. II. c. 38, in common with overseers, to permit an inspection of the poor accounts; and upon the party stating some *special reason* for which he wishes to see them, a *mandamus* to compel them to allow such inspection will be granted; and it is no answer to such an application to the Court, that this statute, relating to the accounts of the poor, imposes a penalty for improperly refusing such inspection. (*R.* v. *Clear*, 4 *B. & Cres.* 899; 7 *D. & Ry.* 393, S. C.)

The 17 Geo. II. c. 3, s. 2, provides that the churchwardens shall allow any inhabitant to inspect the *rate*, and copies to be taken; but this enactment does not apply to the churchwardens *inter se*. (*Wethered* v. *Callcott*, 5 *Scott, N. R.* 409; and see title "*Poor*," Vol. IV.)

Production of.

The ecclesiastical courts may compel the production of accounts, but cannot dispute the validity of them when produced; for the ordinary is not to take the account, he can only give a judgment *quod computent*. (*Wainwright* v. *Bagshaw*, 2 *Stra.* 974.)

Allowance of the account.

The allowance of the account may be by entering it in the church book of accounts, and having it signed by those in the vestry who allow the accounts. (*Barl.* 105.)

Account allowed final.

When they have faithfully accounted, and their account is allowed by the minister and major part of the parishioners present, it shall not afterwards be in the power of any to make them account again; unless some fraud in their accounts be afterwards discovered. (1 *Wood's Inst.* b 1, c. 7.)

Reimbursement of.

If their receipts fall short of their disbursements, the succeeding churchwardens may pay them the balance, and place it to their account. (1 *Roll. Abr.* 121; *Can.* 89, 109, &c.) And the Court of Chancery will, on application, make an order for the purpose. (2 *Eq. Abr.* 203; *Prec. Ch.* 43; but see 4 *Vin.* 529, 8vo.)

In general, however, *preceding* churchwardens cannot be reimbursed a rate. (*Ante*, 648.) If the churchwardens and parishioners make an assessment, and the churchwardens lay out the whole money, and before the whole is collected their time is expired and new churchwardens are chosen, the former churchwardens, by having presented such parishioners as refused to pay before the determination of their time, may still proceed against them, otherwise the new churchwardens must collect such arrears and reimburse their predecessors. (*Bac. Ac.* tit. *Churchwardens*, E. 79.)

BRARY.

8. *Their Accounts.*

How compelled to account, &c.

If they refuse to account, they may be presented at the next visitation by the new churchwardens; or any of the parish that are interested may, by process, call them to account before the ordinary; or the succeeding churchwardens may have a writ of account at common law. (1 *Roll. Abr.* 121.) But after they have passed their accounts at the vestry the Ecclesiastical Court cannot proceed against them to account upon oath. (*Snowden* v. *Herring*, *Bunb.* 289.)

Churchwardens *de facto* may maintain an action against a former churchwarden for money received by him for the use of the parish, though the validity of the election of the plaintiffs to the office be doubtful, and though they be not the immediate successors of the defendant; for the defendant, who was a wrong-doer in withholding the money, shall not be permitted to deny their right to bring the action, and churchwardens being a corporation for the purpose of taking care of the goods of the church, the right to sue for money withholden from the parish passed from one set to the other; it being perfectly immaterial whether the immediate or any other successors of the defendant brought an action which was not founded in privity between them. (*Turner* v. *Barnes*, 2 *H. Bla.* 559.)

And where in the parish of B. consisting of the township of B. and several hamlets, two churchwardens were appointed by the township and two by the rest of the parish, who made separate rates for their own divisions respectively; it was held, that the acting churchwardens for the township might maintain *assumpsit* against their predecessors for a balance remaining in their hands, without joining the other churchwardens as plaintiffs or defendants, and without proving that their appointment was strictly legal. (*Astle* v. *Thomas*, 2 *B. & Cres.* 271; 3 *D. & R.* 492, S. C.)

By 3 & 4 Will. & M. c. 11, in all actions to be brought in the courts at Westminster or at the assizes for money misspent by churchwardens, the evidence of the parishioners, other than such as receive alms, shall be taken and admitted. (See the act, *infra.*)

Ordinary not to take account, but only to give judgment that churchwarden do account.

In the case of *Leman* v. *Goulty and another*, 3 *T. R.* 3, it was determined, that although the Spiritual Court may compel the churchwardens to deliver in their accounts, they cannot decide on the propriety of the charges made therein: and when they had delivered in their accounts, they had done every thing which that Court had the power of enforcing, and there was an end of their jurisdiction, it was *functus officio*; and if they take any steps afterwards, it is an excess of jurisdiction, for which a prohibition will be granted even after sentence. (And see *Wainwright* v. *Bagshaw*, 2 *Stra.* 974; *Adams* v. *Rush*, *id.* 1133.)

IX. Their Punishment for Misbehaviour, &c.

Misbehaviour of, &c.

If churchwardens misbehave themselves, it seems the parishioners may remove them. (13 *Co.* 70; *Com. Dig. Eglise*, f. l.)

For breach of duty they may be sued in the Ecclesiastical Court, as if they take the bells out of the church. (*Welcome* v. *Lake*, 1 *Sid.* 281.)

Committing waste.

If they neglect their duty by wasting the goods of the church, the new churchwardens may call them to an account before the bishop, or bring their action at common law. (*Read's Church Service.*)

At a vestry meeting, called by notice signed by the churchwardens, for the purpose of making a church rate for the repair of the church, a resolution was moved and seconded: "That this vestry, considering church rates at all times bad in principle and particularly unjust in practice, and quite uncalled for at the present time, resolved to adjourn all further consideration of the subject for which it has been called till this day twelve months;" which resolution was carried: It was held, that one of the churchwardens, in having voted in favour of the resolution and against the rate proposed of twopence in the pound, was not guilty of any ecclesiastical offence, it not being averred that, in consequence of the refusal of the rate, the church was still out of repair. (*Cooper* v. *Wickham*, 2 *Curt.* 303.)

9. *Punishment for Misbehaviour, &c.*

Parishioners made witnesses against them.

By the 3 & 4 Will. & M. c. 11, s. 12, reciting, that many churchwardens and overseers, and other persons entrusted to receive collections for the poor, and other public monies relating to the churches and parishes whereunto they belong, do often misspend the same, to the prejudice of such parishes, and of the poor and other inhabitants thereof; and the parishioners, who are the only persons sometimes who can make proof thereof, have not been allowed to be witnesses against them; it is enacted, that in all actions to be brought in any court at Westminster, or at the assizes for the recovery thereof, the evidence of the parishioners, other than such as receive alms, shall be taken and admitted.

Not answerable for indiscretion.

But churchwardens are not answerable for indiscretion, but for deceit only, if they lay out more money than is needful. (1 *Wood's Inst.* b. 1. c. 7.)

Criminal proceedings against churchwardens for not repairing or keeping in proper order the parish church, and for neglecting and disobeying the lawful orders and directions of the archdeacon, the church being still out of repair, and the archdeacon having ordered the same to be repaired, cannot be sustained; there being no proof that the churchwardens had personally neglected their duty, or that they had wilfully disobeyed the order of the archdeacon.

In order to justify criminal proceedings against churchwardens for neglecting to repair their parish church, it must be shown that they have been guilty of a personal and wilful neglect. (*Millar* v. *Palmer*, 1 *Curt.* 553.)

Disobeying orders.

For their punishment for disobeying orders of justices when acting as overseers of the poor, or parish officers, see *Penalty on Overseers for Neglect of their Duty*, "*Poor*," Vol. IV.

Extortion.

An indictment lies against them for extortion and corruption in their office. (*R.* v. *Eyres*, 1 *Sid.* 307; see "*Extortion*," Vol. II.; "*Office*," Vol. V.)

Embezzlement.

As to embezzlement by, see "*Larceny*," Vol. III.

X. Their Indemnity and Protection of.

May plead the general issue.

By stats. 7 Jac. I. c. 5; 21 Jac. I. c. 12; if any action be brought against any churchwardens, or persons called sworn men, executing the office of churchwarden, for any thing done by virtue of their office, they may plead the general issue, and give the special matter in evidence; and if a verdict is given for them, or the plaintiff shall be nonsuit, or discontinue, in every such case the judge before whom the said matter shall be tried shall allow to the defendant his double costs. But by the 5 & 6 Vict. c. 97, s. 3, they are no longer entitled to such double costs, but only to a full indemnity against costs.

As to what cases were considered within this provision of the act, see *Kerchaval's case*, *Cro. Car.* 285; *Atkins* v. *Banwell*, 3 *East*, 92; *Blanchard* v. *Bramble*, 3 *M. & Sel.* 131; *Harper* v. *Carr*, 2 *B. & C.* 621; *Norman* v. *Danger*, 3 *Y. & Jer.* 203; and *post*, "*Constable*."

Where a churchwarden is sued for taking a distress for a poor rate under a warrant of magistrates, he is entitled to the protection given to magistrates and other officers by stat. 24 Geo. II. c. 41. (*Harper* v. *Carr*, 7 *T. R.* 270; *Nutting* v. *Jackson*, *Bull. N. P.* 24; and see cases, *post*, "*Constable*.")

And, therefore, if such an action be brought against him alone, without making the magistrates defendants also, he is entitled to a verdict on proving the warrant of the magistrates. (*Id.*)

XI. Sidesmen.

Sidesmen.

In large parishes there are officers called sidesmen (anciently synodsmen, otherwise called questmen), to assist the churchwardens in their inquiries and presentment of offenders. They shall be chosen yearly in Easter week by the minister and parishioners, if they can agree; if not, by the bishop. (*Can.* 90.)

Formerly they were sworn in like churchwardens, but now by the 5 & 6 Will. IV. c. 62, s. 9, a declaration is to be made in lieu of the oath, and no sidesman shall in future be compelled to take any oath on quitting office. See "*Oaths*," Vol. V. p. 261. 11. *Sidesmen.*

XII. Forms.

Complaint by churchwardens in order to ground a distress for a church rate (*a*).

—— } *BE it remembered, that on the day of in the year of our Lord*
to wit. } *at in the county of , A. C., who together with C. C. are the churchwardens of the parish of in the said county, personally cometh before me, J. P., one of her Majesty's justices of the peace for the said county, and on his oath (b) saith, that C. D., of , in the said county, hath refused* [or *neglected*] *and still doth refuse* [or *neglect*] *to pay them, the said A. C. and C. C., or either of them, or any person authorised to receive and collect the same, the sum of , at which the said C. D. is duly rated to a church rate for the said parish, made on the day of last, the validity of which said rate hath not been questioned in any ecclesiastical court, and which sum is now justly due from the said C. D. unto them the said A. C. and C. C. as such churchwardens,* and that they ought to collect and receive the same, and the said A. C. prayeth justice in the premises, and that the said C. D. may be summoned to answer the premises.* J. P.

Sworn before me, J. P., on, &c.

Summons thereon (*c*).

—— } *To E. F. Constable of and to all Constables and others, her Majesty's*
to wit. } *officers of the peace for the county of .*

WHEREAS complaint has been made before me, J. P. Esquire, one of her Majesty's justices of the peace for the said county, by A. C., who, together with C. C., are the churchwardens of the parish of in the said county, that C. D. of, &c. hath refused and neglected, and still, &c. [proceed as in the complaint, to the asterisk, and then thus:] *These are therefore to require you forthwith to summon the said C. D. to appear before me and such other justices of the peace for the said county as shall be then present at in the said county of on the day of at the hour of in the forenoon of the same day, to answer unto the said information and complaint, and to be further dealt with according to law; and be you then and there to certify what you have done in the premises. Given under my hand and seal, at in the said county, the day of* A. D. .

J. P.

Order thereon.

—— } *WHEREAS complaint has been made unto us* [or *me*] *J. P. Esquire, and*
to wit. } *J. L. two* [or *one*] *of her Majesty's justices of the peace in and for the said county, by A. C., who, together with C. C., are the churchwardens of the parish of in the said county, that C. D. of aforesaid, in the county aforesaid, hath refused* [or *neglected*], *and still, &c.* [proceed as in the complaint, *supra*, to the asterisk, and then thus.] *And whereas by warrant under the hand and seal of me, the said J. P. Esquire, so being such justice as aforesaid, the said C. D. hath been duly summoned and convened before us, J. P. and J. L., so being such justices as aforesaid, and being neither of us patron of the said church, nor any way interested in any of the rights, dues, or other payments belonging to the said church. And whereas the said C. D. having been so summoned and convened appeared before us on the day of instant, at in the said county, and heard the complaint aforesaid:* We the said justices, therefore, having considered the premises, and having also duly examined upon oath into the merits of the said complaint, do find that there is justly due and payable the aforesaid sum of* [it must not exceed 10*l.* see *ante*, 650] *from the said C. D. to the said A. C. and C. C., as such churchwardens as aforesaid in respect of the said rate, and do order and direct the aforesaid C. D. to pay the same unto the said A. C. and C. C., together with the sum of for their reasonable costs and charges in this behalf by us ascertained. Given under our hands and seals, at in the said county, the day of* A. D. .

(*a*) See the 53 Geo. III. c. 127, *ante*, 650, 651. By sect. 7, one justice may receive the complaint and grant the summons.

(*b*) The statute, however, does not seem to require the information to be upon oath, *ante*, 650.

(*c*) See a general form of summons of a witness, *post*, "*Conviction*."

12. *Forms.*

Warrant to levy.

— } *To C. C. the Constable of* *and others whom this may concern.*
to wit. }

WHEREAS complaint have been made unto [me] J. P. Esquire, &c. [proceed as in the Order, *supra*, to the asterisk, and then thus:] *And whereas we the said justices, having duly considered the premises, and having also duly examined upon oath into the merits of the said complaint, did on, &c. at, &c. by an order in writing under our hands and seals, order and direct the said C. D. to pay unto the said A. C. and C. C. the said sum of , at which the said C. D. is duly rated to a church rate for the said parish, and justly due unto the said A. C. and C. C. as such churchwardens as aforesaid; and also the sum of shillings for the reasonable costs and charges of the said A. C. in that behalf ascertained by us, making in the whole the sum of . And whereas it appeareth unto us, upon the oath of of , that the said C. D. hath had due notice of the said order, but hath refused* [or *neglected*], *and still doth refuse* [or *neglect*] *to pay, and hath not paid the said sum of or any part thereof: These are therefore to authorise and command you, that you do forthwith levy the aforesaid sum of by distress and sale of the goods and chattels of the said C. D. and out of the money arising from such sale that you do pay unto A. C. and C. C. the said sum of , and thereout also deduct your necessary charges of distraining; and if any surplus shall remain after such payment and deduction as aforesaid, that you do render the same unto the said C. D. Given under our hands and seals* [or *my hand and seal*], *this day of* A. D. 18 .

Cinque Ports, see *ante*, "*Admiralty Court*," "*Ships*," Vol. V.

Circuit, see "*Assizes*," "*Shire-Hall*," Vol. V.

Clergymen.

It would not be within the object or compass of this work to notice all the laws particularly affecting clergymen, those only which concern the magistrate, parish officer, or crown lawyer, will be noticed; for the rest the reader is referred to Burn's Ecclesiastical Law by Phillimore, tit. *Privileges and Restraints on the Clergy, Residence, Public Worship, &c.*

Estate in church.

As to what estate he has in the church and churchyard, see *ante*, 624.

Dilapidations.

The incumbent is bound to keep the parsonage house and chancel in good and substantial repair, restoring and rebuilding when necessary, according to the original form, without addition or modern improvement: but he is not bound to supply or maintain any thing in the nature of ornament, such as painting, (unless that be necessary to preserve exposed timber from decay,) and white-washing and papering: and in an action for dilapidations against the executors of a deceased rector by the successor, the damages are to be calculated upon this principle. (*Wise* v. *Metcalfe*, 10 *B. & Cres.* 299; see 2 *Bing. N. S.* 627.)

An action for dilapidation will lie by one incumbent against another on an exchange of livings, though neither party at the time contemplated making any claim on that account, and therefore made no agreement on the subject. (*Downes* v. *Craig*, 9 *M. & W.* 166.)

Neglect to cultivate the glebe land in a husbandlike manner is not a dilapidation for which an incumbent is liable. (*Bird* v. *Relph*, 4 *B. & Adol.* 826; 1 *Nev. & M.* 415, S. C.)

If the present incumbent has repaired with timber which grew on the glebe, the executors of the late incumbent are entitled to be allowed for the value of such timber, out of the estimate of dilapidations due from them. (*Percival* v. *Cooke*, 2 *Car. & P.* 460.)

The 1 & 2 Vict. c. 106, *post*, 680, consolidates and amends the laws relating to clergymen holding farms, and for enforcing residence on their benefices, and for the support of stipendiary curates in England.

It has been held that a demise by a parson of his benefice, made subsequent to the 57 Geo. III. c. 99, for securing an annuity, is void, it being in substance a charging of the benefice, within the meaning of the 13 Eliz. c. 20, which, as far as it relates to chargings of benefices, is now in force, having been revived by the 57 Geo. III. c. 99. (*Shaw* v. *Pritchard and others*, 10 *B. & Cres.* 241; and see *Flight* v. *Salter*, 1 *B. & Adol.* 673; *Moore* v. *Ramsden*, 7 *Ad. & Ell.* 898; 3 *N. & M.* 180, S. C.; *Kirlew* v. *Butts*, 2 *B. & Ad.* 736; *Britton* v. *Wait*, 3 *id.* 915; *Saltmarsh* v. *Hewitt*, 1 *Ad. & Ell.* 812; *Alchin* v. *Hopkins*, 1 *Bingh. N. C.* 99.) Charging benefices.

A clergyman might be suspended *ab officio et beneficio* for non-residence. (2 *Lee's Ec. Ca.* 567.)

The curate's stipend is now regulated by the 1 & 2 Vict. c. 106, ss. 83—92. Where differences arise between a rector and his curate respecting the latter's stipend, appointed to him under the provisions of this act, the bishop alone has jurisdiction to decide it (s. 83), and if the curate brings an action for his stipend against his rector, the provisions of that statute, ss. 83 and 109 of the act, are pleadable in bar of such action. (*West* v. *Turner*, 3 *Ad. & Ell.* 614.) Curate's stipend.

By the stamp act, 55 Geo. III. c. 184, sch. 1, "all bonds, contracts, mortgages, conveyances, deeds, and instruments whatever, exempted from stamp duty by the act of the 17th year of his majesty's reign, c. 53, or any other act or acts of parliament now in force for promoting the residence of the parochial clergy, by making provision for building, repairing, or purchasing houses and other buildings for the use of their benefices," are exempted from stamp duty. And see 6 & 7 Vict. c. 72, as to repeal of stamp duties on donations and presentations. Stamp duties.

Clergymen are in general liable to all public charges imposed by act of parliament, when they are not expressly excepted. (See 1 *Hawk.* c. 76, s. 15; and see "*Highways*," Vol. III.) Liability to public charges.

By stat. 43 Eliz. c. 2, clergymen are liable to the poor rates for their glebe and tithe. (See "*Poor*," Vol. IV.) Liable to the poor.

As to their exemption from the tax duty on horses, see title "*Taxes*," Vol. VI. pp. 145, 148. Exemption from tax on horses.

It seems that clergymen are compellable to take parish apprentices, or at least are chargeable towards putting them out, *ante*, p. 222. Apprentices.

To the intent that clergymen may the better discharge their duty in celebration of divine service, and not be entangled with temporal business, if any of them be chosen to any temporal office, as bailiff, constable, &c. he may have his writ to be discharged. (1 *Inst.* 96.) Need not serve in temporal offices,

Nor can they be compelled to serve as sheriff, or overseer of the poor. (*Degge*, 120.)

Ecclesiastical persons have this privilege, that they ought not in person to serve in war. (2 *Inst.* 4.) nor in war,

They are not bound to appear at the torn, or view of frankpledge. 52 Hen. III. c. 10; 9 Edw. II. c. 3. (*Id.*) nor appear at the torn,

They are exempted from serving as jurors. (6 Geo. IV. c. 50, s. 2, "*Jurors*," Vol. III.) nor be jurors,

By 5 & 6 Will. IV. c. 76, s. 28, clergymen and dissenting ministers cannot be electors, councillors, or aldermen of any borough. nor members, &c. of municipal corporations.

By 41 Geo. III. c. 73, they cannot be members of parliament. nor members of parliament.

We have seen that by the 9 Geo. IV. c. 31, s. 23, it is a misdemeanor to arrest a clergyman on civil process while performing, or about to perform, or returning from performing divine service, *ante*, 658. Privilege from arrest.

As to the privilege of clergymen in not answering confidential communications, see "*Evidence*," Vol. II. p. 427. Privilege in not answering questions.

Beating clerks in orders was punishable under the *Articuli Cleri*, 9 Edw. II. st. 1, c. 3, but so much of that "as relates to laying violent hands on a clerk," is now repealed by the 9 Geo. IV. c. 31. But a person laying violent hands Assaulting.

on a clergyman, may, it seems, be punished in the ecclesiastical courts under the 13 Edw. I. st. 4.

Felonies by.

The 7 & 8 Geo. IV. c. 26, repeals so much of the 25 Edw. II. c. 6, (*vulgo*, st. 8,) as relates to clerks convicted of treasons or felonies, and to the arraignment of clerks; and by 6 Geo. IV. c. 25, s. 3, it is enacted, "that clerks in holy orders being convicted of felony, shall stand and be under the same pains and dangers for the same, and shall be used and ordered to all intents and purposes, as other persons not being in holy orders.

Jurisdiction of church.

By the 15 Edw. III. st. 1, c. 6, clergymen shall not answer before his majesty's justices for things done touching the jurisdiction of the church; and by 18 Edw. III. st. 3, c. 6, temporal justices shall not inquire of process awarded by the ecclesiastical jurisdiction, as on wills, &c.

Incontinency.

By the 1 Hen. VII. c. 4, the incontinency of a clergyman may be punished with imprisonment by the ordinary. By the 27 Geo. III. c. 44, s. 2, the suit must be commenced within eight months (see *Free* v. *Burgoyne*, 5 *B. & Ald.* 400.) Upon the proof against him of repeated and habitual acts of incontinency, coupled with neglect of duty and other conduct affording just scandal and offence to his parishioners, the ecclesiastical court is bound to proceed to deprivation. (*Burgoyne* v. *Free*, 2 *Hagg. R.* 456.)

Immoral conduct.

So clergymen may be punished by admonition, suspension, degradation, or deprivation (*Sanders* v. *Danson*, 1 *Add.* 299), for any loose or immoral conduct. (6 *Rep.* 136; *Rowland* v. *Jones*, 2 *Lee*, 191, 565; 2 *Hagg.* 264; 1 *N. & P.* 62.)

Irregularity in preaching, &c., and other neglect of duty.

So clergymen are punishable for any irregularity in the discharge of duty, and preaching doctrines contrary to the articles. (*Bishop* v. *Stow*, 1 *Hagg.* 424; *Argar* v. *Holdsworth*, 2 *Lee*, *E. C.* 515.)

The Court is bound to admit articles by a churchwarden against an incumbent, for frequent irregularities in the performance of divine service and of parochial duties, and also for his violating the church-yard; nor (the suit being commenced in April, 1828, and the alleged offences being laid from September, 1824, till January, 1827,) is the lapse of time any bar. (*Bennett* v. *Bonaker*, *clerk*, 2 *Hagg. R.* 25.)

It seems doubtful whether an action can now be maintained against a clergyman for refusing to solemnize a marriage between two persons in pursuance of a license directed to him. (*Davis* v. *Black*, 1 *Gale & D.* 432.) See also "*Marriage*," Vol. V.

As to his duties in respect of burials see *ante*, 628.

To constitute in a clergyman criminal neglect of duty, requiring censure and correction, there must be neglect without just cause; but unless such cause be shown, the law will infer its absence. (*Bennett* v. *Bonaker*, 3 *Hagg. R.* 39.)

The incumbent has a right, without license, to perform divine service in any consecrated building within the parish. *Semble*, therefore a license to the rector from the ordinary to perform divine service in a chapel tends to show that the chapel was not consecrated (*Moysey* v. *Hillcoat*, 2 *Hagg. R.* 46.)

Fees.

Primâ facie, all parochial duties are committed to, and imposed upon the parish incumbent, and all fees and emoluments arising therefrom belong to him, and such rights can only be granted to a chapel or its officiating minister by composition with the patron, incumbent, and ordinary; *quære*, whether or not also with a compensation to future incumbents. (*Id.* 48.) As to his fees on burials, see *ante*, 628.

Prohibited from farming.

The 1 & 2 Vict. c. 106, s. 28, enacts, that no spiritual person licensed to perform the duties of any ecclesiastical office whatever shall take to farm for occupation by himself any lands exceeding eighty acres in the whole, for the purpose of cultivation, without permission in writing by the bishop, specially given for that purpose under his hand, every permission to specify the number of years, not exceeding seven. And every spiritual person so offending is to forfeit forty shillings an acre for each year of such occupation and cultivation.

Trading.

By sect. 29 no spiritual person as above is to trade or deal for gain or profit in any goods, &c., unless such trading or dealing shall be carried on by more than six partners, or unless such trading or dealing shall have devolved on him

by devise, bequest, inheritance, settlement, marriage, bankruptcy, or insolvency, but in no case is he to act as director or managing partner, or to carry on such trade in person. Trading.

The previous statute, the 57 Geo. III. c. 99, and which is repealed by the 1 & 2 Vict. c. 106, was held to exclude a clergyman from being a shareholder in a joint stock banking company, (*Hall* v. *Franklin*, 3 *M. & W.* 259), and to remedy this decision the above clause was passed.

Sect. 30 contains certain exceptions in the cases of spiritual persons engaged in education, or in cases of articles *bonâ fide* bought to be consumed in the family, though in part sold at an advanced price, or in cases of books sold by means of a bookseller or publisher, or being director, partner, or shareholder in any benefit, or fire, or life assurance society, or buying and selling articles necessary for his glebe or demesne lands, or selling the produce of his mines. But no spiritual person is to buy or sell in any market, fair, or place of public sale. Exceptions there from.

By sect. 31 spiritual persons trading or dealing contrary to the act may be cited by the bishop before a competent judge, and the penalty is, for the first offence, suspension for a period not exceeding one year; for the second offence—suspension for such period as the judge shall think fit; and for the third offence—deprivation. Penalty and punishment for.

For other matters as to, see "*Church*," "*Churchwardens*," "*Common Prayer*."

Clergy, Benefit of.

THE benefit of clergy is now abolished by the 7 & 8 Geo. IV. c. 28, s. 6, and by the 4 & 5 Vict. c. 22, as to peers. Some account of its origin and effect may, however, as well be noticed.

Origin of.]—Anciently princes and states, converted to Christianity, in favour of the clergy, and for their encouragement in their offices and employments, and that they might not be so much entangled in suits, did grant to the clergy very bountiful privileges and exemptions; and particularly an exemption of their persons from criminal proceedings, in some capital cases, before secular judges, which was the true original of the benefit of clergy. (2 *Hale*, 323.) Origin of.

The clergy increasing in wealth, power, honour, number and interest, afterwards set up for themselves, and that which they obtained by the favour of princes and states at first, they now began to claim as a right, and a right of the highest nature, namely, by the law of God; and by their canons and constitutions endeavoured, and in some places obtained, vast extensions of these exemptions, both with regard to the persons concerned, to wit, not only to persons in holy orders, but also to all that had any kind of subordinate ministration relative to the church; and likewise in respect of the causes, exempting as far as they could all causes of clergymen, as well civil as criminal, from the jurisdiction of the secular power, and wholly subordinating them immediately and only to the ecclesiastical jurisdiction, which they supposed to be lodged first in the pope by divine right and investiture from Christ, and from the pope shed abroad into all subordinate and ecclesiastical jurisdiction. (2 *Hale*, 324.)

And by this means they endeavoured, and in some kingdoms and for some ages obtained, that there was a double supreme power in every kingdom; the one ecclesiastical, absolute and independent upon any but the pope, over ecclesiastical men and causes; and the other secular, of the king or civil magistrate.

But this claim of exemption, although it obtained much in this kingdom, yet grew so burdensome that it was from time to time qualified and abridged

Origin of.

by the civil power, sometimes by acts of parliament taking it away in some cases, sometimes by the interpretation and construction of the judges, and sometimes by the contrary usage of the kingdom; for ecclesiastical canons never bound in England farther than they were received, and so had not their authority from their own strength and obligation, but from the usages and customs of the kingdom that admitted them, and only so far forth as they were so admitted. (2 *Hale*, 325)

And therefore if they were indicted in cases criminal, but not capital, nor wherein they were to lose life or limb, there the privilege of clergy was not allowed; and therefore *not in indictments of trespass or petit larceny.* (2 *Hale*, 325).

Also it was not allowed them in high treason.

But at the common law, in all cases of felony or petit treason, clergy was allowable, excepting two, lying in wait, and burning of houses, which were looked upon as hostile acts, and the authors of them therefore not entitled to the common privileges of subjects. (2 *Hale*, 330.)

Who might demand it.

Who might demand it.]—By a favourable interpretation of the statutes relating to the benefit of clergy, not only those actually admitted into some inferior order of the clergy, but also those who were never qualified to be admitted into orders, (which was formerly tried by putting them to read a verse,) were taken to have a right to this privilege as much as persons in holy orders. (2 *Hawk.* c. 33, s. 5.)

But by the common law a woman could not have the benefit of clergy; but by the statute of 3 Will. III. c. 9, a woman convicted or outlawed for any felony for which a man might have his clergy, shall, upon praying the benefit of that statute, be subject only to such punishment as a man would be in the like case.

Lord *Hale* says, a person convicted of heresy, a Jew, or a Turk, should not have their clergy; but a person excommunicate should have his clergy. (2 *Hale*, 373.)

But by stat. 5 Anne, c. 6, which abolished the ceremony of reading, the wall of partition (as Sir *Michael Foster* expresses it) between subject and subject, under one and the same degree of guilt, was taken away; and from this period the measure of punishment was governed by the degrees of real guilt, and not by the function or abilities of the offender. (*Fost.*)

By stat. 4 Hen. VII. c. 13, every person (not being within orders) who had once been admitted to his clergy, should not be admitted to the same a second time.

And by the same statute, if he was convicted of murder, he should be marked, (unless he was a peer, 2 *Hale*, 376,) with an M on the brawn of the left thumb; and if for any other felony with a T.

But he should not be ousted of his clergy, by the bare mark in his hand, or by a parol averment, without the record testifying it, or a transcript thereof, (according to the following statutes.) (2 *Hale*, 373.)

In what case demandable.

In what cases it might be demanded.]—By stat. 25 Edw. III. st. 3, c. 4, all manner of clerks who were convicted before the secular judges for any treasons or felonies, touching other persons than the king himself, might have the privilege of the holy church.

Clergy was never allowed in this nation in cases of high treason, nor was it allowed on indictments of petit larceny or trespass; but by the above recited act clergy was allowed in all treasons, and felonies, except treason against the king; so that after this statute the benefit of clergy might be pleaded and allowed in all other treasons and felonies. (*Hale's Sum.* 230; 2 *Hale*, 326).

Consequently wherever clergy was not allowable in any other cases, it was taken away by some subsequent act of parliament. (*Hale's Sum.* 230.)

Also where a new felony was made by an act of parliament, clergy was to be allowed, unless expressly taken away by such statute. (*Id.*)

And if it be made a new felony, and took away clergy, not generally, but

in such or such cases, regularly in other cases clergy was allowable. (2 *Hale*, 335.)

But if the statute enacted generally that it should be felony without benefit of clergy, or that he should suffer as in case of felony, without benefit of clergy, that excluded it in all circumstances and to all intents. (2 *Hale*, 335.)

And where an act took away clergy from the principal, and said nothing of the accessary, the accessaries, as well *before* as *after*, might have their clergy, (11 *Rep.* 37; *Fost.* 355); neither doth a statute excluding the accessaries thereby exclude the principals.

Benefit of clergy abolished.

Now abolished.]—By the 7 & 8 Geo. IV. c. 28, s. 6, it is enacted, "that *benefit of clergy* with respect to persons convicted of felony shall be abolished; but that nothing herein contained shall prevent the joinder in any indictment of any counts which might have been joined before the passing of this act."

The benefit of clergy had the same effect in restoring a party to his competency as a statute pardon; and the benefit of clergy being abolished, it was at least doubtful whether a person convicted of felony was a competent witness, although he had undergone the punishment. But this is now remedied by the 9 Geo. IV. c. 32, s. 3, by which the punishment for felony, after it is endured, has the effect of a pardon under great seal.

By the 7 Geo. IV. c. 64, s. 7, felonies without benefit of clergy, and sect. 8, felonies within benefit of clergy, are provided for under all circumstances consequent on the indictment. (See the provisions, "*Felony*," Vol. II.)

Clerk, Larceny or Embezzlement by, see "*Larceny*," Vol. III.

Clerk of Assize, see *ante*, "*Assizes*."

As to the lien of, see *R.* v. *Bury*, 1 *Leach*, 201.

Clerk of Justice of the Peace, see "*Justices of the Peace*," Vol. III.; "*Sessions*." Vol. V.

Clerk of the Market, see "*Fairs and Markets*," Vol. III.

Clerk of the Parish.

THE most part of the following laws and observations will be found in Mr. Steer's valuable and well digested work on Parish Law, lately edited by Mr. Clive.

Origin of office.

Parish clerks were heretofore chosen from among the poorer candidates for the clerical office, of whom every minister had at least one to assist under him in the celebration of divine offices. For his better maintenance the profits of the office of aquæbajalus (an assistant in carrying the holy water) were annexed to the office of parish clerk; so that in after times aquæbajalus was only another name for the clerk officiating under the chief minister. (*Lind.* 142.)

His qualifications.

By canon 91, it is required that the said clerk shall be twenty years of age at least; known to the minister to be of honest conversation, and sufficient

for his reading, writing, and also for his competent skill in singing, if it may be.

By whom chosen.

The nomination of clerks, it is said, was at one time vested in all incumbents by the common law and custom of the realm. (*Gibs.* 214.) But differences having arisen between ministers and their parishioners about the conferring of such offices, Archbishop Boniface decreed that the same rectors and vicars, whom it more particularly concerned to know who were fit, should make the choice. (*Steer, P. L.* 96.)

Chosen by minister.

By canon 91 no parish clerk, upon any vacation, shall be chosen within the city of London or elsewhere, but by the parson or vicar, or, where there is no parson or vicar, by the minister of that place for the time being; which choice shall be signified by the said minister, vicar, or parson, to the parishioners the next Sunday following in the time of divine service. (*Steer, P. L.* 97.)

Where the rector may nominate with the consent of the vestry, parties wishing to object should do so at the nomination. (*R.* v *St. Anne's* (*Rector of*) 3 *Burr.* 1877.)

Where certain governors *unà cum assensu* of the inhabitants were to nominate and appoint a chaplain, it was held that a nomination by the governors with a subsequent reference to the inhabitants for their assent was sufficient. (*R.* v. *Davie*, 6 *Ad. & Ell.* 374.)

Verbal appointment by rector sufficient.

A pauper was appointed parish clerk, by the rector of the parish, in the following manner:—The rector sent for the pauper on a Sunday, and requested him to perform duty on that day; and, on coming out of the desk, the rector said to the pauper, "I shall appoint you my regular clerk and sexton, and to follow me in funerals and marriages:" and this was held a proper appointment as parish clerk, without making any notification thereof to the parishioners. (*R.* v. *Bobbing* (*Inhab.*) 1 *Nev. & Per.* 166; 5 *Ad. & Ell* 682.)

Election by custom.

Since the making of the above 91st canon the right hath often been contested between incumbent and parishioners; and wherever it has appeared to be in the latter by custom, a prohibition has issued to the Ecclesiastical Court, in order that the question might be determined at the common law. (*Id.*)

Custom preferred to canon.

The parish of St. Alphage, in Canterbury, prescribed to have the election of their parish clerk; and by the canon the election of the clerk was given to the vicar. It was adjudged, however, that the prescription should be preferred before the canon, because the party chosen is a mere temporal man, and the custom is merely temporal, so as the official cannot deprive him, but upon occasion the parishioners might displace him. (13 *Co.* 70; *Hughes*, 275.) So in *Jermyn's case*, where the rector and clerk sued in the Spiritual Court, to have the said clerk established, having been nominated accordding to the canon, but disturbed by the parishioners, and the churchwardens and parishioners prayed a prohibition upon the surmise of a custom for the vestry to elect: after divers motions a prohibition was granted; for they held that it was a good custom, and that the canon cannot take it away. (*Cro. Jac.* 670; *Townsend* v. *Thorpe*, 2 *Raym.* 1507.) So, though he is in without deed (*Inter the Parishes of Gatton and Milwich*, 2 *Salk.* 536.)

An union of parishes.

Two parishes having been united, in which, before the union, the parish clerk was appointed by the parishioners and the rector: it was held, that after the union, an appointment by the rector alone was invalid. (*Hartley* v. *Cook*, 9 *Bing.* 728; 3 *M. & Scott*, 230; 5 *C. & P.* 411, S. C.)

Before the union of parishes, effected by the statute 22 Car. II. c. 11, there was a custom in the parish of St. M. P. for the parishioners to join with the rector in the election of a parish clerk. By that act the parish of St. M. C. was united to that of St. M. P., the church of the latter parish remaining: Held, that the right of election after the union continued in the inhabitants jointly with the rector, and that an appointment by the rector alone, without the concurrence of the majority of such parishioners, was void; and, consequently, that a person so appointed could not maintain trespass against the churchwardens, &c. for forcibly expelling him from the reading desk of the parish clerk. (*Id.*)

It was made a question, but not decided in that case, whether the election

should be made by the rector and the inhabitants of both parishes in joint vestry assembled, or by the rector with the inhabitants of St. M. P. alone; and whether the rector should be present at the time of the election to make the appointment valid.

Mandamus to appoint.

A mandamus lies to the incumbent to appoint a parish clerk. (*R.* v. *St. Ann's, Soho*, 3 *Burr.* 1877.)

How admitted.

Parish clerks, after having been duly appointed, are usually licensed by the ordinary. (*Johns*, 204.) And sworn to obey the minister. (*Johns*, 205.) And if a parish clerk hath been used immemorially to be chosen by the vestry, and admitted and sworn before the archdeacon, and he refuse to swear him, but admitteth another chosen by the parson, a mandamus lies to the archdeacon, commanding him to swear him. (2 *Rol. Ab.* 234; *Vin. Ab. Mandamus* (H.); *Bac. Ab. Mandamus* (C.))

A temporal officer.

The office of parish clerk is a temporal office. (*R.* v. *Warren*, *Cowp.* 370; *Tarrant* v. *Harby*, 1 *Burr.* 367; *Peake* v. *Bourne*, 2 *Stra.* 942; *semble*, overruling.)

May appoint a deputy.

He may appoint a deputy, who need not be licensed by the ordinary. (*Peake* v. *Bourne*, 2 *Stra.* 942; 2 *Lee, Ec. Ca.* 587.)

A freehold office.

The common law regards parish clerks as belonging to the class of persons who have freeholds in their offices; and, therefore, though they may be punished, yet they cannot be deprived by ecclesiastical censures. (2 *Rol. Ab.* 234; *Reg.* v. *Stogursey*, 1 *B. & Ad.* 795.) The freehold is for life, or, which is the same thing in legal contemplation, during their good behaviour. In *R.* v. *Warren*, *Cowp.* 370, it was stated that the clerk was appointed by the minister; that he had since become bankrupt, and had not obtained a certificate; that he had been guilty of many omissions in his office; was actually in prison at the time of his amoval, and had appointed a deputy, who was totally unfit for the office. Yet after stating an adjournment of the case, the report adds, and now on this day, upon reading the affidavits, Lord *Mansfield* said it was settled in the case of K. and Dr. Ashton, 28 Geo. II., that a parish clerk is a temporal officer, and that the minister must show good ground for turning him out. Now in this case there is no sufficient reason assigned in the affidavits that have been read upon which the Court can exercise their judgment, nor is there an instance produced of any misbehaviour of consequence, therefore the rule for a mandamus to restore him must be made absolute.

Dismissal of.

For bad behaviour in his office the clerk may be dismissed by the minister. But before dismissing him he should summon him to answer the charges made against him, however gross those charges may be. (*Ex parte Cirketh*, 3 *Dowl.* 327; *R.* v. *Gaskin*, 8 *T. R.* 209; and *The Queen on the prosecution of Harris* v. *Smith, Clerk, Qu. Bench, Feb. 8th*, 1844.)

Disturbing congregation after.

A parish clerk having been dismissed from his office by the rector, though irregularly, and another appointed, the former entered the church before divine service had commenced, and took possession of the clerk's seat: it was held, that the churchwardens were justified in removing him from the clerk's desk, and also out of the church, if they had reasonable grounds for believing that he would offer interruption during the celebration of divine service. (*Burton* v. *Henson*, 10 *Mee. & W.* 105.)

Mandamus to restore.

A mandamus lies to the incumbent to replace a parish clerk improperly removed. The affidavit for it should state that such clerk was appointed for life, though it is not perhaps absolutely requisite. (*Anon.* 2 *Chit. Rep.* 254; *R.* v. *Warren*, *Cowp.* 370.)

The Court will not judge of the justice of the cause of removal upon *ex parte* statement of the incumbent. He must state it in his return to the mandamus, and give the clerk an opportunity of answering it. (*R.* v. *Davies*, 9 *D. & Ry.* 231; *R.* v. *Neale*, 4 *N. & M.* 868.)

The *mandamus* to restore must be directed to the incumbent and not to the churchwardens. (*Exp. Cirkett*, 3 *Dowl.* 327.)

A mandamus does not lie to restore one to the office of deputy parish clerk. (*Anon. Loffl*, 134.)

Prohibition.

A prohibition to the Spiritual Court to stay proceedings for restoring a

parish clerk was granted. (*Turrant* v. *Haxby*, 1 *Burr.* 367.) For the law will not suffer the Ecclesiastical Court to deprive him, but only to correct him for any misdemeanor by ecclesiastical censure. (3 *Roll. Ab.* 234; *Gibs* 214.)

Remuneration.

It seems that parish clerks cannot claim any thing by way of a certain allowance or endowment by reason of their office of aquæbajalus. But their sustentation ought to be collected and levied according to the manner and custom of the country. And hereunto the parishioners may be compelled by the bishop. (*Lindw.* 143.)

A custom of this kind is good and laudable, that every master of a family (for instance) on every Lord's day give to the clerk somewhat according to the exigency of his condition; and that on Christmas-day he have of every house one loaf of bread, and a certain number of eggs at Easter, and in the autumn certain sheaves. Also that may be called a laudable custom where such clerk every quarter of the year receiveth something in way of money for his sustenance, which ought to be collected and levied in the whole parish. (*Lind.* 143; *Gibs.* 214.) But if he sue for these things in the Spiritual Court a prohibition lieth. (2 *Roll. Ab.* 286.)

An apparator cannot sue in the Spiritual Court for his fees. (*Pearson* v. *Campion*, 2 *Dougl.* 629.)

Clerk's rate.

In some instances a custom to levy so much money every year for his recompence is set up; and though by canon 91 it is ordained that he shall have his *ancient wages*, and sue for them in the Ecclesiastical Court, yet *Holt*, C. J. said, a clerk of a parish is neither a spiritual person, nor is this duty in demand spiritual; for it is founded on a custom, and by consequence triable at law; and therefore the clerk may have an action on the case against the churchwardens for neglecting to make a rate and levy it, or if it had been levied, and not paid by them to the plaintiff. (*Parker* v. *Clarke*, 6 *Mod.* 252; 3 *Salk.* 87.) So in *Pitts* v. *Evans*, a prohibition was granted to a suit by the clerk of St. Magnus for 1*s.* 4*d.* assessed on the defendant's house, at a vestry in 1672, to be paid to the parish clerk; for if such rate is due by custom, he may maintain an *assumpsit*, if not a *quantum meruit* or a bill in equity. (*Strange*, 1108; 13 *Vin. Ab.* 155.)

In new churches.

The recent acts for building new churches, and making new ecclesiastical districts, provides that the clerks to such churches and chapels shall be annually appointed by the minister thereof. 59 Geo. III. c. 134, s. 29; 1 & 2 Will. IV. c. 38. There is no provision of this kind relating to the churches built under the 1 & 2 Will. IV. c. 38, or the 1 & 2 Vict. c. 107.

Divided parishes.

And the 10th section of the same statute enacts, that when any parish shall be divided, &c., all fees and emoluments of the clerk and sexton afterwards arising in any division shall belong to the clerk and sexton of the division to which they shall be assigned.

Incorporated in London, &c.

By a charter of Hen. III. the parish clerks in and about London were incorporated and authorised to make by-laws and ordinances for their own regulation; and by the 10 Anne, for the building of fifty new churches within the bills of mortality, it is enacted, "that the parish clerks of such new erected churches shall be members of the company or corporation of the clerks of the parish churches within the city and suburbs and liberties of London, Westminster and Southwark, and the fifteen out parishes named in the letters-patent of the said corporation, and shall make weekly and yearly accounts of the churchings and burials happening in their parishes, and shall in all respects be subject to the rules and orders of the said company."

Falsifying, &c. registers.

The 11 Geo. IV. & 1 Will. IV. c. 66, s. 20, 21, 22, provides against the offence of forging, falsifying or destroying parish register. (See "*Register*," Vol. V.)

Embezzling alms.

The parish clerk is in some places employed upon the occasion of administering the Lord's Supper to collect the alms from the communicants, and the purloining or embezzling any portion of the money so received is doubtless punishable as a crime, though it seems from the following case that he cannot be considered as a servant to, nor the money so taken as the *property* of the minister and churchwardens, or either of them. But these objections would have less force against an indictment at common law, and the offence

may be so charged as to ensure conviction and punishment where the facts are fully established. (*R.* v. *Burton*, 1 *Moo. C. C.* 237.)

Gains a settlement.

Serving the office of parish clerk for a year gains a settlement, although he be chosen by the parson and not the parishioners, and have no license from the ordinary, and although he be a certificate man. (1 *Salk.* 536; *Peak* v. *Bourne*, 2 *Stra.* 942; 2 *Ses. Cas.* 182.)

The office of parish clerk being vacant, the pauper began and continued for eleven years to perform the duties, for which he received a yearly salary from the parish. It did not appear how he came into the office. The appointment was in the vicar. It was held, that as the pauper was not even colourably appointed or chosen, he did not by his service as clerk execute an office within the parish so as to gain a settlement under the 3 & 4 Will. & M. c. 11, s. 6. In the same case it was made a question, but not decided, whether the place of parish clerk be a public annual office or charge within that statute. (*R.* v. *Stogursey*, 1 *B. & Adol.* 795.)

Clerk of the Peace.

Who shall appoint and who appointed.

THE *custos rotulorum* shall appoint an able and sufficient person, residing in the county or division, to execute the office of clerk of the peace, by himself or his sufficient deputy (to be allowed of by the said *custos rotulorum*), 37 Hen. VIII. c. 1; and to take and receive the fees, profits, and perquisites thereof, for so long time only as such clerk of the peace shall well demean himself in his said office; 1 Will. III. sess. 1, c. 21, s. 5. And in the recent case of *Harding* v. *Pollock* (6 *Bing.* 25), it was fully settled, on error from the Exchequer Chamber in Ireland, that the appointment to the office of clerk of the peace is in the *custos rotulorum* of each county. See *Crosbie* v. *Hurley*, 1 *Alcock & N.* 431, (*Irish Reports*); 1 *Dow & Clark*, 453; 3 *Bligh, N. S.* 161, S. C. *Bayley*, J., *diss.*

Town clerk.

In cities or towns corporate there is usually an analogous officer who performs correspondent duties under some other title, as "town clerk," and who is generally appointed, not by the *custos rotulorum*, but by the body corporate, of which he is an officer. (*Dick. Sess. by Talf.* 52; and see *The Municipal Corporation Act*, *post*, title "*Corporation*," Vol. II.)

Duration of office.

The office of the clerk of the peace continues "for so long time as he shall well demean himself therein," and therefore he has an estate of freehold for life in the office, on condition of behaving well, and therefore he cannot be dispossessed, except for misbehaviour, by a competent tribunal; nor does his estate determine by the death or removal of the *custos*. (*Harcourt* v. *Fox*, 4 *Mod.* 167, 173; 1 *Show.* 426, S. C.; *R.* v. *Owen*, 4 *Mod.* 293.)

He can be appointed for no other term than "for so long time as he shall well demean himself in his office," and therefore an appointment during pleasure is void, and a party so appointed not a clerk of the peace.

May be displaced for misbehaviour.

By sect. 6 of the 1 Will. III. sess. 1, c. 21, if he shall misdemean himself in his office, and a complaint and charge in writing of such misdemeanor shall be exhibited against him to the justices in sessions, the said justices may, on examination and due proof thereof openly in the said sessions, suspend or discharge him from the said office; and in such case, the *custos rotulorum* shall appoint another able and sufficient person, residing in the said county or division, to be clerk of the peace. And in case of refusal or neglect to make such appointment, before the next general quarter sessions, the justices in sessions may appoint one.

Extortion is one of the offences for which this power of the sessions may be put in force. (*Mod. Ca.* 192.)

The order of sessions removing a party so charged with misconduct need not set forth the evidence on which it is founded. (*R.* v. *Lloyd*, 2 *Stra.* 996.)

Office not to be sold.

By sect. 8 of the 1 Will. III. sess. 1, c. 21, the *custos rotulorum* shall not sell the place of the clerk of the peace, or take any bond or other assurance to receive any reward, fee, or profit, directly or indirectly, to him or to any

other person for such appointment; on pain that such *custos rotulorum* selling, and such clerk of the peace buying, shall be disabled to hold their respective places, and shall each forfeit double the value of the thing given to him who shall sue.

Oath.

By sect. 9, every clerk of the peace, before entering upon the execution of his office, shall, in open sessions, take the oath following:—

I, A. B. do swear, that I have not nor will pay any sum or sums of money, or other reward whatsoever, nor given any bond or other assurance to pay any money, fee, or profit, directly or indirectly, to any person or persons whomsoever, for such nomination and appointment. So help me God.

Qualifying.

He shall moreover take the oaths of allegiance, supremacy, and abjuration, and perform the same requisites as other persons who qualify for offices.

May act as solicitor.

By stat. 22 Geo. II. c. 46, s. 14, a clerk of the peace, or his deputy, was prohibited from acting as an attorney, but this is repealed by the 6 & 7 Vict. c. 73.

Duties of, at sessions.

Duties of.]—The clerk of the peace, by himself or his sufficient deputy, must be in constant attendance on the court of quarter sessions. He gives notice of its being holden or adjourned; issues its processes; records its proceedings; and does all the ministerial acts necessary to give effect to its decisions. (*Dick. Sess.* 52, 53.)

In the actual course of the sessions, it is his duty to read the acts directed to be read in sessions; to call the jurors, and make known their defaults and excuses to the court; to call the parties under recognizance, whether to prosecute, plead, or give evidence; to administer oaths; to present the bills to and receive them from the grand jury; to arraign prisoners; to receive and record verdicts; to tax costs, (*Ex parte Holloway*, 1 *Dowl.* 26); and make true entries of and record all proceedings. (*Dick. Sess.* 53.)

In preparing indictments.

It is his duty, when prosecutors do not choose to seek professional assistance elsewhere, to draw the bills of indictment for felony, at a fee of only 2*s.* each; and if an indictment so prepared be found defective, he is bound to provide another *gratis*, on pain of forfeiting 5*l.* to any one who will sue; 10 & 11 Will. III. c. 23, s. 7, 8. He has also been said to be amerciable in the Court of Queen's Bench for gross errors in indictments framed by him, and brought before that court on *certiorari* (*Lilly's Prac. Reg.* 71). And though perhaps at the present day he would scarcely be held responsible for mere error, there is no doubt that if an indictment drawn by him were of immoderate and oppressive length, it might be referred to the master, and the clerk of the peace might be ordered to pay the costs of such parts of it as should be found manifestly superfluous. (*R.* v. *May*, 1 *Dougl.* 193, 194; *R.* v. *Bury*, 1 *Leach*, 201.) It seems, however, that the obligation to draw indictments at the statutable fee of 2*s.* is confined to cases of *felony*; and in case of *misdemeanor*, he may make reasonable charges to prosecutors requiring his assistance. (*Dick. Sess.* 53.)

Estreats, fines and recognizances.

As to his duty in respect to estreats, fines, and recognizances, see "*Fines*," &c. Vol. III. He is bound to put the law in motion to levy all recognizances forfeited at quarter sessions. (*Reg.* v. *Yorkshire* (*West Riding*) *Justices*, 2 *Nev. & Per.* 457.)

Return of persons tried.

The 11 Geo. IV. & 1 Will. IV. c. 25, repeals the 55 Geo. III. c. 49, relative to his making returns of persons committed, tried, and convicted for criminal offences and misdemeanors.

Sheriff's appointment.

As to his duty upon the appointment of sheriffs and under-sheriffs, see 3 & 4 Will. IV. c. 99, s. 4, 5; "*Sheriff*," Vol. V.

Insolvents.

As to his duties under the Insolvent Act, see the act 7 Geo. IV. c. 57, s. 77, 78, &c. *post*, "*Insolvent Debtors*," Vol. III.

Juries.

As to his duties in summoning, &c. juries, see *post*, "*Jurors*," Vol. III.

Highways.

As to his duties in respect of highways, see "*Highways*," Vol. III.

Savings banks.

Friendly societies.

As to the enrolment of rules of friendly societies and savings banks, see *ante*, "*Banks for Savings*," "*Friendly Societies*," Vol. III.

Exchange of common lands.

As to his duties in respect of the exchange of lands lying in common lands, see *post*, "*Commons*."

As to the duties imposed on him by the 38 & 39 Geo. III. c. 79, relating to printers and the suppression of treasonable societies, see "*Printers*," Vol. V. Printers.

As to the transfer of balances in their hands on account of lunatic asylum licenses, see "*Lunatics*," Vol. III. Lunatics.

Various other duties will be found under different titles of this work.

Fees of.]—The clerk of the peace is not bound to enter judgment, or the like, at the suit of any, without having the fee due for the same; but if the court order any thing without suit of another, to wit, *ex officio*, there he ought to enter the same, without having any fee for the entering thereof. (*Cromp.* 159.) Fees of.

As to his fee for drawing an indictment, see *ante*, 688.

The sessions cannot compel payment of his fees by summary process, or detain parties till they be paid, but he must seek his remedy by action. (*Pollard* v. *Gerrard*, 1 *Ld. Raym.* 703.)

In 1819, the plaintiff, who was then under age, was appointed clerk of the peace for the county of Kerry by the *custos rotulorum* of the county, and acted by himself as well as by deputies till 1824; in that year the defendant as appointee of the crown obtained possession of the office under a mandamus, and continued to hold the possession and receive all the fees and emoluments till 1829, when the plaintiff was restored to his office; the plaintiff then brought an action of indebitatus assumpsit against defendant for the fees received by him whilst clerk *de facto*:—Held, that the action was maintainable as the mandamus did not decide the title, but merely enabled the defendant to try the right, and the right being now settled upon principles of law to be in the *custos* and not in the crown; secondly, that the letters patent of the *custos* under the 55 Geo. III. c. 78, need not be stamped; thirdly, that the fact of the plaintiff having for a considerable time acted as clerk of the peace was sufficient evidence of his admission to the office. (*Crosbie* v. *Hurley*, 1 *Alcock & Napier*, 431 (*Irish*).)

It would seem from that case that the defendant could not sustain a claim of set-off for his work and labour while clerk *de facto*. (*Id.*)

The sessions have no jurisdiction to make a prospective order for a compensation thereafter to be made to the clerk of the peace; and therefore where a county treasurer, in obedience to such order, made the payment, and that payment was afterwards, by an order of sessions, allowed in his accounts, the Court of Q. B. quashed so much of the order of sessions as allowed that item. (*R.* v. *Williams*, 3 *B. & Ald.* 215.) It was made a question in that case, whether, under the 55 Geo. III. c. 51, s. 16, the session had power to make any compensation to the clerk of the peace. Lunatic asylum licenses.

The sessions are not authorised to order the payment by the bridge-master to the clerk of the peace of a per-centage on all money raised for the repair of bridges in a particular district in lieu of all his fees for indictments, presentments, or for bridges within it, although such per-centage was claimed as an ancient fee, and had been paid without dispute for a long period of time. (*Rex* v. *Houldgrave*, 1 *Barn. & Ald.* 312.) Bridges.

By the 5 Geo. IV. c. 84, s. 21, *post*, "*Transportation*," Vol. VI. p. 287,) in the case of convicts sentenced to be transported or pardoned on condition of being transported, the clerk of the court in which the offender is convicted is to be paid by the county treasurer the same fee as hath been usually paid and he is lawfully entitled to receive for every order of transportation. It was held on this enactment, first, that the clerk of every such court is entitled to receive such fees as can be proved to have been usually in fact paid to the clerk of that particular court for such order; second, that where the fees had been paid without variation as to amount as long as could be recollected down to the time of a particular clerk, and to him for the first four years after he entered upon the office, but not for the residue of the term (forty-five years) during which he held it, this could not of itself so interrupt the course of usual payment as to prevent a mandamus issuing to the treasurer to pay the fees to the successor of such clerk, and this, although previous statutes had provided for the payment by the treasurer to the clerk of the same fee as In case of convicts.

had been usually paid or the clerk was entitled to, and although still earlier and down to the latest receipt of the fees in the particular court they had been paid not by the treasurer but by the contractors for transportation. But it was held that the clerk was not entitled to any fees for those sentenced to hard labour only. (*Reg.* v. *Baker*, 7 *Ad. & Ell.* 502.)

Fees on discharge of prisoners abolished.

Stat. 55 Geo. III. c. 50, abolishes all fees and gratuities payable to the same for the entrance, commitment or discharge of prisoners, and makes it a misdemeanor in clerks of the peace, &c. exacting such fees. (See the enactment, title "*Gaols*," Vol. III. p. 395.)

Sessions to settle table of fees of.

Stat. 57 Geo. III. c. 91, s. 1, reciting, that "doubts have arisen touching the fees and allowances due and to be made to the clerks of the peace of the several counties and other divisions in England and Wales; for the removing of such doubts," enacts, "that from and after the first day of July next, it shall and may be lawful to and for the justices of the peace for the county of Kent, and for the county palatine of Lancaster, at their annual general sessions of the peace, and for the justices of the peace in every other county, riding, division, city, town, liberty or precinct, within England and Wales, at their respective general quarter sessions of the peace, to ascertain, make and settle a table of fees and allowances to be taken by the clerk of the peace for such county of Kent and such county palatine, and such other counties, ridings, divisions, cities, towns, liberties, and precincts respectively; and such table of fees and allowances, when so made, shall be subject to the approbation of the justices of the peace at the then next succeeding general annual sessions of the peace for the county palatine of Lancaster, and for the county of Kent, and at the then next succeeding general quarter session of the peace for every other such county, riding, division, city, town, liberty or precinct as aforesaid, or at some adjournment of such sessions respectively; and such table of fees respectively, when so approved respectively, shall be laid before the judges of assize at the next assizes for such counties and places respectively, except the several places being counties in which assizes are not constantly or regularly holden in every year, and in those cases before the justices at the next assizes for the adjoining county where assizes are constantly and regularly holden, and to which prisoners are generally removed for trial from such places respectively, and also except the counties in Wales and the county palatine of Chester, and before the justices at the next great sessions for the several counties in Wales, and for the county palatine of Chester; and the said judges and justices respectively are hereby authorised to ratify and confirm such tables respectively, either as settled and approved as aforesaid, or with such alterations, additions and improvements, as to such judges and justices last mentioned shall appear to be just and reasonable; and it shall be lawful for the said justices of the peace, at their respective quarter or general sessions of the peace, from time to time in like manner to make other table of fees and allowances, instead of or in addition to the tables of fees and allowances before made, which shall and may be approved and afterwards ratified and confirmed in like manner; which fees and allowances contained in such tables respectively, when so made and approved, and afterwards ratified and confirmed as aforesaid, shall be the only fees and allowances which shall be taken by the clerks of the peace of the several counties and places for which such tables respectively shall be so made, approved, ratified and confirmed, from and after such ratification and confirmation thereof respectively; any thing in any act or acts of parliament, or any law, usage or custom to the contrary in anywise notwithstanding."

Taking greater fees than allowed.

Sect. 2. "If at any time after any such table of fees and allowances shall have been so ratified and confirmed as aforesaid, any clerk of the peace, or any person or persons acting as such, shall, under pretence of any matter or thing done, transacted or performed, demand or receive any other or greater fee or allowance than the fee or allowance, fees or allowances, ascertained, ratified and confirmed as aforesaid, such clerk of the peace or other person shall for every such offence forfeit and pay the sum of five pounds to any person who shall sue for the same by action of debt, bill, plaint or information, in any of his majesty's courts of record at Westminster, wherein no essoin,

privilege, protection, wager of law, or more than one imparlance shall be granted or allowed." 57 Geo. 3, c. 91.

There is no doubt that if he wilfully take more than his due under colour of his office, he may be indicted at common law for extortion, or be removed from his office, on articles exhibited against him in the court of quarter sessions. (*Mod. Cas.* 102; "*Extortion*," Vol. II.)

Table of fees to be hung up in conspicuous place where sessions held.

Sect. 3. "Every table of fees and allowances which shall be made, approved, ratified and confirmed from time to time as aforesaid, shall be deposited with the clerk of the peace for the county or place for which such table of fees shall have been so made, approved, ratified and confirmed as aforesaid; and a true and exact written or printed copy or copies thereof shall be placed and constantly kept in a conspicuous part of every room or place wherein any general or quarter sessions of the peace for such county or place shall be held; and if any clerk of the peace, or person acting as such, shall at any time neglect to cause every such copy to be so placed and constantly kept according to the provisions of this act, he shall forfeit and pay to any person who shall sue for the same, for every such offence, the sum of five pounds, to be recovered by action of debt, bill, plaint or information, in any of his majesty's courts of record at Westminster, wherein no essoin, privilege, protection, wager of law, nor more than one imparlance, shall be granted or allowed."

Limitation of actions.

Sect. 4. "All suits and actions which shall be brought or commenced by virtue of this act, shall be brought before the end of three calendar months after the offence committed, and not otherwise."

Appointment of clerk of peace, on stats. 37 Hen. 8, c. 1, and 1 Will. 3, c. 21.

To all persons to whom these presents shall come, I [the Most Noble George Granville Leveson Gower, Marquis,] of the county of , and custos rotulorum *of the said county of , send greeting.*

WHEREAS the office of clerk of the peace for the county of is now void by the death of late clerk of the peace for the said county, Now know ye, that I the said [Marquis] of the county of , custos rotulorum *of the county aforesaid, do hereby nominate, elect, appoint, and assign W. K. an able and sufficient person, instructed and learned in the laws of England, and residing in the said county, to be clerk of the peace for the said county; to hold, execute and enjoy the office of clerk of the peace for the county aforesaid, by himself or his sufficient deputy; and to take and receive the fees, profits and perquisites thereof, so long as he shall well, justly and honestly demean himself in his said office. In witness whereof I the said have hereunto set my hand and seal, the day of , in the*

Clipping Money, see *post*, "*Coin*."

Clockmakers, see "*Servants*," Vol. V.

Cloth and Clothier, see "*Manufactures*," Vol. V.; "*Woollen Manufacturers*," Vol. VI.; "*Servants*," Vol. V.

Coaches and Carts, see *post*, "*Carriers*;" "*Hackney Coaches*," Vol. III.; "*Stage Coaches and Post Horses*," Vol. V.; "*Taxes*," Vol. VI.

Coals and Coal Mines.

I. *Regulations as to Coals in general*, 692.

[30 Car. II. st. 1, c. 8, 6 & 7 Will. III. c. 10; 12 Anne, st. 2, c. 17; 11 Geo. II. c. 15; 17 Geo. II. c. 35; 15 Geo. III. c. 27; 31 Geo. III. c. 36; 43 Geo. III c. 134; 52 Geo. III. c. 9; 5 & 6 Will. IV. c. 63; 6 & 7 Will. IV. c. 109.]

II. *Regulations as to Coals in London and Precincts*, 695.

[1 & 2 Will. IV. c. lxxvi.; 1 & 2 Vict. c. ci.; 6 & 7 Vict. c. 2; 6 & 7 Vict. c. ci.]

III. *Coal Mines, Offences as to*, 736.

[7 & 8 Geo. IV. c. 30, s. 5, 7 Will. IV. & 1 Vict. c. 89, ss. 9, 12.]

I. Regulations as to Coals in General.

By stats. 30 Car. II. st. 1, c. 8; 6 & 7 Will. III. c. 10; and 11 Geo II. c. 15, for the admeasurement of keels, boats, waggons, wains, carts, and other carriages used for the carrying of coals in the ports of Newcastle, Sunderland, and the other members of the port of Newcastle; and by stat. 15 Geo. III. c. 27, for extending the like regulations to the other ports of this kingdom: if after the admeasurement thereof by the commissioners appointed for that purpose, the marks shall be removed or altered, every person who had a hand in or was privy to the doing thereof, shall, on conviction upon the oath of one witness before one justice, forfeit 10*l.* by distress, half to the king and half to the discoverer; and for want of distress shall be committed to the common gaol for three months

31 Geo. 3, c. 36. And by stat. 31 Geo. III. c. 36, s. 1, as to all such keels, boats, wains, carts, and other carriages used as aforesaid, which have been duly admeasured and marked as aforesaid, and such marks afterwards on repairing thereof or otherwise have been removed or altered, it is enacted that the same shall be re-admeasured and marked in manner aforesaid before they are again used, under penalty of forfeiture thereof, together with the coals laden thereon.

And by sect. 4, if any person shall wilfully or designedly remove, deface, or destroy any such mark, he shall on conviction before one justice, on the oath of one witness, forfeit and pay not exceeding 5*l.* nor less than 40*s.*; and in default thereof shall be committed by such justice to the house of correction nearest to the place where the offence was committed for any time not exceeding one month nor less than seven days.

17 Geo. 2, c. 35. And by stat. 17 Geo. II c. 35, s. 1, reciting "Whereas by an act made in the sixteenth and seventeenth year of the reign of King Charles the Second, intituled '*An Act for regulating the Measures and Prices of Coals*,' it is (amongst other things) enacted, That the Lord Mayor of London, and the Court of Aldermen, for the time being, and the justices of the peace of the several and respective counties and places where coals, commonly called sea-coals, brought into the river of Thames, are sold by retail, or any three or more of them, whereof one to be of the quorum, should be and are thereby empowered to set the rates and prices of all such coals as should be sold by retail, as they from time to time should judge reasonable, allowing a competent profit to the said retailer beyond the price paid by him to the importer and the ordinary charges thereupon accruing; and whereas many exactions and abuses are used by retailers of sea-coal, brought by sea into other rivers, creeks, havens, ports, cities, boroughs, towns, counties and places within the kingdom of England, dominion of Wales, and town of Berwick upon Tweed, besides such counties and places where such coals brought into the river Thames were and are sold by retail: for avoiding of which exactions and abuses in such other counties and places as aforesaid, a like remedy is needful to be provided, as by the said recited act is provided, touching the retailers of

coals brought into the said river of Thames, and sold; it is enacted, "That from and after the 24th day of June, in the year of our Lord 1744, the justices of the peace of the several counties in the kingdom of England, dominion of Wales, and of the town of Berwick upon Tweed, or any three or more of them, whereof one to be of the quorum, shall be and are hereby empowered to set the rates and prices of all coals called sea-coals, as shall be brought by sea into any other rivers, creeks, havens, or ports, and sold by retail after landed, in any other cities, boroughs, towns, counties, and places within the kingdom of England, dominion of Wales, and town of Berwick upon Tweed, to which the said recited act doth not extend, as they from time to time shall judge reasonable, allowing a competent profit to the said retailer, beyond the price paid by him to the importer, and the ordinary charges thereupon accruing; and that if any ingrosser or retailer of such coals shall refuse to sell as aforesaid, that then the said justices of the peace respectively are hereby authorised to appoint and empower such officer or officers, or other persons as they shall think fit, to enter into any wharf, or other place where such coals are stored up, and in case of refusal taking a constable to force entrance, and the said coals to sell, or cause to be sold, at such rates as the said justices respectively shall judge reasonable, rendering to such ingrosser or retailer the money for which the said coals shall be so sold, necessary charges being deducted. And if any action shall be commenced against the justices of peace, constable, or any officer or person, for the thing to be done in pursuance of this act, the defendant in every such action may plead the general issue, and give the special matter in evidence; and if the verdict be found for him, or the plaintiff become nonsuited, such defendant shall recover and have his damages and treble costs of suit, for his unjust vexation in that behalf."

1. *Regulations, &c.*

Three justices to set the retail price of coals in any part of England, &c.

allowing a competent profit to the retailers.

Power of justices, if the retailers refuse to sell as ordered.

General issue.

Treble costs.

Sect. 2. "Provided always, that no person having interest in any wharf used for the receiving and uttering of coals, or doth or shall trade by himself or others, in his own or any other name, in the sale of any coals, or the engrossing the same, in order to sell the same, and not for his own private use only, shall act, or otherwise intermeddle in the setting the price of coals; any thing in this act to the contrary in any wise notwithstanding."

No interested person to be concerned in setting a price on coals.

By 52 Geo. III. c. 9, which repeals stat. 25 Geo. III. c. 54, so far as relates to England and Wales, and makes other provisions in lieu thereof, enacts, sect. 6, that all ships in the coal trade shall be measured, and the duties paid on the greatest quantity of coal, culm, or cinders, which it shall appear that any such ship or vessel is capable of containing.

52 Geo. 3, c. 9. Measuring ships.

By stat. 5 & 6 Will. IV. c. 63, s. 9, reciting, "And whereas the sale of all coals, slack, culm, and cannel of every description by weight, and not by measure, would tend greatly to prevent the commission of frauds, and impositions in the vend and delivery of such coals, slack, culm, and cannel of every description; be it therefore enacted, that from and after the 1st day of January, 1836, all coals, slack, culm, and cannel of every description shall be sold by weight, and not by measure; and every person who shall, from and after the 1st day of January, 1836, sell any coals, slack, culm or cannel of every description by measure and not by weight, shall, on conviction, be liable to a penalty not exceeding 40*s.* for every such sale" (See "*Weights and Measures*," Vol. VI. p. 408, &c.; and as to the weighing of coals within twenty-five miles of London, see the 1 & 2 Will. IV. c. lxxvi. *post*, 695, n. (*a*)

5 & 6 W. 4, c. 63. Coals to be sold by weight and not by measure.

By the 6 & 7 Will. IV. c. 109, intituled "*An Act to repeal certain Provisions respecting the Coal Trade*," [20th August, 1836,] "whereas by an act passed in the ninth year of the reign of her late Majesty Queen Anne, intituled '*An Act to dissolve the present and prevent the future Combination of Coal Owners, Lightermen, Masters of Ships and others to advance the Price of Coals, in prejudice of the Navigation, Trade and Manufactures of this Kingdom, and for the further Encouragement of the Coal Trade*,' and made perpetual by an act passed in the first year of the reign of his late Majesty King George the First, it was amongst other things enacted, that all and every contract or contracts, covenants or agreements, whether the same were in writing or not in writing, and whether theretofore made or entered

6 & 7 W. 4, c. 109.
9 Ann. c. 28.

1. *Regulations, &c.*

into, or thereafter to be made or entered into, by or between any coal owners, lightermen, fitters, masters or owners of ships or vessels, crimps, coal factors, or other person or persons whatsoever concerned in the said coal trade, for engrossing coals, or for restraining or hindering any person or persons whomsoever from freely selling, buying, loading or unloading, navigating or disposing of coals in such manner as they lawfully might, should be and were thereby declared to be illegal, null and void, to all intents and purposes; and further, that if any coal owners, lightermen, fitters, masters or owners of ships or vessels, crimps, coal factors or any other person or persons whatsoever, should, at any time or times from and after the first day of June, one thousand seven hundred and eleven, keep up, continue, act in, make, enter into, sign, seal or be knowingly interested or concerned in any contract or contracts, covenants or agreements, before by that act declared to be illegal, null and void, or should erect or keep up any office or offices, chamber or chambers, or other place or places for the management of such contract or contracts, covenants or agreements, as party or parties to or knowingly interested in the same, or should anywise act or officiate therein as officer, clerk, agent or servant to or for the persons so contracting, agreeing, or acting contrary to the true intent and meaning of this act, the person or persons so offending should for every such offence forfeit and pay as follows; (that is to say,) every coal owner or owners, or proprietor of or in any pit or mine, pits or mines of coal, the sum of one hundred pounds; and every fitter, whether acting by himself, his agent or servant, the sum of fifty pounds; and every master or owner of any ship or vessel the sum of twenty pounds; and every officer, clerk, agent or servant as aforesaid the sum of twenty pounds: and whereas by an act passed in the fourth year of the reign of his late Majesty King George the Second, intituled '*An Act for rendering more effectual an Act made in the third year of his Majesty's reign, intituled "An Act for the better Regulation of the Coal Trade," so far as the same relates to the preventing the enhancing the Price of Coals in the River of Thames by the keeping of turn in delivering of Coals there,*' it was amongst other things enacted, that from and after the fifteenth day of May, one thousand seven hundred and thirty-one, it should not be lawful for any owner or owners of any ship or vessel employed in the coal trade, or any person authorised by them, or any other person or persons whatsoever, directly or indirectly, by writing or otherwise, to give any orders or directions to any master or person having the command or rule of any ship or vessel employed in the coal trade, or to any agent or servant employed in the selling of coals, which should anywise relate to the keeping of turn in selling or delivering of coals in the river of Thames, and that no master or masters or other person having the command or rule of any ship or vessel as aforesaid should obey any such orders or keep turn as aforesaid, upon pain that every person giving such directions, and the person or persons observing and following the same, or any otherwise, directly or indirectly, acting contrary to the true intent and meaning of that act, should respectively forfeit and pay the sum of one hundred pounds for every such offence, one moiety thereof to his majesty, his heirs and successors, and the other moiety to him or them who should sue for the same within the space of six months next after such offence or offences should be committed, to be recovered, with treble costs of suit, by action of debt, bill, plaint or information in any of his majesty's courts of record, wherein no essoign, protection, wager of law, nor more than one imparlance should be allowed: and whereas by an act passed in the twenty-eighth year of the reign of his late Majesty King George the Third, intituled '*An Act to indemnify and save harmless all persons who may have incurred Penalties or Forfeitures under an Act passed in the ninth year of the reign of Queen Anne, intituled "An Act to dissolve the present and prevent the future Combination of Coal Owners, Lightermen, Masters of Ships, and others, to advance the Price of Coals, in prejudice of the Navigation, Trade, and Manufactures of this Kingdom, and for the further Encouragement of the Coal Trade," and also an Act passed in the third year of the reign of his late Majesty King George the Second, intituled "An Act for the better Regulation of the Coal Trade," and for the better preventing of Combinations in the Trade of Coals,*' it was amongst

6 & 7 W. 4, c. 100.
4 Geo. 2, c. 30.

28 Geo. 3, c. 53.

other things enacted, that from and after the first day of June, one thousand seven hundred and eighty-eight, any number of persons united in covenants or partnerships, or in any way whatsoever, consisting of more than five persons, for the purchasing of coals for sale, or for making regulations with respect to the manner of carrying on the said trade in coals, shall be deemed and adjudged to be an unlawful combination to advance the price of coals, and every person concerned therein shall be liable to be punished by indictment or information for the same in his Majesty's court of King's Bench at Westminster: and whereas the hereinbefore recited provisions are injurious to the public, by obstructing the free and open trade in coals, and preventing the employment of large joint capital in the said trade:" it is enacted, "that the said acts, so far as the same are herein-before recited and set forth, shall be and the same are hereby repealed."

1. *Regulations, &c.*

Repeal of certain provisions in recited act.

Sect. 2. "That this act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such by all judges, justices and others."

Public act.

II. Regulations as to Coals in and near London and its Precincts. (a)

By the 1 & 2 Will. IV. c. lxxvi. (b) intituled "*An Act for Regulating the Vend and Delivery of Coals in the Cities of London and Westminster, and in Certain Parts of the Counties of Middlesex, Surrey, Kent, Essex, Hertfordshire, Buckinghamshire, and Berkshire,*" [5th October, 1831,] reciting that "The acts now in force for regulating the vend and delivery of coals in the cities of London and Westminster, and the liberties thereof, and in certain parts of the counties of Middlesex, Surrey, Kent, and Essex, have been found insufficient to prevent the commission of frauds and impositions in the vend and delivery of such coals: and that the objects intended to be effected by the said acts would be more effectually promoted, and the rates and charges which tend to increase the price of coals might be reduced, if the said acts were repealed, and other provisions were made in lieu thereof:" it is enacted "That so much of an act passed in the ninth year of the reign of Queen Anne, intituled '*An Act to dissolve the present and prevent the future Combination of Coal Owners, Lightermen, Masters of Ships, and others, to advance the Price of Coals, in Prejudice of the Navigation, Trade, and Manufactures of this Kingdom, and for the further Encouragement of the Coal Trade,*' as directs that, for the further encouragement of the said coal trade, and for preventing of frauds and abuses therein, every fitter or other person vending or delivering coals, or some or one of them, shall give a full, true, and ample certificate or certificates to each and every ship master, every voyage, signed by his or their handwriting, containing the day of the month and year of such loading, the master's and ship's names, and the exact quantity, and the usual names of the several and respective collieries out of which the said coals are and shall be wrought and gotten, and the price paid by the master or masters for each and every sort of coals that each and every fitter or other person vending or delivering coals as aforesaid, his or their agent or servant, hath sold and loaded on board each and every ship or vessel; which said certificate or certificates shall, upon the arrival of the said ship at the port of London, or any other delivering port, be registered, if delivered in the port of London, at the cocquet office always kept and appointed by the lord mayor of London for the time being, and if delivered in any other delivering port, then at the custom-house, with the keeper of the cocquets there; for

1 & 2 Will. 4, c. lxxvi.

Part of act 9 Ann. c. 28;

(a) This recent enactment of the 1 & 2 Will. IV. is of so much importance and as it extends its operation over 25 miles from the General Post Office, it is deemed proper to insert it. The 6 & 7 Vict. c. ci. also contains provisions for the establishing an office for the benefit of whippers in the port of London, and regulations for the loading and unloading of, and other matters as to coals in London.

(b) See the principal objects of this act pointed out in Mr. Dowling's Treatise on it, p. 1, n.

2. *Regulations, &c. in London, &c.*

1 & 2 Will. 4, c. lxxvi.

registering whereof no more than sixpence shall be paid; to which said register any person or persons shall and may have recourse to see and examine without fee or reward; and in case any person or persons omit or refuse to give such certificate or certificates as aforesaid, or shall give or make any false certificate or certificates, or any master or masters of any ship or vessel shall knowingly give in any false certificate or certificates to be registered, or shall not, within forty-eight hours after entry of his ship at the custom-house of London or other delivering port, give in his or their certificate or certificates to be registered in manner aforesaid, or if the person or persons who ought to register, file, or enter such certificate or certificates, or his or their clerk or deputy officiating in such office or offices, shall neglect to register the same for the space of four and twenty hours after the delivery of such certificate or certificates into such office or offices, or shall make a false entry of such certificate or certificates, or refuse to show and produce such certificate and certificates, and register thereof, to any person or persons coming at the usual office hours to see and inspect the same, every person so offending shall for every such offence forfeit and pay the sum of ten pounds; and also an act passed in the forty-seventh year of the reign of King George the Third, intituled '*An Act for Repealing the several Acts for Regulating the Vend and Delivery of Coals within the Cities of London and Westminster, and Liberties thereof, and in certain Parts of the Counties of Middlesex, Surrey, Kent, and Essex, and for making better Provision for the same;*' and also an act passed in the fifty-sixth year of the reign of King George the Third, intituled '*An Act for Preventing Frauds in the Admeasurement and Delivery of Coals within the several Parishes in the County of Middlesex, lying between the Parish of St. Luke, Chelsea, and the Mouth of the River Colne near Staines, and also between Limehouse Hole and the Mouth of the River Lee, near Blackwall, and also within the several Parishes in the Counties of Middlesex and Essex adjoining to both Banks of the River Lee and the Branches thereof, between the River Thames and Edmonton;*' and also an act passed in the fifty-seventh year of the reign of King George the Third, intituled '*An Act to extend the Limits of an Act made in the last Session of Parliament, for preventing Frauds in the Admeasurement of Coals in certain Parishes in the Counties of Middlesex and Essex;*' and also an act passed in the same year, intituled '*An Act for Continuing the Term and Enlarging the Powers granted to the principal Land Coal Meters for the City and Liberty of Westminster, and for Extending the Limits of their Office to the Parish of St. Luke, Chelsea;*' and also an act passed in the ninth year of the reign of King George the Fourth, intituled '*An Act to enable his Majesty's Justices of the Peace for the County of Surrey to nominate and appoint two or more Persons to act as Principal Land Coal Meters within and for the several Parishes and Places therein mentioned in the said County;*' shall, from and after the thirty-first day of December next after the passing of this act, be and the same are hereby repealed (except as to such acts, matters, and things as shall have been done before the passing of this act, and also except as to such proceedings, offences, penalties, and forfeitures as shall have been commenced, committed, or incurred before the passing of this act, and which proceedings, offences, penalties, and forfeitures may be proceeded in or punished, recovered, and enforced, according to the provisions contained in the said acts respectively): provided always, that the several acts and provisions repealed by the said recited acts, or any of them, shall not be revived, and that nothing herein contained shall have the effect of reviving any act or any provisions of any act whatsoever."

and the acts 47 Geo. 3, sess. 2, c. 68;

56 Geo. 3, c. 21;

57 Geo. 3, c. 1;

57 Geo. 3, c. 40;

and 9 Geo. 4, c. 65;

repealed after 31st Dec. 1831.

Nothing herein to revive any former act.

Sect. 2, continues the 1 Will. IV. c. 137, until first of January, 1832.

Coal exchange to continue vested in the corporation of London.

Sect. 3. "The piece or parcel of land, with the buildings thereon, called 'The Coal Exchange,' with the hereditaments and appurtenances, which by the said act of the forty-seventh year of the reign of King George the Third was declared to be vested in the mayor and commonalty and citizens of the city of London, shall continue and the same is hereby vested in them for the purposes of this act."

Coal exchange to be an open market.

Sect. 4. "There shall continue to be in or upon the said coal exchange and hereditaments a free, open, and public market for the sale of coals brought into the port of London, which shall be called "The Coal Market.'"

Sect. 5. "It shall be lawful for the said mayor, aldermen, and commons of the city of London, in common council assembled, to continue and retain any clerk or clerks or other officer or officers of the said coal market, or to appoint such other clerks and officers, with such salary or salaries for his or their trouble and attendance there, as the said mayor, aldermen, and commons, in common council assembled, shall from time to time think just and reasonable, and from time to time to remove or displace any of the said present or other clerks or officers, and to appoint other clerk or clerks, officer or officers, in his or their stead."

2. *Regulations, &c. in London, &c.*

1 & 2 Will. 4, c. lxxvi.

Power to continue, appoint, and remove clerks and officers.

Sect. 6. "It shall be lawful for the said mayor, aldermen, and commons, in common council assembled, if they shall think proper, at any time to remove the said market to any other place which they may from time to time think more convenient, and also at any time to enlarge the said coal exchange, or other the place where the said market shall for the time being be holden."

Power to remove the market, and to enlarge the present or any future market place.

Sect. 7. "For the purpose of providing a site for any new market place, or for enlarging the present or any future market place, it shall be lawful for the said mayor, aldermen, and commons, in common council assembled, and they are hereby authorised and empowered, in the name of the mayor and commonalty and citizens of the city of London, to treat and agree for the purchase of and from any body or bodies politic, corporate, or collegiate, or any person or persons able or authorised by this act and willing to sell the same, any tenements or hereditaments, or estates or interests therein, which the said mayor, aldermen, and commons, in common council assembled, shall think proper."

Corporation empowered to purchase tenements and hereditaments.

Sect. 8. "It shall be lawful for all bodies politic, corporate, or collegiate, corporations aggregate or sole, tenants in tail or for life, husbands, guardians, trustees, and feoffees in trust for charitable or other purposes, committees, executors and administrators, and all other trustees and persons whomsoever, not only for and on behalf of themselves, their heirs and successors, and also for and on behalf of their *cestui que trusts* or wards, whether infants, issue unborn, lunatics, idiots, femes covert, or other person or persons whomsoever, but also for and on behalf of the person or persons entitled in remainder or reversion, or for any other future interest, and to and for all femes covert who are or shall be seised, possessed of, or interested in their own right, or entitled to dower or other interest therein, and to and for all and every other person or persons whomsoever, who are or shall be seised or possessed of or interested in any tenements and hereditaments which, or part of which, by the said mayor, aldermen, and commons, in common council assembled, shall be thought necessary for the purposes of this act, to contract for, sell, and convey the same, and every or any part thereof, to the mayor and commonalty and citizens of the city of London; and all contracts, agreements, bargains, sales, conveyances, and assurances, acts and deeds, which shall be made by such bodies politic, corporate, or collegiate, trustee or trustees, or other person or persons as aforesaid, shall be valid and effectual in the law to all intents and purposes whatsoever; and all bodies politic, corporate, or collegiate, and all persons whomsoever, contracting or conveying as aforesaid, are hereby indemnified for or in respect of any such sale which he, she, they, or any of them shall respectively make by virtue or in pursuance of this act."

Bodies politic, &c. trustees, and other persons, empowered to sell and convey, &c.

Sect. 9. "All and every body or bodies politic, corporate, or collegiate, trustee or trustees, and other person or persons hereinbefore capacitated to contract for, sell, and convey any such tenements or hereditaments as aforesaid, and any other owner or owners of any such tenements or hereditaments, or any share or shares, estate or estates, interest or interests therein, may accept and receive such satisfaction or recompense for the value thereof, and such body or bodies, trustee or trustees, person or persons, owner or owners, and also any tenant or tenants for a year, or from year to year, or at will, or other occupier or occupiers of any such premises, may accept and receive such sum or sums of money by way of compensation for goodwill or improvements which shall be lost, and for tenants' fixtures, and for injury or damage

Satisfaction may be accepted.

2. *Regulations, &c. in London, &c.*

1 & 2 Will. 4, c. lxxvi.

which shall be sustained on account of the execution of this act, or in anywise relating thereto, as shall be agreed upon between them respectively and the said mayor, aldermen, and commons, in common council assembled; and such satisfaction, recompence, or compensation shall be paid out of the fund hereinafter mentioned, or the monies to be received for the purposes of this act."

Bargains and sales to have the force of fines and recoveries.

Sect. 10. "The conveyance of the estate or interest of any feme covert to the said mayor and commonalty and citizens by indenture or indentures of bargain and sale, sealed and delivered by such feme covert in the presence of and attested by two credible witnesses, and duly acknowledged, and to be enrolled in the Court of Hustings of the city of London within six calendar months after making thereof, shall as effectually and absolutely convey the estate and interest of such feme covert in the premises as any fine or fines, recovery or recoveries, would or could do if levied and suffered thereof in due form of law; and further, that all bargains and sales whatsoever to be made of any such tenements or hereditaments, or part or parts thereof, as shall be purchased by virtue and for the purposes of this act, and enrolled as aforesaid, shall have the like force, effect, and operation in law, to all intents and purposes, as any fine or fines, recovery or recoveries whatsoever would have had if levied or suffered by the bargainor or bargainors, or any person or persons seised of any such tenements or hereditaments in trust for such bargainor or bargainors, in any legal manner or form whatsoever."

Application of compensation when amounting to 200*l.*

Sect. 11. "If any money shall be agreed to be paid for any tenements or hereditaments, or part or parts thereof, or share or shares, estate or estates, interest or interests therein, purchased by virtue of the powers of this act, which shall belong to any body politic, corporate, or collegiate, or which shall belong to any trustee or trustees, or other person or persons who shall have no power to give a valid receipt for the same, or to sell and convey the same premises, otherwise than by virtue of this act, or any money shall be paid for any estate of freehold belonging to a feme covert, such money shall, in case the same shall amount to the sum of two hundred pounds, with all convenient speed be paid into the Bank of England in the name and with the privity of the accountant-general of the Court of Exchequer, to be placed to his account there *ex parte* the said mayor and commonalty and citizens of the city of London, pursuant to the method prescribed by an act made in the first year of the reign of King George the Fourth, intituled "*An Act for the better securing the Monies and Effects paid into the Court of Exchequer at Westminster, on Account of the Suitors of the said Court, and for the Appointment of an Accountant-general and Two Masters of the said Court, and for other Purposes,*' and the general orders of the said court, and without fee or reward; and shall, when so paid in, be applied, under the direction and with the approbation of the said court, to be signified by an order made upon a petition to be preferred in a summary way by the body or bodies, person or persons, who would have been entitled to the rents and profits of the said tenements or hereditaments, in the purchase or redemption of the land tax, or discharge of any debt or debts, or such other incumbrances, or part thereof, as the said court shall authorise to be paid, affecting the same tenements or hereditaments, or part or parts thereof, or share or shares, estate or estates, interest or interests therein, or charge or charges thereon, or affecting other tenements or hereditaments standing settled therewith to the same or the like uses, intents, or purposes; or where such money shall not be so applied, then the same shall be laid out and invested, under the like direction and approbation of the said court, in the purchase of other tenements or hereditaments, which shall be conveyed and settled to, for and upon such and the like uses, trusts, intents and purposes, and in the same manner, as the tenements or hereditaments, or part or parts thereof, shares, estates, interests, or charges, which shall be so purchased as aforesaid, stood settled or limited, or such of them as at the time of making such conveyance and settlement shall be existing, undetermined, and capable of taking effect; and in the meantime, and until such purchase shall be made, the said money shall, by order of the said court, upon application thereto, be invested by the said accountant-general in his

1 Geo. 4, c. 35.

name in the purchase of three pounds *per centum* consolidated or three pounds *per centum* reduced bank annuities; and in the meantime, and until the bank annuities shall be ordered by the said court to be sold for the purposes aforesaid, the dividends and annual produce of the said consolidated or reduced bank annuities shall from time to time be paid, by order of the said court, to the body or bodies, person or persons, who would for the time being have been entitled to the rents and profits of the said tenements or hereditaments so hereby directed to be purchased, in case such purchase and settlement were made."

2. *Regulations, &c. in London, &c.*

1 & 2 Will. 4, c. lxxvi.

Sect. 12. "Provided that if any such money shall be agreed to be paid for any tenements or hereditaments, or part or parts thereof, or share or shares, estate or estates, interest or interests therein, or charge or charges thereon, purchased as aforesaid, belonging to any corporation, or any trustee or trustees, person or persons, or feme covert as aforesaid, which shall be less than the sum of two hundred pounds, and shall exceed or be equal to the sum of twenty pounds, then and in all such cases the same shall, at the option of the body or bodies, person or persons for the time being entitled to the rents and profits of the tenements or hereditaments, or parts, shares, estates, interest, or charges so purchased, or of the guardian or guardians, committee or committees of such person or persons, in case of infancy or lunacy, to be signified in writing under their respective hands or seals, be paid in the name and with the privity of the said accountant-general of the Court of Exchequer, and be placed to his account as aforesaid, in order to be applied in manner hereinbefore directed; or otherwise the same shall be paid, at the like option, to two trustees, to be nominated by the body or bodies, person or persons, making such option, and approved of by the said lord mayor for the time being, (such nomination and approbation to be signified in writing under the hands and seals or the seals of the nominating and approving persons,) in order that such principal money, and the dividends arising thereon, may be applied in any manner hereinbefore directed, so far as the case be applicable, without obtaining or being required to obtain the direction and approbation of the Court of Exchequer."

Application when the compensation shall be less than 200*l.* and exceed 20*l.*

Sect. 13. "Provided also, that where such money so to be paid as aforesaid shall be less than twenty pounds, then and in all such cases the same shall be applied to the use of the body or bodies, person or persons, who would for the time being have been entitled to the rents and profits of the tenements or hereditaments, parts, shares, estates, interests, and charges purchased as aforesaid, in such manner as the said mayor, aldermen, and commons, in common council assembled, shall think fit; or in case of the infancy or lunacy of such person or persons, then such money shall be paid to his, her, or their guardian or guardians, committee or committees, to and for the use and benefit of such person or persons so entitled respectively."

Application where the money is less than 20*l.*

Sect. 14. "Provided also, that where the purchase or compensation money for any tenements or hereditaments, or part or parts thereof, or share or shares, estate or estates, interest or interests therein, or charge or charges thereon, to be purchased under the authority of this act, shall be required to be paid into the Bank of England in the name and with the privity of the accountant-general of the Court of Exchequer, and to be applied to the purchase of other lands, tenements, or hereditaments, to be settled to the like uses in pursuance of this act, it shall be lawful for the said court to order the expenses of all purchases from time to time to be made in pursuance of this act, or so much of such expenses as the said court shall deem reasonable, to be paid by the said mayor, aldermen, and commons, in common council assembled, out of the monies to be applied for the purposes of this act, who shall from time to time pay such sums of money for such purposes as the said court shall direct."

The court may order expenses of purchase to be paid by the corporation.

Sect. 15. "It shall be lawful for the said mayor, aldermen, and commons, in common council assembled, and they are hereby empowered, to pull down or cause to be pulled down, all houses, erections and buildings which shall be purchased by virtue of this act, or such of them or such part thereof respectively as they shall think proper to be pulled down, and to clear and level

Power to clear grounds and sell materials.

2. *Regulations, &c. in London, &c.*

any ground which they may think necessary to be cleared and levelled, and to sell or cause to be sold the materials of the houses and other buildings which shall be taken down and removed.

1 & 2 Will. 4, c. lxxvi.

Power to let or sell any ground not wanted, or from which the market shall be removed.

Sect. 16. "It shall be lawful for the said mayor, aldermen, and commons, in common council assembled, and they are hereby empowered, to let, sell, and dispose of, or cause to be let, sold, or disposed of, all or any part of the ground, tenements, or hereditaments to be purchased as aforesaid, which they shall not think necessary for a new market place, or for the enlargement of a market place, and also any ground and buildings from which the said market shall have been removed, after a new market place shall have been provided and opened in lieu thereof, to any person or persons who shall be willing to contract for, rent, or purchase the same."

Receipts of the chamberlain or his clerk to be effectual discharges.

Sect. 17. "The receipt or receipts of the chamberlain of the city of London, or his known clerk, for any purchase monies, rents or other sum or sums of money payable to the said mayor and commonalty and citizens, or the said mayor, aldermen, and commons, in common council assembled, by virtue of this act, shall be a sufficient and effectual discharge or sufficient and effectual discharges for the money in such receipt or receipts expressed or acknowledged to be received; and the purchaser or purchasers to whom the same respectively shall be given shall not afterwards be answerable or accountable for the misapplication or non-application, nor be in anywise obliged to see to the application of the money in such receipt or receipts expressed or acknowledged to be received."

Money produced by sales and rent to be applied to the purposes of the act.

Sect. 18. "All and every the sum and sums of money which shall be received by the said chamberlain from any sale or sales of materials, tenements, and hereditaments hereinbefore directed or authorised to be made, and also the rents (if any) which shall be received from all the said ground, hereditaments and premises, or any of them, until the same shall be sold, shall (after payment of the costs and expenses of the said sale or sales, which are hereby directed to be paid thereout,) be applied in paying off the monies to be raised by this act as hereinafter mentioned, or any other of the purposes of this act."

Any new market to be vested in the corporation, and subject to the same regulations as the present.

Sect. 19. "When and so often as any new market place shall be provided by virtue of this act, the same shall be vested in the said mayor and commonalty and citizens of London, and shall be subject to the same jurisdiction and regulations in all respects, and the like rates, dues, and charges may be demanded, received, and taken at or in respect of the same, in the like manner and under the like authorities and provisions as if the said market had continued to be holden on its present site."

Restriction as to market places.

Sect. 20. "When any new market place shall have been provided and opened, no market shall any longer be holden in the place from whence the said market shall have been removed."

Notice to be given of the opening of any new market.

Sect. 21. "No new market place shall be or be deemed to be opened for the purposes of this act, until notice shall have been given, in the name of the said mayor and commonalty and citizens of the city of London, in the London Gazette, seven days previous to the day on which such market is to be opened; and in such notice the day on which such market is to be opened shall be specified; and on the day so specified in such notice such market shall be and be deemed to be opened and established for the purposes of this act."

Power to erect buildings, and repair and alter the same.

Sect. 22. "It shall be lawful for the said mayor, aldermen, and commons, in common council assembled, by and out of the fund hereinafter mentioned, or the monies to be received for the purposes of this act, to erect or cause to be erected, on the present or any future market place, such buildings as they shall think necessary or proper for the purposes of the said market, with proper gates, fixtures, conveniences, and appurtenances thereto, and to maintain, keep in repair, or alter the same as they shall from time to time think proper."

A duty of 1*d.* per ton on coals, culm, and cinders, to be levied for defray-

Sect. 23. "For the purposes of defraying the charges and expenses of such market, and of the purchase of the tenements and hereditaments hereby authorised to be purchased, and of erecting and supporting convenient buildings

thereon, and for defraying the salaries and allowances of the several clerks and other persons employed in the execution of this act, and for defraying the other charges and expenses of carrying the same into execution, and for paying the compensations hereinafter directed or authorised to be made, and the monies hereinafter authorised to be borrowed or raised, and the interest thereof, and for creating a fund for the purposes hereinafter mentioned, it shall be lawful for the said mayor, aldermen, and commons, in common council assembled, to demand and take, or cause to be demanded and taken, of and from every master of a ship or vessel laden with coals, cinders, or culm, or other person having the care or command thereof, arriving at her moorings within any part of the port of London at or to the westward of Gravesend, the sum of one penny per ton, and no more, for every ton of coals, cinders, or culm contained in such ship or other vessel; and such sum of one penny per ton of all such coals, cinders, or culm shall and may be collected, levied, recovered and paid in such and the like manner, and by, with, and under such powers, authorities, and provisions, as the other duty or duties, or imposition or impositions on coals hereinafter made payable may be collected, levied, recovered and paid respectively." (*a*)

2. *Regulations, &c. in London, &c.*

1 & 2 Will. 4, c. lxxvi.

ing the expenses of the market, &c.

Sect. 24. "Provided always, that the costs, charges, and expenses incident to and incurred in obtaining and passing this act shall be paid and discharged by and out of the money to be received by virtue of this act; and when and as soon as such costs, charges, and expenses, and the costs, charges, and expenses of purchasing tenements and hereditaments for the said market, and of making buildings and other conveniences thereto, and the compensation hereinafter directed or authorised to be made, and the sums of money hereinafter authorised to be borrowed or raised, and the interest thereof, shall have been paid off and discharged, and the said duty of one penny per ton of coals, cinders, and culm shall be more than sufficient for maintaining, repairing and supporting the said market, and of the several buildings and conveniences thereto, and for paying the said compensation, and the salaries and other payments and allowances to the clerk or clerks and other officers and persons employed in the execution of this act, and for defraying the several other charges and expenses of carrying the same into execution, then and from thenceforth the residue or overplus of the monies to be received and produced from and by the said duty of one penny per ton of coals, cinders, and culm, shall from time to time, as and when received, be laid out or invested in the purchase of stock in some of the public stocks or funds, or upon government or real securities, at interest, in the names of the chamberlain, town clerk, and comptroller of the chamber of the city of London, for the time being, who shall from time to time lay out or invest the yearly dividends or interest of the stocks, funds, and securities so purchased in their names in like manner for the purpose of accumulation, until the yearly dividends and interest of all the stocks, funds, and securities so purchased shall be sufficient for the payment of the salaries and other payments and allowances to the clerk or clerks and other officers and persons employed in the execution of this act, and for defraying the several other charges and expenses of carrying the same into execution; and when and so soon as the same dividends and interest shall be fully sufficient for the purposes last mentioned, then and from thenceforth the said duty of one penny per ton of coals, cinders, and culm shall cease: provided always that it shall be lawful for the said mayor, aldermen, and commons, in common council assembled, again to raise such duty, or any part thereof, to any sum not exceeding the sum granted by this act, when and so often as it shall be necessary for the purposes thereof; and such duty, or any part thereof, when so reduced or again raised, shall be collected, levied, and recovered in such and the same manner as the duty granted or continued by this act can or may be collected, levied, and recovered; and when and so often as the said duty of one penny per ton

When expenses of executing this act have been paid, and provision made for defraying the compensation and salaries to officers, the duty to cease;

but may be again levied.

(*a*) The duty here imposed is the same in amount as in s. 20 of the above statute. It will be a question whether "coke" be subject to duty under this act. It would seem the legislature intended it should. (*Dowling on the Coal Act*, p. 10, *n.*)

2. *Regulations, &c. in London, &c.*

1 & 2 Will. 4, c. lxxvi.

on coals, cinders, and culm, or any part thereof, shall cease or be again renewed, the said mayor, aldermen, and commons, in common council assembled, shall cause one calendar month's previous notice of such cesser or renewal to be given by advertisement in the London Gazette, and by affixing notice thereof in writing on the door or some conspicuous place in the said coal market."

Money may be raised on the credit of duty.

Sect. 25. "For the purposes of this act, it shall be lawful for the said mayor, aldermen, and commons, in common council assembled, to borrow or raise, on the credit of the said duty of one penny per ton on coals, cinders and culm, any sum or sums of money not exceeding the sum of twenty thousand pounds; and upon payment of any monies so to be raised into the chamber of the said city, by such instalments, in such proportions, at such times, and in such manner as the said mayor, aldermen, and commons, in common council assembled, shall direct, the persons who shall contract or advance or contribute any part of the said monies shall, in respect of the sums which they shall so respectively advance, be entitled to interest at such rate as the said mayor, aldermen, and commons, in common council assembled, shall think reasonable and as shall be agreed upon, to be payable half-yearly, and to continue until the payment of each respective principal sum.

Common council to cause bonds or other securities to be given, assignable by indorsement.

Sect. 26. "The said mayor, aldermen, and commons, in common council assembled, shall cause one or more bond or bonds, note or notes, or other security or securities in writing, under the common seal of the said city, to be delivered to every person advancing any part of the said monies, for the payment of such interest in respect thereof until redeemed as is hereinafter mentioned, which notes or other securities shall be assignable by indorsement."

Upon notice of paying off bonds and tender of the monies, the interest to cease.

Sect. 27. "The said mayor, aldermen, and commons, in common council assembled, shall give or cause to be given notice in the London Gazette, and also in one or more daily papers published in the city of London or Westminster, of their intention to pay off such bonds as shall by virtue of this act be granted in respect of the said sum or sums of money to be raised as aforesaid; and at the end of six calendar months next after such notice shall be given, upon payment or tender of the respective principal sums for which such bonds shall have been given, together with interest for the same respectively up to the day of such payment or tender, to or for the person or persons then entitled thereto, at the office of the chamberlain of the said city, the interest payable to such person or persons respectively shall cease and determine: provided, nevertheless, that such person or persons, at any time after such notice shall have been given as aforesaid, shall, at the expiration of fourteen days next after a declaration in writing of his, her, or their intention to receive the same shall have been delivered at the said office, (such declaration being delivered between the hours of ten in the morning and two in the afternoon,) be paid to the said office the sum or sums of money for which such bond or bonds respectively shall have been given, together with interest for the same bond or bonds respectively up to the day expressed in such declaration for receiving the same, and such interest respectively shall, on the day specified in such declaration for payment, cease and determine."

Securities to be entered in books.

Sect. 28. "The said chamberlain shall enter in a book or books to be kept for that purpose the bond or bonds to be granted in pursuance of this act, and all assignments and transfers thereof, expressing in words at length the names, surnames, additions, places of abode, and other descriptions of such person or persons as shall from time to time be entitled to such bond or bonds, to which book and books all and every person and persons entitled to or interested in such bond or bonds shall at all reasonable times in the daytime have access, with free liberty to inspect the same, without fee or reward."

Application of the monies which shall be borrowed.

Sect. 29. "The sum and sums of money which shall be raised and borrowed by virtue of this act shall be applied for all and any of the purposes for which the said duty of one penny per ton on coals, cinders, and culm is hereinbefore directed to be applied."

Duty of 1d. per

Sect. 30. "The said duty of one penny per ton on coals, cinders, and

culm shall be and the same is hereby charged and made chargeable with interest which shall be payable in respect of such sum or sums of money as aforesaid to be borrowed and raised under or by virtue of this act, and then with such principal sum or sums."

2. *Regulations, &c. in London, &c.*

1 & 2 Will. 4, c. lxxvi.

Sect. 31. "Provided always, that if the said duty of one penny per ton on coals, cinders, and culm shall at any time hereafter prove insufficient to pay the interest of the sum or sums to be borrowed and raised as aforesaid, then and in every such case the sum which shall be wanting to complete the payment of such interest shall be advanced and paid out of the chamber of the said city, and be made good and supplied out of the future produce of the said duty."

ton charged with such annuities. Deficiencies to be paid out of the chamber of London.

Sect. 32. "It shall be lawful for the court of lord mayor and aldermen of the city of London from time to time to make, ordain and establish such orders, rules and bye-laws, and from time to time to amend, alter, or repeal the same or any of them, for the regulating, governing, and managing the said coal market, and all erections, buildings, works, matters, and things thereunto belonging, and also for the regulating of all officers to be employed in such market, and all other persons coming thereto or transacting any business therein, as to the said court of lord mayor and aldermen shall seem just and reasonable, and also from time to time, as occasion shall require, to repeal, amend, and alter such rules, orders, and bye-laws, and also to fix and appoint certain and reasonable penalties or forfeitures for the non-observance or non-performance or other breach of any such rule, order, or bye-law, not exceeding the sum of five pounds for any one offence; and all such penalties and forfeitures shall and may be recovered by such ways and means as any other penalties or forfeitures may be recovered by virtue of this act: provided always, that no such rule, order, or bye-law be repugnant to or inconsistent with the laws of that part of the united kingdom called England, or contrary to the directions and provisions in this act contained."

Court of aldermen may make bye-laws to regulate the market.

Sect. 33. "No such order, rule, or bye-law shall be good, valid, or effectual, nor shall any such order, rule, or bye-law be amended, altered, or repealed, unless such order, rule, or bye-law, or any amendment, alteration, or repeal of any such order, rule, or bye-law, shall have been submitted to and allowed and approved of from time to time by the lord high chancellor of Great Britain, the lord keeper or lords commissioners of the great seal, the lord chief justice and the rest of the justices of the Court of King's Bench, the lord chief justice and the rest of the justices of the Court of Common Pleas, and the lord chief baron and the rest of the barons of the Court of Exchequer, for the time being, or any one or more of them, who are and is hereby empowered and required, on request from time to time to them or him made by or on behalf of the said court of lord mayor and aldermen, to peruse and examine all such orders, rules and bye-laws as shall from time to time be made, amended, altered, or repealed by the said court of lord mayor and aldermen in pursuance of this act, and laid before them or him the said lord high chancellor, lord keeper or lords commissioners of the great seal, the lord chief justice and the rest of the justices of the Court of King's Bench, the lord chief justice and the rest of the justices of the Court of Common Pleas, and the lord chief baron and the rest of the barons of the Court of Exchequer, for the time being, or any one or more of them, and to alter and amend all such orders, rules, and bye-laws, or any of them, and to allow and approve of or disallow and disapprove of the same or any part thereof, or to allow and approve of or to disallow or disapprove of the repeal of the whole or any part thereof, as to them or him shall from time to time seem proper and expedient; and for doing thereof no fee or reward shall be paid or taken; and no such allowance or approval shall be given, unless previous notice of the intention to make, amend, alter, or repeal such orders, rules, or bye-laws shall have been given in the London Gazette at least seven days before the date of such allowance or approval."

Such bye-laws to be approved and allowed by one or more of the judges.

Sect. 34. "Provided always, that all such orders, rules, and bye-laws so to be from time to time made, altered, amended or repealed by the said court of lord mayor and aldermen, shall be printed; and such orders, rules, and bye-laws, and the several alterations and amendments made therein, and the

Bye-laws to be printed and published.

2. *Regulations, &c. in London, &c.*

1 & 2 Will. 4, c. lxxvi.

Corporation empowered to appoint committees.

repeal thereof respectively, shall also be made public in such other manner as the said court of lord mayor and aldermen shall think proper, and shall from time to time order and direct."

Sect. 35. "It shall be lawful for the said mayor, aldermen, and commons, in common council assembled, from time to time to appoint one or more committee or committees to manage and transact all or any of the matters or purposes which they the said mayor, aldermen, and commons, in common council assembled, are hereby authorised and required to do, execute, or perform; which committee or committees so to be appointed shall have such or so much of the powers and authorities by this act given to the said mayor, aldermen, and commons, in common council assembled, as they shall think fit or proper to delegate to such committee or committees."

Persons interested not eligible to such committees.

Sect. 36. "Provided nevertheless, that if any person being a member of any such committee shall be directly or indirectly interested or concerned in any contract which shall be made or entered into by or on behalf of such committee, for or concerning any of the works to be performed or done in pursuance of this act, or for or concerning any materials to be used or employed therein, every such contract shall be void, and the person who, being a member of such committee, shall be so interested or concerned, shall for every such offence forfeit and pay the sum of one hundred pounds to any person or persons who shall sue for the same."

Monies received under former act to be applied for the purposes of this act.

Sect. 37. "And whereas certain sums of money, which have been received by virtue of the said act of the forty-seventh year of the reign of King George the Third, are now in the chamber of the city of London; be it therefore further enacted, that the monies now in the chamber of London as aforesaid, and any surplus which may hereafter be received by virtue of the said act, shall be applied in aid of the fund hereinbefore directed to be created, or for the purposes of this act, or any of them."

Compensation to be given to land coal meters.

Sect. 38. "And whereas compensation should be made to such of the present principal and labouring land coal meters, and clerks, officers, and persons employed in the land metage of coals, as have regularly discharged their duty, except those appointed under the said act of the ninth year of the reign of his late Majesty King George the Fourth, or appointed or continued by the said act of the first year of the reign of his present majesty, for the loss of their offices, which will be rendered unnecessary by this act; be it therefore further enacted, that, out of the said funds, or out of the said duty of one penny per ton on coals, cinders, and culm, the said mayor, aldermen, and commons, in common council assembled, with the consent and approbation of the lord high treasurer, or any three or more of the lords commissioners of his majesty's treasury (testified by writing under his or their hands), shall pay such sums of money, annuities, or other compensation to the principal and labouring land coal meters, and the clerks, officers, and persons employed in the land metage of coals, (except as aforesaid, and except those within the district attached to the city and liberties of Westminster, for whom provision is hereinafter made), as have regularly discharged their duty, and whose offices shall be abolished by virtue of this act, as they shall think proper."

Compensation to Westminster meters.

Sect. 39. "Provided always, that, out of the said fund, or out of the said duty of one penny per ton on coals, cinders, and culm, the said mayor, aldermen, and commons, in common council assembled, shall likewise pay such further sums of money, annuities, or other compensation to the present principal and labouring land coal meters, and the clerks, officers, and persons employed in the land metage of coals within the district attached to the land coal meter's office for the city and liberties of Westminster, who have regularly discharged their duty, and whose offices shall be abolished by virtue of this act, as the said lord high treasurer or any three or more of the lords commissioners of his majesty's treasury shall think proper (the same to be certified in writing under his or their hand or hands)."

Superannuations to be continued.

Sect. 40. "Out of the said fund, or out of the said duty of one penny per ton on coals, cinders, and culm, the said mayor, aldermen, and commons, in common council assembled, shall pay to such of the late principal and

labouring land coal meters, clerks, officers, and persons employed in the land metage of coals, as have been superannuated previous to the passing of this act, such sums of money or annuities as are now paid and payable to them respectively."

2. *Regulations, &c. in London, &c.*

1 & 2 Will. 4, c. lxxvi.

Sect. 41. "The chamberlain of the said city for the time being shall keep one or more book or books, in which all the monies to be received in respect of the aforesaid duty upon coals, cinders, and culm, and the monies to be raised or borrowed on the credit thereof by virtue of this act, shall, from time to time, be entered and set down; and wherein also all the monies to be paid and disbursed out of the monies received or to be received by virtue of the said last mentioned act, or to be received by virtue of this act, shall from time to time be entered and set down; and such entries shall specify the times when, the occasions for which, and the names of the persons to whom, the same shall be so paid."

Chamberlain to keep accounts of receipts and disbursements of the duty on coals, &c.

Sect. 42. "The said mayor, aldermen, and commons, shall once in each and every year, or oftener if required, lay before both houses of parliament an account of the produce of the said duty of one penny per ton hereby granted and made payable upon coals, cinders, and culm, and also of all receipts and disbursements received or paid for or on account of the said market."

Accounts to be laid before parliament.

Sect. 43. "All coals, cinders and culm which shall be sold from and out of any ship or vessel in the port of London, or at any place within the cities of London and Westminster, or within the distance of twenty-five miles from the general post office in the city of London, shall be sold by weight and not by measure." (*a*)

Coals shall be sold by weight.

Sect. 44. "All contracts or agreements for the sale and delivery of any quantity of coals by measure at any place within the cities of London and Westminster, or within the distance of twenty-five miles from the post office aforesaid, made previous to the first day of January next after the passing of this act, and which shall not have been completed by that period, shall be and continue in full force and virtue, except that such coals shall be delivered by weight and not by measure; and for that purpose twenty-five hundred weight and the half of another hundred weight shall be considered and taken to be equivalent to one chaldron: provided always, that in case the cargoes of any ships to which ship meters shall have been appointed previously to the first day of January next shall not have been wholly delivered at that period, the cargoes or the residue of the cargoes of such ships shall be delivered from such ships by measure in the same manner as if this act had not been passed."

Existing contracts for coals to be completed by weight instead of measure.

Sect. 45. "Any seller or sellers of or dealer or dealers in coals shall knowingly sell one sort of coals for and as a sort which they really are not, within the said port of London, or at any place within the cities of London and Westminster, or within the distance of twenty-five miles from the post office aforesaid, every such seller or sellers of or dealer or dealers in coals shall forfeit and pay for every such offence the sum of ten pounds per ton for every ton of coals so sold, and so in proportion for any smaller quantity; and such seller or sellers of or dealer or dealers in coals shall not be subject or liable to any penalty imposed by the said act of the ninth year of the reign of Queen Anne, or by the 3 Geo. II. c. 26, on every person who shall knowingly sell one sort of coals for and as a sort which they really are not: provided always, that no seller or sellers of or dealer or dealers in coals shall be subject to such penalty for or in respect of any number of tons exceeding twenty-five tons for the same offence." (*b*)

For preventing the sale of one sort of coals for another.

(*a*) The 5 & 6 Will. IV. c. 63, *ante*, 693, extends this provision to all places.

(*b*) In sect. 32 of the repealed act, 47 Geo. III. c. lxviii. the point from which the twenty-five miles were to be measured was the Royal Exchange, and the penalty of 20*l.* a chaldron. Under the 3 Geo. IV. c. 26, s. 4, this offence was not complete by contracting for the coals without delivery. (*Butterfield, qui tam, &c.* v. *Windle and another*, 4 *East*, 385; *Dowl. on Coal Act*, 17, *n.*)

2. *Regulations, &c. in London, &c.*

1 & 2 Will. 4, c. lxxvi.

Lightermen may carry on partnership with coal dealers.

Sect. 46. "It shall be lawful for any lighterman or lightermen to enter into any co-partnership with any woodmonger or woodmongers, or other person or persons whomsoever, in the trade or business of a coal dealer or coal dealers, and to carry on as co-partner or co-partners with such person or persons such trade or business of a coal dealer or dealers, and to keep, use, and employ as such co-partners their own lighters, barges, or other craft in and for the carrying of coals to or from any such ship or other vessel in the river Thames, and to and from any wharf, dock, creek, or other place whatsoever on or near the said river Thames, without being subject to any penalty or penalties for any such joint trading together, any act, statute, bye law, or ordinance whatsoever to the contrary thereof in anywise notwithstanding: provided, nevertheless, that nothing herein contained shall extend or be construed to extend so as to authorise or empower any lighterman or lightermen to be or become jointly interested with any woodmonger or woodmongers, or other person or persons whomsoever (not being a lighterman or lightermen), in the trade or business of carrying in lighters, barges, or other craft for hire any sort or description of goods whatsoever, other than and except only such coals as may be lightered by them in their said trade of coal dealers."

Sect. 47, relating to the seller's ticket to be sent with coals, is now repealed, and other provisions substituted by the 1 & 2 Vict. c. ci. s. 2, *post*, 727.

Coals to be delivered in sacks containing a certain quantity.

Sect. 48. "Coals sold from any lighter, barge, or other craft, or from any wharf, warehouse, or other place within the cities of London and Westminster, or within the distance of twenty-five miles from the post office aforesaid, in any quantity exceeding five hundred and sixty pounds, except coals carried and delivered in bulk as hereinafter mentioned, shall be carried and delivered to the respective purchasers thereof in sacks, each sack containing either one hundred and twelve pounds, or two hundred and twenty-four pounds net: provided always, that coals delivered by gang labour may be conveyed in sacks containing any weight; any thing herein contained to the contrary thereof notwithstanding." (*a*)

Coals may be delivered in bulk.

Sect. 49. "Provided always, that any coals sold from any ship, lighter, barge, or other craft, or from any wharf or place within the cities of London and Westminster, or within the distance of twenty-five miles from the post office aforesaid, in any quantity exceeding five hundred and sixty pounds, may be carried and delivered to the respective purchasers thereof, if they think fit, in bulk in carts or other carriages, or in any lighter, barge, or other craft: provided also, that in every case where any such coals shall be carried and delivered in any cart or other carriage in bulk as aforesaid, the weight of such cart or other carriage, as well as of the coals contained therein, shall be previously ascertained by a weighing machine fixed for that purpose on the wharf or place from which the coals shall be brought; and the seller's ticket shall, in such cases, state the weight of the cart or other carriage, as well as the weight of the coals contained therein; and if any sellers or dealers in coals shall carry or deliver to the purchaser or purchasers, by any cart or other carriage, any quantity of coals exceeding five hundred and sixty pounds in bulk, without having a weighing machine fixed up on his wharf or place, or without having previously ascertained by such weighing machine the weight of the cart or other carriage, and the weight of the coals contained therein, then and in every such case such seller or dealer shall for every such offence forfeit and pay any sum not exceeding fifty pounds."

Carman to weigh the carriage and the coals, if required.

Sect. 50. "The carman or driver of any cart, waggon, or other carriage in which any coals exceeding in quantity five hundred and sixty pounds shall be carried in bulk, for delivery to the purchaser or purchasers thereof, from any ship, lighter, barge, or other craft, or any wharf, warehouse, or other place within the cities of London and Westminster, or within the distance of twenty-five miles from the post office aforesaid, shall (in case he shall be required so to do by the purchaser or purchasers of such coals, or his, her, or their servant or

(*a*) Where the amount of coals sold is *less* than five hundred and sixty pounds, it may be delivered either in sacks or in bulk, as the provisions of this and the next section only apply to cases where the amount is *exceeding* five hundred and sixty pounds. (*Dowl. on Coal Act*, 19, *n.*)

servants, or other person or persons acting on the behalf of such purchaser or purchasers), weigh the waggon or other carriage, with the coals therein, at any public weighing machine for carts or other carriages which may be situate on the road between the place from which the coals shall be brought and the place of delivery, or at any point within the distance of one hundred yards from any part of such road; and such carman or driver is also hereby directed (in case he shall be required so to do by the purchaser or purchasers, or any such other person or persons as aforesaid), to weigh in like manner the cart, waggon, or other carriage, without the coals, at any public weighing machine for carts or carriages which may be situate as aforesaid; and if any such carman or driver shall neglect or refuse, when so required as aforesaid, to weigh the cart, waggon, or other carriage, either with or without the coals, at any public weighing machine for carts and carriages which may be situate as aforesaid, such carman or driver shall for every such offence forfeit any sum not exceeding ten pounds: provided always that no carman or driver shall be compelled or obliged to weigh the cart, waggon, or other carriage, without the coals, until after the same shall have been delivered, and that no such carman or driver shall be obliged to go back or return to any such public weighing machine as aforesaid, for the purpose of weighing the cart, waggon, or other carriage, either with or without the coals, after he shall have passed the same."

2. *Regulations, &c. in London, &c.*

1 & 2 Will. 4, c. lxxvi.

Sect. 51. "If in any case where any coals shall be delivered in bulk to the purchaser or purchasers thereof, from any ship, lighter, barge, or other craft, or from any wharf, warehouse, or other place within the cities of London and Westminster, or within the distance of twenty-five miles from the post-office aforesaid, a less quantity shall be delivered than shall be expressed in the tickets to be delivered therewith as aforesaid, the seller or sellers shall for every such offence forfeit any sum not exceeding ten pounds; and if the deficiency shall exceed two hundred and twenty-four pounds, the seller or sellers shall forfeit any sum not exceeding fifty pounds."

Penalty on deficiency in weight of coals.

Sect. 52. "If any carman or driver of any cart, waggon, or other carriage laden with coals for sale, or to be delivered to the purchaser or purchasers thereof, by any seller or sellers of, or dealer or dealers in, or carrier or carriers of coals from any ship, lighter, barge, or other craft, or from any wharf, warehouse, or other place within the said port of London, or within the cities of London and Westminster, or within the distance of twenty-five miles from the post-office aforesaid, shall not have placed in, on, or under his cart, waggon, or carriage, a perfect weighing machine marked at Guildhall, London, by the proper officer there, for which the sum of two shillings and sixpence shall be paid, and no more (which machine shall be of the form, size, and dimensions of the machine approved by the lord high treasurer, or any three or more of the lords commissioners of his majesty's treasury, and deposited at the office of the hall keeper of the city of London, to which any person shall have access between the hours of ten in the morning and two in the afternoon, and shall be provided by the seller or sellers, dealer or dealers in, or carrier or carriers of such coals), then and in every such case every such carman or driver of such cart, waggon, or other carriage not having such machine so placed therein, thereon, or thereunder, shall for every such offence forfeit and pay any sum not exceeding ten pounds; and the seller or sellers of, or dealer or dealers in, or carrier or carriers of such coals, shall forfeit and pay any sum not exceeding twenty pounds: provided always, that coals which shall be carried or conveyed in bulk, or in any cart, waggon, or other carriage belonging to the purchaser or purchasers of such coals, may be so carried or conveyed without the carman being obliged to carry a weighing machine therewith, or any person or persons being subject or liable to any penalty or penalties in respect thereof." (As to what is a weighing machine within this section, and as to the penalty for carrying an improper one, see 1 & 2 Vict. c. ci. s. 5, *post*, 728.)

Carman to carry a weighing machine in his cart.

Penalty on carman; or seller.

Sect. 53. "If at any time or times it shall appear to the said mayor, aldermen, and commons, in common council assembled, that a weighing machine may be made upon a better or more convenient principle or mode of construc-

Weighing machine may be altered.

2. *Regulations, &c. in London, &c.*

1 & 2 Will. 4, c. lxxvi.

tion than the machine for the time being deposited at the office of the hall keeper of the said city, they may, with the consent of the lord high treasurer, or any three or more of the lords commissioners of his majesty's treasury, cause a machine according to such better or more convenient principle or mode of construction to be deposited in the said office of the hall keeper, in lieu of the machine for the time being deposited there, and shall cause notice of the deposit of such new machine to be given by advertisement in the London Gazette; and until the expiration of three calendar months next after such advertisement the machine to be placed and carried as aforesaid in any cart, waggon, or carriage, may be either similar to such new machine, or similar to the machine in lieu of which the same shall have been deposited; and after the expiration of such three calendar months the machine to be placed and carried as aforesaid shall be similar to such new machine."

Carman required to weigh any of the sacks in the cart.

Sect. 54. "Provided always, that the carman or driver of any cart, waggon, or other carriage in which coals shall be carried in sacks for delivery to the purchaser or purchasers thereof, from any ship, lighter, barge, or other craft, or from any wharf, warehouse, or other places within the cities of London and Westminster, or within the distance of twenty-five miles from the post office aforesaid, shall and he is hereby directed to weigh, if he shall be required so to do, any one or more of the sacks contained in any such cart, waggon, or other carriage, which may be chosen by the purchaser or purchasers of the said coals, or his, her, or their servant or servants, or other person or persons acting on the behalf of such purchaser or purchasers, with the coals therein, and also afterwards to weigh in like manner such sack without any coals therein."

Penalty on carman for driving coals away without weighing, if required.

Sect. 55. "If any carman or driver of any cart or waggon or other carriage in which coals shall be carried in sacks for delivery to the purchaser or purchasers thereof, from any ship, vessel, lighter, barge, or other craft, or from any wharf, warehouse, or other place within the cities of London and Westminster, or within the distance of twenty-five miles from the post office aforesaid, shall neglect or refuse to weigh by the said machine any such sack or sacks of coals in manner hereinbefore directed, when thereunto required by the purchaser or purchasers of such coals, or by his, her, or their servant or servants, or other person or persons acting by, for, or under the authority of such purchaser or purchasers, or if any such carman or driver shall drive away, or permit or suffer the said cart, waggon, or other carriage to be driven away, without weighing in manner herein directed the said sack or sacks of coals, or shall hinder, obstruct, or otherwise prevent the purchaser or purchasers of such coals, or his, her, or their servant, or any other person or persons whomsoever, from examining the said machine, or weighing all or any of the sack or sacks of coals in such his cart, waggon, or other carriage, then and in every such case every such carman or driver so offending shall for every such offence forfeit and pay any sum not exceeding twenty pounds nor less than five pounds." (This section is now repealed, so far as it imposes a penalty on the carman for preventing any person other than the purchaser or his servant from examining the machine. 1 & 2 Vict. c. ci. s. 6, *post*, 728.)

All the coals sent to be weighed, if desired by the purchaser.

Sect. 56. "Provided always, that if any purchaser or purchasers, or his, her, or their servant or servants, or any other person or persons acting by, for, or under the authority of such purchaser or purchasers, who shall require any sack or sacks of coals to be weighed as aforesaid, shall find the coals therein to be deficient in weight, and shall signify to the carman or other person attending such cart, waggon, or other carriage, his, her, or their desire to have all the coals contained in such cart, waggon, or other carriage, or any part of such coals, weighed or re-weighed in the presence of some constable, police officer, or other indifferent and credible person, then and in every such case the carman or driver of such cart, waggon, or other carriage in which such coals shall be brought, shall and he is hereby required to continue and remain at or before the house, lodging, or other premises of the purchaser or purchasers of such coals, with such coals, and the cart, waggon, or other carriage, until such coals are weighed; and if any such carman or driver shall drive away, or permit or suffer to be driven away, such cart, waggon, or other carriage, before the coals contained therein shall be weighed, without the consent

of the purchaser or purchasers thereof, or his, her, or their servant or servants, or such other person or persons as aforesaid, then and in every such case such carman or driver shall for every such offence forfeit and pay any sum not exceeding twenty pounds."

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Purchaser to procure the attendance of a constable, &c., if desirous of having the coals re-weighed.

Sect. 57. "Such purchaser or purchasers, or his, her, or their servant or servants, or other person or persons as aforesaid, so desiring such coals contained in such cart, waggon, or other carriage to be weighed, shall, and he, she, or they, is and are hereby required to procure the attendance of some constable, police officer, or other indifferent and credible person, to be present at the weighing of such coals; and all the said sacks, both with and without the coals therein, shall accordingly be weighed with the said machine by the carman or other person attending such cart, waggon, or other carriage, in the presence of the purchaser or purchasers of the said coals, or of his, her, or their agent or servant, agents or servants, if they or any of them shall attend to see the same weighed, and of such constable, police officer, or other person; and in case such purchaser or purchasers, or his, her, or their agent or servant, agents or servants, shall not attend for the purpose of seeing such coals so weighed, then such carman or other person shall proceed in the weighing of such sacks in his, her, or their absence; and in case such carman or other person shall refuse or neglect to weigh such sacks, or any of them, in manner aforesaid, he shall forfeit and pay for such offence any sum not exceeding ten pounds; and the constable, police officer, or any other person who may be present, may weigh the said sacks or any of them as aforesaid; and in case, upon the weighing of any such sack, it shall happen that any sack or sacks shall not contain either one hundred and twelve pounds or two hundred and twenty-four pounds net of coals, as the case may be, then and in every such case the seller or sellers of such coals shall for every such sack of coals that shall be so found deficient forfeit and pay any sum not exceeding five pounds."(*a*)

Penalty for not weighing.

For short weight

No quantity less than 560 pounds weight of coals to be sold without being weighed.

Sect. 58. "All coals sold in any quantity less than five hundred and sixty pounds, or in the quantity of five hundred and sixty pounds, from any place, or from any cart or other carriage, within the cities of London and Westminster, or within the distance of twenty-five miles from the post office aforesaid, shall be weighed previous to being delivered to the purchaser or purchasers of such coals, and also, if required by such purchaser or purchasers, or his, her, or their agent or servant, in the presence of such purchaser or purchasers, or his, her, or their agent or servant; and if any seller or dealer in coals shall deliver to the purchaser or purchasers thereof, within the cities of London and Westminster, or within the distance of twenty-five miles from the post office aforesaid, any quantity of coals less than five hundred and sixty pounds, or the quantity of five hundred and sixty pounds, without previously weighing the same, and also, if required by such purchaser or purchasers, or his, her, or their agent or servant, in the presence of such purchaser or purchasers, or his, her, or their agent or servant, then and in every such case such seller or dealer shall for every such offence forfeit and pay any sum not exceeding five pounds."

Weighing machines to be kept at watch houses and police stations.

Sect. 59. "A proper machine or proper scales and weights for weighing coals shall be kept at every watch-house or police station, or at any other place or places which shall from time to time be appointed by any two or more of his majesty's justices of the peace for the said cities or counties, within the cities of London and Westminster, or within the distance of twenty-five miles from the post office aforesaid; and the same shall be provided and kept in repair from time to time by the overseers of the poor of the township, parish, precinct, or place in which such watch-house, station, or such other place or places as aforesaid, shall be situate, out of the rate for the relief of the poor of such township, parish, precinct, or place, and shall and may be used at

(*a*) In a *qui tam* action under this section, for delivering coals short of weight, the declaration must aver that the coals were carried for delivery from a ship, wharf, &c., or place in London or Westminster, or within twenty five miles of the General Post Office in London, and it is not sufficient to allege that they were sold and delivered at such place. (*Friend* v. *Butterfield*, 11 *Ad. & E.* 838.)

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any time or times for weighing, in such township, parish, precinct, or place, any coals respecting which there may be any dispute; and in case the overseers of any such township, parish, precinct or place shall not provide and send to such watch-house, station, or such other place or places as aforesaid, such a machine, on or before the first day of January after the passing of this act, or if such overseer shall not cause such machine to be repaired or a new machine to be provided within seven days after notice of the want thereof in writing shall have been given to them, or left at their usual places of abode, by any police officer, or any inhabitant of such township, parish, precinct, or place, such overseer shall for every such offence forfeit and pay any sum not exceeding ten pounds."

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Sect. 60. "And whereas, by a charter of his Majesty King James the First, bearing date the twentieth day of August, in the third year of his reign, after reciting that the mayor and commonalty and citizens of the city of London, from all the time whereof the memory of man was not to the contrary, had had and exercised, and ought and had been accustomed to have and exercise, the office of bailiff and the conservancy of the water of Thames, to be exercised and occupied by the mayor of the city aforesaid for the time being, during the time of his mayoralty, or by his sufficient deputies, in, upon, and about the same water of Thames, (to wit), from the bridge of the town of Staines in the county of Middlesex westwards to London bridge, and thence to a certain place called Yendall, otherwise Yenland, otherwise Yenleete, towards the sea and eastwards, and in the Medway, and in the port of the city of London aforesaid, and upon every bank and upon every shore and every wharf of the same water of Thames within the limits and bounds aforesaid, and in, upon, and about each and every of the same, and also by all the time aforesaid had had and taken, and ought and had been accustomed to have and take, to their own use, by the mayor of the city aforesaid for the time being, during the time of his mayoralty, or by his sufficient deputies, all the wages, rewards, fees, and profits pertaining and belonging to the same office of bailiff; and also reciting that the same mayor and commonalty and citizens, from all the time aforesaid, had had and exercised, and ought and had been accustomed to have and exercise, the office of measurer and the measuring of all and singular coals, and grains of every kind, and also of all kinds of salt, and all kinds of apples, pears, plums, and other fruits whatsoever, and of all eatable roots of every kind, and also of onions, and of all other merchandizes, wares, and things whatsoever measurable, and the measuring of the same whatsoever, landing, conveyed, or brought in or to the port of the said city of London upon the said water of Thames in every ship, boat, barge, or other vessel whatsoever, floating, laden, remaining, or being on every part of the same water of Thames, and upon every bank or every shore or every wharf of the same water of Thames, which should happen to stop, remain, and be delivered or set down from the aforesaid bridge of the same town of Staines in the said county of Middlesex westwards to the aforesaid London bridge, and thence to the aforesaid place called Yendall, otherwise Yenland, otherwise Yenleete, towards the sea and eartwards, and in the Medway, and in the said port of the city of London aforesaid, exercising and occupying the same office of measurer and the measuring aforesaid by the mayor of the city aforesaid for the time being, during the time of his mayoralty, or by his sufficient deputies, and also by all the same time had had and taken and ought and had been accustomed to have and take, to their own use by the mayor of the city aforesaid for the time being, during the time of his mayoralty, or by his sufficient deputies, all the wages, rewards, fees, and profits to the same office of measurer belonging and appertaining; and nevertheless the same mayor and commonalty and citizens then a short time ago were disturbed therein, and were unjustly hindered in some of the measurings aforesaid, and especially in the aforesaid office of the measuring of coals, supposing that that office to the said mayor and commonalty and citizens did not anciently pertain, nor did still pertain or belong by any lawful grant or prescription, where in truth it plainly and manifestly appeared that that office and all the other premises did anciently pertain and belong, and did then of right pertain to them, and that they had

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lawfully taken, had, and enjoyed, and ought to take, have and enjoy, the wages, rewards, fees, and profits thereof; his said majesty, in order to put an end to all controversy in that behalf then and at all times thereafter, and to set aside all doubt, and to the intent that the same mayor and commonalty and citizens might more securely, freely, and quietly have, use, exercise, and enjoy the offices aforesaid and every of them, and the measuring aforesaid, and the wages, rewards, fees, and profits to the same offices and measuring belonging, and all and singular the other recited premises, to them and their successors for ever, without contradiction, let, or impeachment in anywise of his said majesty or of his heirs or successors, the admirals of England, justices, escheators, bailiffs, sheriffs, or other officers or ministers of his said majesty, his heirs or successors, whomsoever; and because it was his said majesty's pleasure to show favour to the same mayor and commonalty and citizens in this behalf, and rather to strengthen, increase, and amplify than diminish the liberties, franchises, jurisdictions, privileges, and customs of the city aforesaid, his said majesty, of his especial grace and certain knowledge and mere motion, did, for him, his heirs and successors, approve, allow, ratify, and confirm by the said charter now in recital all and singular the offices and measurings aforesaid, and the other recited premises, and the wages, rewards, fees, and profits thereof belonging or pertaining, and the uses and customs aforesaid, to the said mayor and commonalty and citizens of the city aforesaid, and their successors; and further, of his said majesty's especial grace, and of his certain knowledge and mere motion, his said majesty had granted, and by the said charter now in recital, for him, his heirs and successors, did grant to the aforesaid mayor and commonalty and citizens, and their successors, that they the aforesaid mayor and commonalty and citizens, and their successors, might from time to time for ever exercise and execute the aforesaid office of bailiff and the conservancy of the water of Thames by the mayor of the city aforesaid for the time being, during the time of his mayoralty, or by his sufficient deputies, in, upon, and about the same water of Thames, (to wit), from the aforesaid bridge of the town of Staines in the county of Middlesex westwards to London bridge, and thence to a certain place called Yendall, otherwise Yenland, otherwise Yenleete, towards the sea and eastwards, and in the Medway, and in the port of the city of London aforesaid, and upon every bank and upon every shore and every wharf of the same water of Thames within the limits and bounds aforesaid, and in, upon and about each and every of the same, and to have, receive, collect and enjoy all and singular the wages, rewards, fees and profits to the same office of bailiff pertaining and belonging, to the proper use of the same mayor and commonalty and citizens, by the mayor of the city aforesaid for the time being, during the time of his mayoralty, or by his sufficient deputies; and also, of his majesty's further especial grace, and of his certain knowledge and mere motion, his said majesty had granted, and by the said charter now in recital, for him, his heirs and successors, did grant, to the aforesaid mayor and commonalty and citizens, and their successors, that they the aforesaid mayor and commonalty and citizens, and their successors, might peacefully and quietly from time to time for ever exercise and execute the aforesaid office of measurer of all and singular coals, and all and singular grains of every kind, and of all kinds of salt, and all kinds of apples, pears, plumbs, and other fruits whatsoever, and of all eatable roots of every kind, and also onions, and all other merchandizes, wares, and things whatsoever measurable, and the measuring of the same whatsoever, landed, conveyed, or brought in or to the port of the said city of London upon the said water of Thames, in every ship, boat, barge, or other vessel floating, laden, remaining, or being on whatever part of the same water of Thames, and upon whatever bank or whatever shore or whatever wharf of the same water of Thames they should happen to stop, remain, be delivered or set down, from the aforesaid bridge of the said town of Staines in the said county of Middlesex westwards to the aforesaid London Bridge, and thence to the aforesaid place called Yendall, otherwise Yenland, otherwise Yenleete, towards the sea and eastwards, and the Medway, and in the said port of the city of London, by the mayor of the city aforesaid for the

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time being, during the time of his mayoralty, or by his sufficient deputies, and might have, receive, collect, and enjoy all and singular the fees, wages, rewards, and profits whatsoever pertaining and belonging to the same offices and measurings, and to every or either of them, to the use of the aforesaid mayor and commonalty and citizens, and their successors, to be received and perceived by the mayor of the city aforesaid for the time being, during the time of his mayoralty, or by his sufficient deputies, without impeachment of his said majesty, or his heirs or successors, or any officers, bailiffs, or ministers of his said majesty, or his heirs and successors, or the admirals of England of his said majesty, his heirs and successors, or other subjects of his said majesty or his successors whomsoever, or of any grant by his said majesty or his heirs or successors to be made to the contrary; to have, hold, and enjoy the office aforesaid, and all and singular the other premises, with all and singular wages, rewards, fees, profits, and appurtenances whatsoever belonging or pertaining to the same offices and every or either of them, to the aforesaid mayor and commonalty and citizens, and their successors, for ever, to be exercised and executed by the mayor of the city aforesaid for the time being, during the time of his mayoralty, or by his sufficient deputies, without rendering or making any account thereof or any other thing to his said majesty, his heirs or successors, so that no other bailiff or conservator of the water aforesaid, or measurer of coals, grains, salt, apples, pears, plumbs, eatable roots, onions, or other merchandizes, wares, or other thing or things above mentioned, be or in anywise intermeddle himself in the premises or any of them; and his said majesty, willing to show more abundant favour to the aforesaid mayor and commonalty and citizens, of his said majesty's special grace, and of his certain knowledge and mere motion, his said majesty did, for himself, his heirs and successors, grant, and by the said charter now in recital confirm, to the aforesaid mayor and commonalty and citizens, and their successors, that although the same mayor and commonalty and citizens, or their predecessors, in any case arising thitherto, had not fully used, or had perchance abused the offices aforesaid, or any one or other of the offices or measurings aforesaid, or any thing or things to the same or either of them pertaining or belonging, nevertheless the same mayor and commonalty and citizens, and their successors, might thenceforth freely, quietly, and peacefully enjoy and use the offices aforesaid so not used or abused, and every of them, and the measurings aforesaid so not used or abused, and every of them, without let or hindrance of his said majesty, his heirs or successors, the admirals of England of his said majesty, his heirs or successors, the justices, escheators, sheriffs, or other bailiffs, officers, or ministers of his said majesty, his heirs or successors, whomsoever; any statute or ordinances passed, or judgments rendered, or any charters of his said majesty's progenitors or predecessors, in past times made or granted to the contrary, notwithstanding that express mention was not made of the true yearly value or of any other value or certainty of the premises or any of them, or of any gifts or grants made before those times by his said majesty or any of his progenitors or predecessors to the aforesaid mayor and commonalty and citizens of the city of London aforesaid, and not made in the said charter now in recital, or any statute, act, ordinance, provision, proclamation, or restriction, to the contrary thereof, thitherto had, made, passed, ordained, or provided, or any other thing, cause, or matter whatsoever, in anywise notwithstanding; and whereas by another charter of his said majesty King James the First, bearing date the fifteenth day of December, in the twelfth year of his reign, after reciting that so great was the force of his said majesty's love towards the city of London, his royal chamber, that whatever in his said majesty lied, which he had deemed necessary or useful to the mayor and commonalty and citizens of his same city, he had freely of his own mind been inclined to give and bestow it upon the same mayor and commonalty and citizens of the said city, and his majesty's pleasure was, not only to confirm but also to amplify the grants in all past times made by his predecessors to his city of London; therefore, when, among other things, it was sufficiently manifest to his said majesty that the same mayor and commonalty and citizens of his city of London, from all times whereof the memory

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of man was not to the contrary, had had and lawfully exercised, and ought to have and exercise, the office of measurer and the measuring of all and singular coals of whatever kind, nature, and species soever they were, landed, conveyed or brought in or to the port of the said city upon the water of Thames, in every ship, boat, barge, or other vessel whatsoever, floating, laden, remaining, or being on every part of the same water of Thames, and upon every bank or every shore or every wharf of the same water of Thames, from the bridge of the town of Staines in the county of Middlesex westwards to London bridge aforesaid, and thence to a certain place called Yendall, otherwise Yenland, otherwise Yenleete, towards the sea and eastwards, and in the Medway, and in the port of the city of London, nevertheless a question had then very lately arisen whether the weighing of coals brought within the limits and bounds aforesaid, together with the measuring of coals, pertained to the mayor and commonalty and citizens of the said city; his said majesty therefore, in order to put an end to all controversy in that behalf then and at all times thereafter, and to set aside all doubt, and to the intent that the same mayor and commonalty and citizens of the city aforesaid might have, use, perceive, and enjoy, as well the weighing as the measuring, and every or either of them, and the wages, fees, and profits usual for the same, of his said majesty's especial grace and certain knowledge and mere motion, had given, granted, and confirmed, and by the said charter now in recital, for his said majesty, and his heirs and successors, did give, grant, and confirm to his beloved the mayor and commonalty and citizens of the city of London aforesaid, and their successors, the weighing of all and singular coals called stone coals, pit coals, earth coals, and all other coals weighable, of what kind, nature, and species soever they were, landed, conveyed, or brought in or to the port of the said city of London upon the aforesaid water of Thames, in every ship, boat, barge, or other vessel whatsoever, floating, laden, remaining, or being on either side of the same water of Thames, and upon every bank or every shore or every wharf of the said water of Thames, from the bridge of the town of Staines in the county of Middlesex aforesaid, westwards, to London bridge aforesaid, and thence to the aforesaid place called Yendall, otherwise Yenland, otherwise Yenleete, towards the sea, and in the Medway, and in the port of London aforesaid, to be sold or exposed to sale, and also the fees, wages, rewards, profits and advantages usual or thereunto belonging or in anywise appertaining, to be exercised by the mayor of the city aforesaid for the time being, and by the deputies, officers and ministers of the same mayor; and further, of his said majesty's more abundant grace, and of his certain knowledge and mere motion, his said majesty had given, granted and confirmed, and by the charter now in recital for him, his heirs and successors, did give, grant and confirm, to the aforesaid mayor and commonalty and citizens of the city aforesaid, and their successors, that they and their successors for ever might have and enjoy, and should and might be able to have and enjoy, the office of the weighing of all and singular coals called stone coals, pit coals, earth coals, and all other coals weighable, of whatever kind, nature, or species soever they were, landed, conveyed, or brought in or to the port of the said city of London upon the aforesaid water of Thames, in every ship, boat, barge, or other vessel whatsoever, floating, laden, remaining, or being on every part of the same water of Thames, and upon every bank or every shore or every wharf of the same water of Thames, from the bridge of the town of Staines in the county of Middlesex aforesaid, westwards, to London bridge aforesaid, and thence to the aforesaid place called Yendall, otherwise Yenland, otherwise Yenleete, towards the sea, and in the Medway, and in the port of London aforesaid, to be sold or exposed to sale, and also all the fees, wages, rewards, profits, advantages, and emoluments whatsoever usual or to the same office belonging or in anywise pertaining, to be exercised by the mayor of the city aforesaid for the time being, and by the deputies, officers and ministers of the same mayor; and also of his said majesty's further especial grace, and of his certain knowledge and mere motion, his said majesty had appointed, ordained, and made, and by the said charter now in recital, for his said majesty, his heirs and successors, did appoint, ordain, create, and make the aforesaid mayor and commonalty and citizens of the city

2. *Regulations, &c. in London, &c.*

1 & 2 Will. 4, c. lxxvi.

2. *Regulations, &c. in London, &c.*

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of London aforesaid, and their successors, by the mayor of the same city for the time being, during the time of his mayoralty, or by the deputies, officers, ministers and servants of the same mayor for the time being, to be weighers of all and singular coals called stone coals, pit coals, earth coals, and all other coals weighable, and to have and exercise and execute the weighing of all and singular coals called stone coals, pit coals, earth coals, and all other coals weighable, of what kind, nature, or species soever they were, landed, conveyed or brought in or to the port of the said city of London upon the aforesaid water of Thames, in every ship, boat, barge, or other vessel whatsoever, floating, laden, remaining or being on every part of the same water of Thames, and upon every bank or every shore or every wharf of the same water of Thames, which should happen to stop, remain, and be delivered or set down from the aforesaid bridge of Staines in the said county of Middlesex westwards, and thence to the aforesaid place called Yendall, otherwise Yenland, otherwise Yenleete, towards the sea, and in the Medway, and in the port of London aforesaid, to be sold or exposed to sale; and reciting that a question had arisen respecting the quantity of the fee asked, taken and received by the mayor of the city aforesaid for the time being, and by his deputies, ministers, servants and officers, for the weighing of every ton weight of coals weighable, computing twenty hundred weight (each hundred weight containing five score and twelve pounds weight) to every ton weight, brought within the limits and bounds aforesaid; his said majesty, entirely to put an end to all question of the kind, did, of his special grace, and of his certain knowledge and mere motion, declare, establish, and for him, his heirs and successors, grant to the aforesaid mayor and commonalty and citizens of the city aforesaid, and their successors, that it should and might be fully lawful to the said mayor and commonalty and citizens of the city aforesaid, and their successors, by the mayor of the same city for the time being, and by the deputies, ministers, officers, and servants of such mayor for the time being, to ask, demand, take, receive and have the fee of eight-pence of lawful money of England to the use of the aforesaid mayor and commonalty and citizens of the city aforesaid, and their successors, for the weighing of every the like ton of coals aforesaid, and of all other coals weighable, of every kind, and so according to the rate aforesaid for a greater or less quantity, of the person who should bring the like coals, for and in respect of the charge and cost of the same mayor and commonalty and citizens of the city of London aforesaid, and their successors, for scales, and for and in respect of their attendance, labour, and other necessary costs and expenses taken and expended in and about the premises, which said fee of eight-pence the aforesaid mayor and commonalty and citizens of the city aforesaid had hitherto had and perceived, and did then have and perceive, for the weighing of a like ton of coals; and also his said majesty did command, and by the said charter now in recital, for him, his heirs and successors, firmly order and enjoin, all and singular merchants and other persons whatsoever bringing and about to bring coals called sea coals, stone coals, pit coals, earth coals, or any other coals, of what kind, nature, or species soever they were, in or within the limits and bounds aforesaid, upon the water of Thames aforesaid, in any ship, boat, or other vessel whatsoever, being within the same limits, that neither they nor any of them should thenceforth deliver or set down, nor presume or cause or permit such coals called sea coals, pit coals, stone coals, and earth coals, or other coals, of whatsoever kind they were, to be unladen, discharged, delivered, or set down, from or out of the same ships, boats, or other vessels, being within the limits and bounds aforesaid, in the water of Thames aforesaid, upon every wharf, bank, or shore on either side of the same water of Thames within the limits aforesaid, or otherwise to be carried away or set down out of the same ships, boats, or other vessels, before the mayor of his city aforesaid for the time being should have received certain notice of the quantity of all such coals so brought in any ship, boat, or other vessel whatsoever within the limits aforesaid, and should have given direction for unlading the like coals, and for the weighing or measuring of the like coals, according to the nature and quality of the same coals; to the intent that the same mayor of the city aforesaid for the time being, according to the duty of his office, could and might be able to

2. *Regulations, &c. in London, &c.*

1 & 2 Will. 4, c. lxxvi.

render a better and readier reckoning and account to his said majesty, his heirs and successors, of what quantity of coals of every kind from time to time had been brought into the port of his city of London aforesaid, and within the limits aforesaid, and in what manner the aforesaid city of London, his royal chamber, and the parts and places near and immediately adjoining the port of the same city, were from time to time and at all times provided, if occasion should so require, and at any time his said majesty, his heirs and successors, should demand the same of the mayor of the city aforesaid for the time being; and also to the intent that the money to be taken, and the other profits due to his said majesty, his heirs and successors, for the like coals or any of them so brought and to be brought within the limits aforesaid (if any there should be), might be better answered for and paid to the officers and ministers of his said majesty, his heirs and successors, to the use of his said majesty, his heirs and successors, on pain of contempt of his royal command, and of incurring all such pains and penalties as by the laws and statutes of this realm of England could be inflicted against the like offenders for disregard and contempt; and also reciting, that because it was notoriously well known that the river Thames was so necessary, convenient, and useful to the city of London aforesaid, that without the said river the said city could not long subsist, flourish and continue, and that by the forestalling, engrossing and regrating of coals brought in or to the port of the said city upon the water of Thames aforesaid, the like coals were rendered dearer, to the great loss and prejudice as well of his said majesty as of his subjects; and further reciting, that divers ill-disposed persons, looking more to their own private advantage and profit than to the general and public good and benefit of his city aforesaid, and by no means regarding the conservancy of the same river, did with impunity, and then daily, usually sell coals and other things of that sort by retail in a less quantity, in boats commonly called lighters, and other vessels, floating, placed and being in and upon the water of Thames aforesaid, after the like coals had been unladen from the ships and other vessels which at first brought the same coals and other things of that sort within the limits and bounds abovesaid, upon the water of Thames aforesaid, which said persons made the boats commonly called lighters and other vessels as it were their common shops and warehouses, and in the same did daily hold, upon the water of Thames aforesaid, a common market for the sale of the like coals and other things of that sort, having one, two, three, and sometimes more boats, commonly called lighters, and other vessels, lying and affixed one to the other in the river Thames aforesaid, by which the forestalling, monopoly, and regrating aforesaid growed and increased every day, to the great deception, loss and oppression as well of the rich as the poor, and the prices of the coals and other things were augmented and rendered dearer; and that by the frequent importation, carrying away, measuring and weighing the like coals and other things of that sort into and out of the same boats, commonly called lighters, and other vessels, a great many of the same coals and other filth very often fell and were thrown into the river Thames, to the great nuisance and choking up of the stream of the same river, and the aforesaid boats and other vessels so placed greatly impeded as well the course of the stream of the river aforesaid as the passage of those passing by upon the water of the same river; his said majesty therefore, considering it just that so great an evil ought not longer to be permitted to continue, but should, as quickly as possible, be put an end to and removed, did firmly order and enjoin, and for him, his heirs and successors, prohibit all and singular persons whatsoever, that neither they nor any of them should thenceforth sell nor presume to sell any coals of any kind whatever upon the water of Thames, in any boat commonly called lighters, or in any other vessel whatsoever, except only in the same ships or other vessels which at first brought the like coals within the port of the city aforesaid, and within the limits and bounds abovesaid, and not otherwise, unless upon some port, quay, or wharf near the river aforesaid, under pain of contempt of his royal command, and of incurring such pains and penalties as by the laws and statutes of this realm could be inflicted against the like offenders for disregard and contempt; and because his said majesty's intention was, that the same mayor and commonalty and citizens

2. *Regulations, &c. in London, &c.*

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of the city aforesaid, and their successors, should fully enjoy the premises aforesaid, his said majesty therefore, by the said charter now in recital, did declare and signify his will and pleasure, and will, and for him, his heirs and successors, grant and agree, to and with the aforesaid mayor and commonalty and citizens of the city aforesaid, and their successors, that the same mayor and commonalty and citizens of the city aforesaid, and their successors, might securely, peacefully and quietly have, exercise, enjoy and use all and singular the premises above mentioned, to them and their successors for ever, without hindrance of his said majesty, his heirs and successors, or any officers or ministers of his said majesty, his heirs or successors, and without making or rendering any account thereof or any other thing to his said majesty, his heirs and successors: and if it should happen that any defect in the said charter now in recital were thereafter found, or any doubt, ambiguity, or question respecting the premises arose or were made, his said majesty, his heirs and successors, would vouchsafe to grant and make other letters patent under the great seal of England, of him, his heirs or successors, to the same mayor and commonalty and citizens of the city aforesaid, and their successors, for the better donation, grant and confirmation, and for the more secure enjoyment of the premises, whenever it should be desired by the same mayor and commonalty and citizens of the city aforesaid, or their successors, that express mention of the true yearly value, or of the certainty of the premises or any of them, or of other gifts or grants before those times made by his said majesty, or any of his progenitors or ancestors, to the aforesaid mayor and commonalty and citizens of the city aforesaid, was not made in the said charter now in recital, or any statute, act, ordinance, provision, proclamation or restriction to the contrary thereof, thitherto had, made, passed, ordained or provided, or any other thing, cause or matter whatsoever, in anywise notwithstanding: and whereas by an act of parliament passed in the fifth and sixth year of the reign of King William and Queen Mary, intituled '*An Act for the Relief of the Orphans and other Creditors of the City of London*,' it was enacted, that for all sorts of coal which should be imported or brought into the port of the said city of London, or the river of Thames within the liberty of the said city, upon the same river, to be sold by the chaldron or ton, there should be paid, by way of imposition thereupon, according to the rates and duties after mentioned, (that is to say,) for all such sorts of coal or culm as were usually sold by the chaldron, for every chaldron thereof which should be imported from and after the twenty-fourth day of June, one thousand six hundred and ninety-four, the sum of four-pence metage for ever, over and above what was then lawfully paid for the metage thereof, which said sum should be paid in like manner as the then present duty for metage was or had been accustomed to be paid and from time to time be paid to the said mayor and commonalty and citizens of the said city by the officer and officers receiving the said metage; and for all such sort of coals or culm which should be imported into the said port or members thereof from and after the twenty-ninth day of September, one thousand seven hundred, (over and above all other impositions and duties, and the above-mentioned sum of four-pence,) the further sum of sixpence for every chaldron thereof; and for such sort of coals, as were sold by the ton, for every ton thereof containing twenty hundred weight, the like sum of sixpence; which said imposition of sixpence should continue from the said twenty-ninth day of September for and during the term of fifty years and no longer; and the said imposition of sixpence per chaldron was to be answered and paid to the said mayor and commonalty and citizens by the master, owner or owners, or other person or persons taking charge of any ship or vessel whereupon the same should be laden, before they should break bulk, or have a meter assigned for the measuring or weighing any coals to be as aforesaid delivered from on board such ship or vessel, the same to be paid at such place or places as by the said mayor and court of aldermen should from time to time be appointed, within the said city or liberties thereof, for the receipt thereof, upon receipt whereof the party appointed to receive the same should, without delay, fee or reward, deliver a receipt to the person or persons who should pay the said duty or

5 & 6 W. & M. c. 10.

duties, which receipt should for so much be a sufficient discharge; and the said imposition of sixpence per ton or chaldron was to be collected in such sort and manner in all and every respects as in and by an act made in the nineteenth year of the reign of King Charles the Second, intituled '*An Act for the Rebuilding the City of London*,' the imposition of coals thereby granted was to be collected and levied, and all and every the powers, authorities, directions and provisions in or by the said act mentioned or provided for the levying, collecting and recovering thereof, or the penalties thereby imposed, or for the ordering or regulating the proceedings of the said coal meters or others in discharge of their respective offices and duties, or for the preventing of fraud or covin, and for the discovery of the just quantity of all sorts of coals to be imported as aforesaid, should remain and be in force, and by virtue of the said act now in recital should and might be exercised and put in use for the collecting, levying and recovering the said duty of sixpence, according to the purport and effect of the aforesaid act, and under the same penalties in all and every respect, and that for and during all the time by the said act now in recital limited and appointed for the payment of the said imposition, as if the same were expressly mentioned in the said act now in recital with reference to the said imposition thereby imposed: and whereas the said imposition, rate or duty of sixpence has been continued from time to time by several acts of parliament, and ultimately by an act passed in the tenth year of the reign of his late majesty, intituled '*An Act for Improving the Approaches to London Bridge*,' and is now payable for terms which will expire on the fifth day of July, one thousand eight hundred and fifty-eight; and the said last-mentioned imposition, rate or duty of four-pence per chaldron, and the said imposition, rate or duty of sixpence, are charged with sums of money raised and to be raised for defraying the expenses of public works: and whereas it is expedient for the purposes of this act, that the lord mayor of the city of London, and the mayor and commonalty and citizens of the said city, should not at the present time exercise any right or privilege of weighing or measuring coals, culm or cinders, to which under or by virtue of the aforesaid charters and acts of parliament, or by prescription or otherwise, he or they is or are or may be entitled, and that during the term hereinafter mentioned, one rate or duty should be paid to the said mayor and commonalty and citizens in lieu of all rates and duties payable to them in respect of coals, culm and cinders (except the rates and duties made payable by this act); be it therefore further enacted, that, during the term of seven years, to be computed from the thirty-first day of December next after the passing of this act, the lord mayor of the said city of London, and the said mayor and commonalty and citizens, shall not exercise any right of measuring or weighing coals, or any other rights with respect to coals to which he or they is, are or may be entitled, by prescription, or by the said charters and acts of parliament or otherwise; and that the rate or duty of twelve-pence for every ton of coals, cinders and culm imported or brought into the port of London shall be collected and may be recovered in manner hereinafter mentioned; and the sum of four-pence for every ton, part thereof, shall be applied in the same manner as the sum in the said charters mentioned to be payable for metage would be applicable; and the sum of eight-pence for every ton, residue thereof, shall be applied in the same manner as the said imposition, rates or duties of four-pence per chaldron, and sixpence for every chaldron or ton, made payable by the said act of parliament, would be applicable."

2. *Regulations, &c. in London, &c.*

1 & 2 Will. 4, c. lxxvi.

10 Car. 2, c. 8.

10 Geo. 4, c. 136.

During seven years the right of measuring not to be exercised by the corporation.

Duty of 12*d.* per ton on coals, cinders and culm.

Sect. 61. "Provided always, nevertheless, that at the end of the said term of seven years, and also if at any earlier period the said rate or duty of twelve pence per ton shall cease to be payable as aforesaid, the lord mayor of the said city of London, and the said mayor and commonalty and citizens, shall be entitled to resume, use, exercise and enjoy all rights of weighing and measuring coals, and other rights and privileges in respect thereof, to which he or they is, are or may be entitled, and to demand, collect, recover, receive and take the metage, impositions, duties, rates or sums, and all other privileges and advantages to which he or they is, are or may be entitled at the time of passing this act, and that in as full, ample, and beneficial a

Rights of the corporation of London to be resumed after seven years, or sooner, if the duty of 12*d.* shall cease.

2. *Regulations, &c. in London, &c*

1 & 2 Will. 4, c. lxxvi.

manner to all intents and purposes as if this act had not been made; and the interruption in the exercise of any right, or in the receipt of any fees or duties to which he or they is, are or may be entitled by prescription or otherwise, during such time as the payments hereby directed to be made in lieu thereof shall be received, shall not be deemed in law to be a waiver or discontinuance of any such right, fees or duties, but the same shall be in as full force and effect, and may be enforced and recovered by the same remedies, and may be claimed and pleaded in the same manner, to all intents and purposes, as if they had been exercised and received respectively during the time in which the exercise and receipt thereof respectively shall have been suspended, interrupted or varied by virtue of this act; and that the lord mayor of the said city of London, and the said mayor, and commonalty and citizens, shall and may prescribe and continue to prescribe, in any action, suit or other proceeding in law or equity, for any right, fees and duties to which he or they is, are or may be entitled as aforesaid, as if he or they had continued in the exercise of such right, and in receipt of such fees and duties, notwithstanding the nonuser thereof in pursuance of this act or any other act of parliament for the weighing of coals and payment of the sums provided for the same in lieu of the said metage, fees and duties."

Water baillage and groundage suspended.

Sect. 62. "During the said term of seven years, if the said rate or duty of twelve pence per ton shall so long continue payable, the said mayor and commonalty and citizens shall not receive or take the water baillage and groundage to which they are now entitled in respect of the coals imported or brought into the said port of the said city of London, and the ship in which the same are imported, or the sums for which the said lord mayor for the time being is entitled for permits and for registering certificates."

Water baillage and groundage resumed after seven years.

Sect. 63. "Provided always, nevertheless, that at the end of the said term of seven years, and also if at any earlier period the said rate or duty of twelve pence per ton shall cease to be payable as aforesaid, the lord mayor of the said city of London, and the said mayor and commonalty and citizens, shall for ever thereafter be entitled to the said water baillage and groundage, and the sums to which the said lord mayor for the time being is entitled for permits and for registering certificates, in as full, ample and beneficial a manner, to all intents and purposes, as if this act had not been made, and the interruption in the exercise or in the receipt of the same shall not be or be deemed in law to be a waiver or discontinuance thereof, but the same shall be in as full force and effect, and may be enforced and recovered by the same remedies, and may be claimed and pleaded in the same manner, to all intents and purposes as if they had been received respectively during the time in which the exercise and receipt thereof respectively shall have been suspended, interrupted or varied by virtue of this act; and that the lord mayor of the said city of London, and the said mayor and commonalty and citizens, shall and may prescribe and continue to prescribe in any action, suit or other proceeding at law or equity, for the said water baillage and groundage, and the sums to which the said lord mayor for the time being is or may be entitled for permits and for registering certificates, as if they had continued in the receipt of the said water baillage and groundage, and the sums to which the said lord mayor for the time being is entitled for permits and for registering certificates, notwithstanding the nonuser thereof in pursuance of this act."

1s. 1d. per ton instead of 1s. 3d. per ton to be paid for inland coals.
6 Geo. 4, c. 111.

Sect. 64. "And whereas by an act passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled '*An Act for granting Duties of Customs*,' a duty of one shilling and three-pence the ton is granted on coals, culm and cinders brought by the Grand Junction or Paddington canals nearer to London than the stone or post at or near the north-east point in Grove Park in the county of Hertford, or brought down the river Thames nearer to London than the city's stone placed on the west side of Staines Bridge in the county of Middlesex, payable to the proper officer of customs, in lieu of the duty called orphans' duty, and of all other rates, dues and duties payable to the corporation of London upon coal, culm and cinders imported into the port of London, to be paid over to the said corporation at the end of

every quarter: and whereas it is expedient for the purposes of this act that the said duty of one shilling and three-pence should not be received at the present time, but that duties of one shilling per ton and one penny per ton on coals, culm and cinders should be taken in lieu thereof in the said canals and river at the aforesaid places: be it therefore further enacted, that during the term of seven years, to be computed from the thirty-first day of December next after the passing of this act, the sum of one shilling and three pence per ton on coals, culm and cinders brought by the Grand Junction and Paddington canals nearer to London than the stone or post at or near the north-east point in Grove Park in the county of Hertford, or brought down the Thames nearer to London than the city's stone placed on the west side of Staines Bridge in the county of Middlesex, shall not be paid; and in lieu thereof, and of all such other rates and duties as aforesaid, the sums of one shilling and one penny per ton on coals, culm and cinders brought nearer to London on the said canals and river than the places aforesaid, shall be paid to such person or persons, at such place or places, in such manner, and under such regulations, as the said mayor, aldermen and commons, in common council assembled, shall from time to time direct and appoint; and the receipt of such person or persons shall be a valid and effectual discharge for the same; and in case of neglect or refusal to pay such duties of one shilling and one penny per ton on coals, culm and cinders, or either of them, or any part or parts thereof, on demand, to such person or persons as aforesaid, then and in every such case it shall be lawful for the said mayor, aldermen and commons, in common council assembled, to sue for the same by action of debt or upon the case, in the name of the mayor and commonalty and citizens of the said city of London, in any of his majesty's courts of record at Westminster; or the person or persons to whom the said duty ought to have been paid may, and he and they is and are hereby empowered, either at the time of the barge or other vessel containing such coals, culm and cinders passing the place appointed for receiving such duty, or at any time afterwards, to seize and detain such barge or vessel, and the coals, culm and cinders therein, for or in respect whereof the said duties ought to be paid, until paymont thereof, together with reasonable charges for such seizure and detention; and if the same shall not be redeemed within five days after the taking thereof, the same may be appraised and sold as the law directs in case of distress for rent: provided always, nevertheless, that when the said duty or sum of one penny per ton first hereinbefore authorised to be taken shall cease, the said last-mentioned duty or sum of one penny shall also cease, and the said duty or sum of one shilling per ton shall be payable as aforesaid, without the said duty or sum of one penny per ton; and when and as often as the said first-mentioned duty, or any other renewed duty in lieu thereof, shall again be payable as aforesaid, a sum or duty of the like amount shall be payable, together with the said rate or duty of one shilling per ton, in manner hereinbefore mentioned."

2. *Regulations, &c. in London, &c.*

1 & 2 Will. 4, c. lxxvi.

Sect. 65. "Provided always, nevertheless, that at the end of the said term of seven years, and also if at any earlier period the said duties of one shilling and one penny per ton shall cease to be payable as aforesaid, the said mayor and commonalty and citizens shall thereafter be entitled to the said duty of one shilling and three-pence per ton, and that in as full, ample and beneficial a manner to all intents and purposes as if this act had not been made."

The duty of 1s. 3d. to be resumed after seven years.

Sect. 66. "Nothing in this act contained shall abridge, extend, prejudice, confirm or otherwise affect, or be deemed or construed to abridge, extend, prejudice, confirm or otherwise affect, any of the rights of the lord mayor of the said city of London, or the said mayor and commonalty and citizens of the city of London, to which they are or may be entitled under or by virtue of the aforesaid charters or otherwise, to have and exercise the office of measurer and the measuring of all and singular grains of every kind, and also of all kinds of apples, pears, plumbs and other fruits whatsoever, and of all eatable roots of every kind, and also of onions, and all other merchandizes, wares and things whatsoever measurable, and the measuring of the same, landed, conveyed or brought in or to the port of the said city of London

Act not to affect rights of corporation to the measuring of grain, &c.

2. *Regulations, &c. in London, &c.*

1 & 2 Will. 4, c. lxxvi.

upon the said water of Thames, in every ship, boat, barge or other vessel whatsoever, floating, laden, remaining or being on every part of the same water of Thames, and upon every bank or every shore, or every wharf of the same water of Thames, which should happen to stop, remain, and be delivered or set down from the aforesaid bridge of the said town of Staines in the said county of Middlesex westwards to the aforesaid bridge of London, and thence to the aforesaid place called Yendall, otherwise Yenland, otherwise Yenlecte, towards the sea and eastwards, and in the Medway, and in the said port of the city of London aforesaid, or to all wages, rewards, fees and profits to the same office of measurer belonging and pertaining, (being the rights mentioned in the said charter as aforesaid), or any other rights or privileges to which the said lord mayor, or the said mayor and commonalty and citizens respectively, are entitled, but that the same shall be and continue in full force and virtue, and may be enforced and recovered by the same remedies, and claimed or pleaded in the same manner, as if there had been no such suspension or interruption of any rights or privileges to which they are or may be entitled with respect to coals."

Chamberlain to keep account of receipts and disbursements on account of metage monies.

Sect. 67. "The chamberlain of the said city for the time being shall keep one or more book or books in which all the monies to be received by virtue of this act in respect of the said rates and duties of eight-pence per ton, and the application thereof, shall from time to time be entered and set down, and such entries shall specify the times when, the occasions for which, and the names of the persons to whom, the same shall be paid."

The city to lay accounts before parliament.

Sect. 68. "The said mayor, aldermen and commons, in common council assembled, shall once in each and every year, or oftener if required, lay before both houses of parliament an account of the monies to be received by virtue of this act in respect of the said rates and duties of eight-pence per ton."

Duties to be paid to the clerk of the coal market before bulk is broken.

Sect. 69. "The rates or duties of one penny and twelve-pence per ton on coals, cinders and culm, made payable by this act, shall be paid by every owner or master or other person having the command or charge of the ship or other vessel laden with such coals, cinders or culm, or by the factor thereof, before bulk shall be broken, or any of such coals, cinders or culm in such ship or vessel shall be unladen, and the same shall be paid at the said coal market for the time being, to one of the clerks of the said market; and the certificate or certificates of any clerk of the coal market, that the rates or duties on the coals, cinders or culm in any ship or vessel have been paid, shall be an effectual discharge for the same; and if any of the said clerks shall refuse, on demand, to receive the said rates or duties, or to give a certificate for the same, without fee or reward, such clerk shall for every such offence forfeit any sum not exceeding ten pounds."

Penalty on breaking bulk before payment of the duties.

Sect. 70. "If the bulk of any ship or vessel laden with coals, cinders or culm liable to the duties hereby imposed, shall be broken, or any of such coals, cinders, or culm shall be unladen, before the rates or duties made payable by this act shall have been paid, the master or owner of such ship or vessel shall for every such offence forfeit and pay any sum not exceeding twenty-five pounds."

Custom house officers not to cancel bond before duties are paid.

Sect. 71. "And to the intent that the rates or duties aforesaid may be duly accounted for and paid, be it further enacted, that no collector or other officer of his majesty's customs shall on any pretence whatever cancel any bond which shall have been entered into by the master or owner or other person having the command or charge of any ship or other vessel which shall have been laden with coals, cinders, or culm liable to the duties hereby imposed, unless and until a return has been made by the clerk of the coal market to the coast office at the custom house, London, that the owner, master, or other person, having the command or charge of such ship or other vessel, has paid the rates or duties by this act imposed; and the clerk of the coal market shall, within seven days after the said rates or duties have been paid upon any such ship or vessel, transmit to the said coast office a return stating the name of the ship and the number of tons upon which the said rates or duties have been paid, upon pain of forfeiting for every such offence any sum not exceeding twenty-five pounds."

2. *Regulations, &c. in London, &c.*

1 & 2 Will. 4, c. lxxvi.

Manner of recovering rates and duties.

Sect. 72. "And to the intent that the rates and duties imposed by this act may be more effectually collected and levied, be it enacted, that in case any owner or master, or any other person having the command or charge of any ship or other vessel shall neglect to pay the same, it shall be lawful for any other person or persons, appointed for that purpose by the said mayor, aldermen and commons, in common council assembled, to go on board such ship or other vessel to demand, collect, and receive the said rates or duties, and on nonpayment thereof to take and distrain any such ship or other vessel, and all the tackle, apparel, and furniture thereto belonging, or any part thereof, and all or any part of the coals, cinders or culm in respect whereof such rates or duties shall be payable, either on board such ship or other vessel, or on land, and the same to retain until the respective rates or duties shall be satisfied and paid; and in case of any neglect or default in payment of the said rates or duties for the space of five days after any distress or distresses so made or taken, that then it shall be lawful for the said person or persons appointed as aforesaid, to cause the same to be appraised by two or more sworn appraisers or other sufficient persons, and afterwards to sell the said distress or distresses, and out of the produce of the sale thereof to satisfy themselves or himself, as well for and in respect of their or his reasonable charges in taking, keeping, appraising, and selling the same, as also for or in respect of the said rates and duties and every of them, rendering the overplus (if any such there be) to the owner, upon demand; and it shall be lawful for the said mayor and commonalty and citizens, in case of nonpayment of the rates and duties as aforesaid, instead of recovering the same in manner aforesaid, or in case the whole thereof shall not be so recovered, to proceed for the recovery of the same, or so much thereof as shall not be so recovered, by action of debt or on the case in any court of record at Westminster."

Persons evading payment of duties to remain liable, and also to forfeit a sum equal thereto.

Sect. 73. "If any master, owner, or other person having the command or charge of any ship or other vessel, or the owner or factor of any coals, cinders or culm, shall by any means whatsoever at any time or times elude, evade, or avoid the payment of the rates or duties hereby made payable in respect thereof, or any part of the same, every person eluding, evading, or avoiding payment as aforesaid, shall forfeit and pay to the said mayor and commonalty and citizens, a sum equal to the amount of such rates and duties, and shall also stand charged with and be liable to the payment of the said rates and duties; which rates and duties, as well as the forfeiture incurred by having eluded, evaded, or avoided the payment thereof, shall and may be recovered from such master or owner or factor, or such person having such command or charge respectively, at any time or times either by the means hereinbefore prescribed for the levying the said rates or duties, and by the same method, or in such manner as is hereinafter directed for levying and recovering the fines, forfeitures, and penalties imposed by this act, and with the like costs."

Owners of ships may compound for the number of tons in respect of which the duties shall be paid.

Sect 74. "In order to prevent any trouble in ascertaining the quantity of coals, cinders or culm contained in any ship or vessel, it shall be lawful for the said mayor, aldermen and commons of the city of London, in common council assembled, or any committee or committees appointed by them, to agree and compound with the master, owner, or agent of any such ship or other vessel, that the same shall on any voyage or voyages, with respect to the rates or duties hereby made payable, be considered to contain such number of tons of coals, cinders, or culm as the said mayor, aldermen, and commons, in common council assembled, or such committee or committees, upon consideration, shall think reasonable; and a certificate of such composition, signed by the town clerk of the said city for the time being, expressing the number of tons of coals, cinders, or culm agreed to be considered to be contained in such ship or vessel, in respect of which the rates or duties imposed by this act shall be payable, shall be given to the master or owner of such ship or vessel: provided always, that if any such ship or other vessel shall, after such composition, be enlarged, repaired, altered, or varied, whereby or by means whereof a larger quantity of coal can be carried in such ship or vessel, such composition shall be void; and if the master or

2. *Regulations, &c. in London, &c.*

owner of any such ship or other vessel shall omit to give notice to the clerk of the coal market of any such enlargement, reparation, alteration, or variation as aforesaid, or shall pay the amount of such composition as if no such enlargement, reparation, alteration, or variation had been made, he shall for every such offence forfeit and pay any sum not exceeding fifty pounds."

1 & 2 Will. 4, c. lxxvi.

Certificate of the quality of the coals to be given by the fitter, and registered at the coal market on arrival of ship.

Sect. 75. "Every fitter or other person vending or delivering coals for the port of London shall send, in a letter directed to the clerk of the coal market, and put into the General Post Office on the day on which the ship or vessel containing any coals shall sail on any such voyage, or shall give to the ship master of such ship or vessel, before the same shall sail on every or any such voyage, a certificate signed by such fitter, containing the day of the month and year of such loading, the master's and ship's names, and the quantity of tons, and the usual names of the several and respective collieries out of which the said coals are and shall be wrought and gotten, and the price paid by the master or masters for each and every sort of coals that each and every fitter or other person vending or delivering coals as aforesaid, his or their agent or servant, hath sold and loaded on board each and every ship or vessel; and in case any person or persons omit or refuse to give such certificate as aforesaid, or shall give or make any false certificate, every person so offending shall for every such offence forfeit and pay the sum of one hundred pounds; (*a*) and where such certificate shall be given to the ship master, he shall upon the arrival of the said ship or vessel at the port of London, deliver or cause to be delivered such certificate at the office of the clerk of the coal market, [and every fitter who shall send or give any such certificate as aforesaid shall, on or before the expiration of three calendar months next after the same shall have been given, send, in a letter directed to the said clerk of the coal market, and put into the General Post Office, or delivered at the office of the said clerk of the coal market, an affidavit according to the form in the schedule to this act annexed, sworn by him before one of his majesty's justices of the peace (and which oath any such justice is hereby authorised to administer), in which affidavit such fitter shall verify such certificate alone or together with any other certificates which may have been sent or given by him in the mean time; and in case it shall happen that such fitter's certificate shall at any time be accidentally lost, or in case any such ship or vessel shall have been originally loaded or entered outwards for exportation, and shall afterwards change her destination, and arrive or come into the port of London without any such fitter's certificate having been obtained or provided, then and in either of such last-mentioned cases each and every master of such ship or vessel shall deliver or cause to be delivered a like account of the quantity, and name or names or description or descriptions of the coals on board of such his ship or vessel, at the office of the clerk of the coal market, together with an affidavit to accompany such account, and to be sworn by such master before any of his majesty's justice or justices of the peace for the county, city, town, or place where the same shall be sworn, (and which oath any such justice or justices is and are hereby authorised to administer), in which affidavit such master shall state and verify such circumstances, either of the accidental loss of any such certificate, or of any such ship having been originally entered outwards, and having afterwards changed her destination and arrived as aforesaid without any such certificate having been obtained or provided (as the case may be); and such clerk or other officer is hereby required to receive and register such certificate or certificates as aforesaid, account or accounts, together with the affidavit or affidavits accompanying any such account or accounts as aforesaid; and in case any master of any ship or vessel shall knowingly give in any false certificate or account as aforesaid to be registered, or shall not, when no certificate shall have been sent by the post, within twenty-four hours after the arrival of his ship at her moorings in the port of London, deliver or cause to be delivered in his certificate, or such account and affidavit as aforesaid, to be registered in manner aforesaid, every person so offending shall for every such

Provision in case of loss of certificate, or of ship's destination being changed.

(*a*) But the 6 & 7 Vict. c. 2, s. 1, *post*, 732, and 6 & 7 Vict. c. ci., *post*, 733, provide for the discontinuance of actions for this penalty. See *Grant* v. *Browne*, *C. P.* 13; *L. J.* (*N.S.*) 23.

offence forfeit and pay any sum not exceeding one hundred pounds]; (a) and if the person or persons who ought to register, file, or enter such certificate or account, or his or their clerk or deputy officiating in such office, shall neglect to register the same for the space of twenty-four hours after the delivery of such certificate or account into such office or offices, or shall make a false entry of such certificate or account, or refuse to show and produce such certificate or account, and registry thereof, to any person or persons coming between the hours of twelve and two to see and inspect the same, and take extracts therefrom, every person so offending shall for every such offence forfeit and pay any sum not exceeding five pounds."

2. *Regulations, &c. in London, &c.*

1 & 2 Will. 4, c. lxxvi.

Penalty for neglect to register, or refusing to show certificate.

Sect. 76. "Where no such certificate of composition shall have been given, and the said mayor, aldermen, and commons of the said city of London, in common council assembled, or any inspector appointed by them, shall not be satisfied with any such fitter's certificate or account and affidavit as aforesaid, and shall require, before any coals shall be delivered from the ship or vessel respecting which the same shall have been given, that such coals shall be weighed, in order to ascertain whether such certificate or account and affidavit be correct, the master of such ship or vessel shall permit any such inspector to weigh the coals in such ship or vessel at the time of the delivery thereof; and in case the quantity of coals in such ship or vessel shall exceed the quantity mentioned in the fitter's certificate thereof, or such account and affidavit as aforesaid, to the extent of five pounds over and above every one hundred pounds of such coals, then, in addition to the penalty of one hundred pounds which will be incurred by sending or giving such false certificate or account as aforesaid, there shall be paid by the master of such ship or vessel to the inspector by whom such coals shall be weighed, a sum not exceeding three pence per ton for or in respect of the trouble of weighing the same and the use of the weighing machines employed for that purpose, which sum shall be recovered in the same manner as hereinafter is directed with respect to any penalty imposed by this act; but no payment shall be required by such inspector for trouble or the use of machines in case the quantity of coals shall not be found to exceed the quantity stated in such certificate or account as aforesaid to the extent hereinbefore mentioned."

In certain cases master of ship to permit inspector to weigh coals.

Additional penalty of 3*d.* per ton if coals shall exceed the quantity mentioned in fitter's certificate by 5lbs. in 100lbs.

Sect. 77. "All fines, penalties, or forfeitures by this act, or by virtue of the powers and authorities thereof, imposed, (the manner of levying and recovering whereof is not hereby otherwise directed), not exceeding twenty-five pounds, shall be sued for within one calendar month (now two calendar months, 1 & 2 Vict. c. ci., s. 7, *post*, 729) after the offence or offences committed; and all such fines, penalties, and forfeitures shall be levied and recovered before any justice or justices of the peace for the county, city, or place where the offence shall be committed; and such justice or justices is and are hereby empowered and required, upon information or complaint to him or them made, to grant a summons or warrant to bring before him or them such offender or offenders at the time and place as shall be in such warrant specified; and if, on the conviction of the offenders respectively, either on his, her, or their confession, or on the evidence of any one or more credible witness or witnesses upon oath, (which oath such justice or justices is and are hereby empowered to administer), such fine, penalty, or forfeiture, shall not be forthwith paid, the same shall be levied by distress and sale of the goods and chattels of the offender or offenders, by warrant under the hand and seal of such justice or justice; and the overplus of the money (if any) raised by such distress and sale, after deducting the fine, penalty, or forfeiture, and the costs and charges of making such distress and sale shall be rendered to the owner

Recovery and application of fines and penalties not exceeding 25*l.* (b)

(a) So much of this section as is between the [ ] is repealed by the 1 & 2 Vict. c. ci. s. 8, *post*, 729.

(b) The penalty of 20*l.* per chaldron for every chaldron of coals of one sort sold as and for another sort, inflicted by the now repealed act, 47 Geo. III. c. lxviii., was a penalty exceeding 20*l.*, and therefore recoverable in the superior courts under the 145th section of that act; *Reeve* v. *Poole*, 4 *B. & Cres.* 155; 1 *C. & P.* 622; S. C. *nom. Thompson* v. *Poole*, 6 *D. & R.* 29; *aliter* for penalties under the 17th section. *Id.*

2. *Regulations, &c. in London, &c.*

1 & 2 Will 4, c. lxxvi.

of the goods and chattels so distrained; and for want of distress, or in case the fine, penalty, or forfeiture, shall not be forthwith paid, it shall and may be lawful to and for such justice or justices to commit every such offender to the common gaol or house of correction for the county, city, or place where the offence shall be committed, there to remain without bail or mainprize for any time not exceeding six calendar months, unless such fine, penalty, or forfeiture, and all reasonable charges attending the recovery thereof, shall be sooner paid; and all such fines, penalties, and forfeitures when recovered shall be paid into the hands of the overseers of the poor of the parish, township, or place where the same shall have been incurred, for the use of the poor of such parish, township, or place."

Justices may proceed by summons in the recovery of penalties.

Sect. 78. "In all cases in which by this act any penalty or forfeiture is made recoverable before a justice of the peace, it shall be lawful for any justice of the peace to whom complaint shall be made of any offence against this act, to summon the party complained against before him, and on such summons to hear and determine the matter of such complaint, and on proof of the offence to convict the offender, and to adjudge him to pay the penalty or forfeiture incurred, and to proceed to recover the same, although no information in writing shall have been exhibited or taken by or before such justice; and all such proceedings by summons without information shall be as good, valid, and effectual, to all intents and purposes, as if an information in writing was exhibited."

Power to the justice to give part of penalties to informers.

Sect. 79. "Provided always nevertheless, that it shall be lawful for any justice or justices before whom any such conviction shall take place, if they or he shall think fit, to order and direct any part, not exceeding one half, of such fines, penalties, and forfeitures, to be paid or applied to or for the use of the informer or informers, or other persons aiding or assisting in the apprehension of the offender or offenders, or any of them."

Expenses of witnesses may be directed to be paid.

Sect. 80. "It shall be lawful for any justice or justices, before whom any person or persons shall be brought or convicted for any offence for which a penalty is imposed by this act, to direct all or any part, according to the discretion of such justice or justices, of the reasonable expenses of any constable, police officer, or other witness of the matter which shall be charged, and of such compensation (if any) for the time and trouble of such witness, as such justice or justices shall think reasonable, to be paid either by the offender or offenders, or the complainant or complainants; and the sum so ordered to be paid shall and may be recovered, together with any penalty of which the person by whom the same shall be ordered to be paid shall have been convicted, or without, in the same manner as any penalty directed to be recovered by this act, and shall be paid to such constable, police officer, or other witness."

Penalties incurred by carmen may be recovered from their employers;

Sect. 81. "Where any carman, driver, or other person employed by any seller or sellers of, or dealer or dealers in coals, shall have been convicted of any offence against this act, and the penalty or forfeiture for the same, or any sum directed to be paid to any witness, shall not be forthwith paid, the same respectively shall be paid by the seller or sellers, dealer or dealers, by whom such carman, driver, or other person shall have been employed at the time when such offence was committed, and shall be recovered by such ways and means as are hereinbefore directed with respect to any penalty imposed by this act: provided always, that such carman, driver, or other person shall be liable to repay to such seller or sellers, dealer or dealers, the amount of such penalty and the costs attending the same; and in case of nonpayment thereof upon demand, and oath, or by a quaker or quakers an affirmation, of the payment thereof, and that the same and the cost thereof have not been repaid by such carman, driver, or person, although demanded, (such oath or affirmation to be made before any justice or justices of the peace for the county, city, or place where such penalty shall have been recovered), the amount of such penalty and costs shall be recovered in like manner as any penalty is directed to be recovered by this act, and shall be paid to such seller or sellers, dealer or dealers respectively."

who may recover them back.

Appeal to sessions.

Sect. 82. "It shall and may be lawful to and for any person or persons so convicted by any justice or justices of the peace, as before mentioned, of any offence or offences against this act, or against any rule, order, or by-law made

in pursuance thereof, to appeal to the justices of the peace assembled at the next general quarter sessions or general sessions to be holden for the county, city, or place where such conviction shall be made, on giving immediate notice of such appeal, and finding sufficient security to the satisfaction of such justice or justices for prosecuting the said appeal with effect, and abiding the determination of the Court therein; and such justices in such general quarter sessions or general sessions shall hear and determine the matter of such appeal, and may either confirm or quash and annul the said conviction, and award such costs to either party, as to them the said justices shall seem just and reasonable; and the decision of the said justices therein shall be final, binding, and conclusive; and no proceedings to be had or taken in pursuance of this act shall be quashed or vacated for want of form only, or be removed by certiorari, or any other writ or process whatsoever, into any of his majesty's courts of record at Westminster or elsewhere, any law or statute to the contrary thereof in any wise notwithstanding."

2. *Regulations, &c. in London, &c.*

1 & 2 Will. 4, c. lxxvi.

Sect. 83. "It shall and may be lawful to and for any such justice or justices of the peace before whom any such fines, penalties, or forfeitures shall be sued for, to summon before him or them any person who shall, in or by the complaint or information made to him or them, appear to be a necessary witness as to the matters thereby charged, to appear before him or them at a time and place to be specified in the summons; and in case such person so summoned shall not appear according to such summons, then upon due proof of the service of such summons in manner aforesaid, such person so summoned, and not appearing in compliance therewith, shall forfeit and pay the sum of twenty-five pounds, to be levied and recovered in such manner, and by such ways and means as are herein-before directed as to other penalties; and it shall and may be lawful to and for the said justice or justices to cause such person to be apprehended by warrant under the hand and seal, or hands and seals of such justice or justices, and to be brought before him or them; and thereupon, whether such person shall appear upon summons as aforesaid, or shall be apprehended as aforesaid, such justice or justices shall and may proceed to examine him or her upon oath as to the matter of such complaint or information, and in case such person shall refuse to be sworn or to answer or to give evidence therein, then and in every such case it shall and may be lawful to and for such justice or justices, by warrant under his hand and seal or their hands and seals, to commit such person so refusing to be sworn, or to answer or to give evidence as aforesaid, to the common gaol or house of correction of the city, county, or place in or for which such justice or justices shall then act, there to remain for any space of time not exceeding six calendar months."

For compelling attendance of witnesses.

Sect. 84. "If any person or persons, upon his, her, or their examination upon oath before any justice or justices of the peace acting in execution of this act, shall wilfully and corruptly give false evidence touching any matter or thing relating to this act, or if any person or persons shall take or make any false oath or affidavit with respect to any matter or thing relating to this act, every such person so offending, and being duly convicted thereof, shall be and is hereby declared to be subject and liable to such pains and penalties as by any law in force and effect persons guilty of wilful and corrupt perjury are subject and liable to."

Penalty on persons guilty of perjury.

Sect. 85. "All fines, penalties, or forfeitures exceeding the sum of twenty-five pounds by this act imposed for any offence or offences committed against this act shall and may be recovered by action of debt, bill, plaint, or information in any of his majesty's courts of record at Westminster, wherein no essoign, protection, wager of law, or any more than one imparlance, shall be allowed, by the person or persons who shall inform and sue for the same within three calendar months after the offence or offences shall be committed; and one moiety of all such fines, penalties, or forfeitures shall be to and for the use of our sovereign lord the king, his heirs and successors, and the other moiety thereof (together with double costs of suit) shall be to and for the use of the person or persons who shall inform or sue for the same." (See *Reeve* v. *Pool*, 4 *B. & Cres.* 155; 6 *D. & R.* 29; 1 *C. & P.* 622, S. C.; *ante*, 723.)

Penalties above 25*l.* how to be recovered.

2. *Regulations, &c. in London, &c.*

1 & 2 Will. 4, c. lxxvi.

Distress not to be unlawful for want of form, nor the parties to be deemed trespassers *ab initio*.

Sect. 86. "When any distress shall be made for any sum or sums of money to be levied by virtue of this act, the distress itself shall not be deemed unlawful, nor shall the party or parties making the same be deemed a trespasser or trespassers, on account of any defect or want of form in the summons, conviction, warrant of distress, or the proceedings relating thereto, nor shall the party or parties be deemed a trespasser or trespassers *ab initio* on account of any irregularity which shall be afterwards committed by the party or parties distraining, but the person or persons aggrieved by such irregularity shall and may recover full satisfaction for the special damage sustained in an action on the case."

Form of conviction.

Sect. 87. "And for the more easy and speedy conviction of offenders against this act, be it further enacted, that every justice of the peace before whom any person shall be convicted of any offence against this act shall and may cause the conviction to be drawn up according to the following form; (*videlicet.*)

"*BE it remembered, that on the day of , in the year of our Lord , A. B. is convicted before me , one of his Majesty's justices of the peace for the* [here specify the offence, and the time and place when and where committed, as the case may be], *contrary to an act of parliament made in the second year of the reign of King William the Fourth, entitled* [here insert the title of this act.] *Given under my hand and seal the day and year first above written.*" "*C. D.*"

Plaintiff not to recover after tender of amends.

Notice of action.

Sect. 88. "No plaintiff or plaintiffs shall recover in any action to be commenced against any person or persons for any thing done in pursuance of this act, unless notice in writing shall have been given to the defendant or defendants twenty-one days before such action, signed by the attorney for the plaintiff or plaintiffs, specifying the cause of such action; nor shall the plaintiff or plaintiffs recover in any such action, if tender of sufficient amends hath been made to him, her, or them, or to his, her, or their attorney, by or on the behalf of the defendant or defendants, before such action brought; and in case no tender shall have been made, it shall and may be lawful to and for the defendant or defendants in any such action, at any time before issue joined, to pay into Court such sum of money as he, she, or they shall think fit, whereupon such proceeding, order, and judgment shall be made and given in and by such Court as in other actions where the defendant is allowed to pay money into court."

Limitation of actions.

Sect. 89. "No action or suit shall be commenced against any person or persons for any thing done in pursuance of this act after three calendar months next after the fact committed; and every such action or suit shall be brought and tried in the county or place where the cause of action shall arise; and if any such action or suit shall be brought before twenty-one days' notice shall have been given, or after a sufficient satisfaction made or tendered as aforesaid, or after the time limited for bringing the same as aforesaid, or shall be brought in any other county or place than as aforesaid, then the jury shall find for the defendant or defendants; and upon such verdict, or if the plaintiff or plaintiffs shall be nonsuited, or discontinue his, her, or their action or suit after the defendant or defendants shall have appeared, or if upon demurrer judgment shall be given against the plaintiff or plaintiffs, then the defendant or defendants shall recover double costs, and have such remedy for recovering the same as any defendant hath for costs of suit in any other cases by law."

Commencement of the act.

Sect. 90. "This act shall commence and take place from and after the thirty-first day of December next after the passing of this act."

Public act.

Sect. 91. "This act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such by all judges, justices, and others, without being specially pleaded."

See the schedule to this act, *post*, 733.

1 & 2 Vict. c. ci.

By stat. 1 & 2 Vict. c. ci., intituled "*An Act to continue for Seven Years an Act for regulating the Vend and Delivery of Coals in London and Westminster, and in certain Parts of the adjacent Counties,*" (14th August, 1838,) and reciting the passing of the 1 & 2 Will. IV. c. lxxvi., and "that the term of seven years, during which the provisions contained in the said act were thereby directed to continue in force, will expire on the thirty-first day of December one thousand

eight hundred and thirty-eight, and that it was expedient that the same should be continued, and that in the respects herein-after mentioned the said recited act should be altered and amended:" it is enacted "that the said act, and all the powers, authorities, directions, provisions, penalties, forfeitures, regulations, clauses, matters, and things therein contained (except such of them or such parts thereof respectively as are repealed, altered, or otherwise provided for), shall be and the same is and are hereby continued for the further term of seven years from the thirty-first day of December one thousand eight hundred and thirty-eight; and all the provisions, regulations, clauses, matters, and things in the said act contained to take effect at the end of the term of seven years therein mentioned, or at any other time or times, shall take effect in the same manner, to all intents and purposes, as if the term of fourteen years had been inserted in the said act instead of the said term of seven years."

2. *Regulations, &c. in London, &c.*

1 & 2 Vict. c. cl.

1 & 2 Will. 4, c. lxxvi. continued, except as hereby altered.

Sect. 2. "That so much of the said act as directs that with any quantity of coals exceeding five hundred and sixty pounds, delivered from any lighter, ship, barge, or other craft, or from any wharf, warehouse, or other place within the cities of London and Westminster, or within the distance of twenty-five miles from the General Post Office in the city of London, the seller or sellers thereof should deliver or cause to be delivered to the purchaser or purchasers thereof, or to his, her, or their agent or agents, servant or servants, immediately on the arrival of the cart, waggon, or other carriage, or lighter, barge, or craft, in which such coals should be sent, and before any of such coals should be unloaded, a paper or ticket in the form therein mentioned, and as imposes a penalty on any such seller or sellers as should not deliver or cause to be delivered such ticket as therein is mentioned, and a penalty on the carman, driver of, or other person attending any such cart, waggon, or other carriage, or the person having the charge of the lighter, barge, or craft laden with any such coals, who should refuse or neglect to deliver such ticket as therein is mentioned, shall, so far as relates to any coals delivered from and after sixty days after the passing of this act, be and the same is hereby repealed."

Repeal of so much of 1 & 2 Will 4, c. lxxvi. as directs the seller's ticket to be sent with coals.

Sect 3. "That with any quantity of coals exceeding five hundred and sixty pounds, delivered, from and after sixty days after the passing of this act, by any cart, waggon, or other carriage, within the cities of London and Westminster, or within the distance of twenty-five miles from the post office aforesaid, the seller or sellers thereof shall deliver or cause to be delivered to the purchaser or purchasers thereof, or to his, her, or their agent or agents, or servant or servants, immediately on the arrival of the cart, waggon, or other carriage in which such coals shall be sent, and before any of such coals shall be unloaded, a paper or ticket, according to the form in Schedule (A.) to this act annexed; and in case any such seller or sellers do not deliver or cause to be delivered such paper or ticket as aforesaid to the purchaser or purchasers of such coals, or to his, her, or their agent or agents, or servant or servants, before any part of such coals are unloaded, every such seller shall for every such offence forfeit and pay any sum not exceeding twenty pounds; and in case the carman, driver of, or other person attending any such cart, waggon, or other carriage laden with any such coals, to whom any such paper or ticket shall have been given by or by the orders of the seller in order to be delivered to the purchaser, shall (having so first received the same from the seller or any person by the direction of the seller) refuse or neglect to deliver such paper or ticket to the purchaser or purchasers of such coals, or to his, her, or their agent or agents, or servant or servants, before any part of such coals shall be unloaded, such carman, driver, or other person so offending shall for every such offence forfeit and pay any sum not exceeding twenty pounds: provided always, that coals delivered to any seller or dealer in coals, or to any person or persons purchasing the same at the coal market, may be delivered without any such paper or ticket." (a)

New enactment regarding the seller's ticket being sent with coals.

Exception.

(a) The 113th sect. of the 47 Geo. III. c. lxviii. made it imperative on the vender to deliver a ticket of this kind; and where a ticket was delivered not signed by the vender, it was held the vender could not recover the price of the coals

2. *Regulations, &c. in London, &c.*

1 & 2 Vict. c. ci.

A paper or ticket to be sent with coals delivered from lighters.

Sect. 4. "That with any quantity of coals exceeding five hundred and sixty pounds, delivered, from and after ten days after the passing of this act, by any lighter, vessel, barge, or other craft, within the cities of London and Westminster, or within the distance of twenty-five miles from the Post Office aforesaid, the seller or sellers thereof shall deliver or cause to be delivered to the purchaser or purchasers thereof, or to his, her, or their agent or agents, or servant or servants, immediately on the arrival of the lighter, vessel, barge, or other craft in which such coals shall be sent, and before any of such coals shall be unloaded, a paper or ticket setting forth in words at length the number of tons to be delivered, and the name of the coals, together with the name and number of the lighter, vessel, barge, or other craft, and the name of the seller or sellers, and also the name of the lighterman; and in case any such seller or sellers do not deliver or cause to be delivered such paper or ticket as aforesaid to the purchaser or purchasers of such coals, or to his, her, or their agent or agents, or servant or servants, before any part of such coals are unloaded, every such seller shall for every such offence forfeit and pay any sum not exceeding twenty pounds; and in case the person having the charge of the lighter, vessel, barge, or craft laden with any such coals, to whom any such paper or ticket shall have been given by or by the orders of the seller, in order to be delivered to the purchaser, shall (having so first received the same from the seller, or any person by the direction of the seller,) refuse or neglect to deliver such paper or ticket to the purchaser or purchasers of such coals, or to his, her, or their agent or agents, or servant or servants, before any part of such coals shall be unloaded, the person so offending shall for every such offence forfeit and pay any sum not exceeding twenty pounds: provided always, that coals delivered to any seller or dealer in coals, or to any person or persons purchasing the same at the coal market, may be delivered without any such paper or ticket."

Exception.

As to the weighing machines required to be sent with each cart, &c.

Sect. 5. "That no weighing machine shall be deemed a perfect weighing machine within the meaning of the said act unless proper weights shall be carried therewith, and also that any other just balance, with an even beam and legal weights, shall be deemed a perfect weighing machine within the meaning of the said act, without having been marked at Guildhall; and if any carman or driver required to carry a weighing machine by the said act and this act shall have placed in, on, or under his cart, waggon, or other carriage, any beam or scales or other weighing machine, or any weights, which shall be imperfect, or improper for the purpose of denoting the weight of coals, then and in every such case every such carman or driver, or person delivering such coals, shall for every such offence forfeit and pay any sum not exceeding five pounds, and the seller or sellers of, or dealer or dealers in, or carrier or carriers of such coals, shall forfeit and pay any sum not exceeding ten pounds."

Repeal of the penalty on preventing persons, other than the purchaser or his servant, from examining the weighing machine or weighing the sacks of coals.

Sect. 6. "That so much of the said act as imposes a penalty on any carman or driver of any cart, waggon, or other carriage in which coals shall be carried in sacks for delivery to the purchaser or purchasers thereof, for hindering, obstructing, or otherwise preventing the purchaser or purchasers of such coals, or his, her, or their servant, or any other person or persons whomsoever, from examining the weighing machine which in pursuance of the said act shall be placed in, on, or under such his cart, waggon, or other carriage, or weighing all or any of the sack or sacks of coals in such his cart, waggon, or other carriage, shall, so far as relates to the hindering, obstructing, or otherwise preventing as aforesaid any person or persons other than the purchaser or purchasers of such coals, or his, her, or their servant, be and the same is hereby repealed." (*Ante*, 708.)

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sold. (*Little* v. *Poole*, 9 B. & Cres. 192; *vide Brown* v. *Duncan*, 10 B. & Cres. 93, explaining the law.)

Where the vender of coals himself inserts in the vender's ticket the description of them, it was not necessary in an action for penalties under the 47 Geo. III. c. lxviii to produce the ship meter's certificate as required by the 55th section of that act. (*Reeve* v. *Starey*, 4 Car. & P. 17.)

2. *Regulations, &c. in London, &c.*

1 & 2 Vict. c. ci.

Repeal of provision directing the suing for certain fines, &c.

Sect. 7. "That so much of the said act as directs that fines, penalties, or forfeitures, not exceeding twenty-five pounds, shall be sued for within one calendar month after the offence or offences committed, shall be and the same is hereby repealed; and that from and after the passing of this act all fines, penalties or forfeitures by the said act, or by virtue of the powers and authorities thereof, or by this act imposed, the manner of levying and recovering whereof is not otherwise provided for, not exceeding twenty-five pounds, shall be sued for within two calendar months after the offence or offences committed."

Such fines, &c. to be sued for within two calendar months.

Repeal of so much of 1 & 2 W. 4, c. 76, as directs fitter's affidavit to be transmitted to clerk of coal market every three months, and as directs an affidavit of the master to be made in case of loss of fitter's certificate.

Sect. 8. "That so much of the said act as directs that every fitter who should send or give any such certificate as therein mentioned to the clerk of the coal market in manner therein mentioned should, on or before the expiration of three calendar months next after the same should have been given, send, in a letter directed to the clerk of the coal market, an affidavit according to the form in the schedule to the said act annexed, sworn by him before a justice of the peace, and also so much of the said act as directs that in case it should happen that such fitter's certificate should be accidentally lost, or in case any such ship or vessel should have been originally loaded or entered outwards for exportation, and should afterwards change her destination, and arrive or come into the port of London without any such fitter's certificate having been obtained or provided, each and every master of such ship or vessel should deliver an account of the quantity and name or description of the coals on board his ship or vessel at the office of the clerk of the coal market, together with an affidavit to accompany such account, and to be sworn by such master before any justice of the peace, and as imposes a penalty on any master of any ship or vessel who should knowingly give in any false certificate or account as aforesaid to be registered, or who should not, when no certificate should have been sent by post within twenty-four hours after the arrival of the ship at her moorings within the port of London, deliver or cause to be delivered in his certificate, or such account and affidavit, to be registered in manner aforesaid, shall from and after the passing of this act be and the same is hereby repealed."

Fitter to transmit a declaration to the coal market every month; and master to make declaration in case of loss of certificate, &c.

5 & 6 W. 4, c. 62.

Penalty for refusing to send declaration.

When certificate lost, master to send an account and declaration.

Sect. 9. "That every fitter, who from and after the passing of this act shall send or give any such certificate as aforesaid, shall, on or before the expiration of one calendar month next after the same shall have been given, send, in a letter directed to the said clerk of the coal market, and put into the General Post Office, or deliver at the office of the said clerk of the coal market, a declaration to be made before any justice of the peace, or any master extraordinary in chancery, or commissioner for taking affidavits in any of her Majesty's courts at Westminster, according to the form in schedule (B.) to this act annexed, pursuant to the 5 & 6 Will. IV. c. 62, (see "*Oaths*," Vol. V.), in which declaration such fitter shall verify such certificate, alone or together with any other certificates which may have been sent or given by him in the meantime; and in case any such fitter shall omit or refuse to send the said declaration to the said clerk of the coal market in manner aforesaid, on or before the expiration of every calendar month, he shall for every such offence forfeit and pay any sum not exceeding one hundred pounds; and in case it shall happen that such fitter's certificate shall be accidentally lost, or in case any such ship or vessel shall have been originally loaded or entered outwards for exportation, and shall afterwards change her destination, and arrive or come into the port of London, without any such fitter's certificate having been obtained or provided, then and in either of such last-mentioned cases each and every master of such ship or vessel shall deliver or cause to be delivered an account of the quantity, and name or names, or description or descriptions of coals on board of such his ship or vessel, at the office of the clerk of the coal market, together with a declaration to accompany such account pursuant to the said act of the sixth year of the reign of King William the Fourth, in which declaration such master shall state and verify such circumstances, either of the accidental loss of any such certificate, or of any such ship having been originally entered outwards and having afterwards changed her destination and arrived as aforesaid without any such certificate having been obtained or provided (as the case may be); and in case any master of any ship or vessel shall knowingly give in any false certificate or account as

2. *Regulations, &c. in London, &c.*

1 & 2 Vict. c. ci.

Penalty on master for giving false certificate or account.

aforesaid to be registered, or shall not, when no certificate shall have been sent by the post within twenty-four hours after the arrival of his ship at her moorings in the port of London, deliver or cause to be delivered in his certificate or such account and declaration as aforesaid to be registered in manner aforesaid, every person so offending shall for every such offence forfeit and pay any sum not exceeding one hundred pounds."

Allowance of drawback.

Sect. 10. "That from and after sixty days after the passing of this act there shall be allowed in the cases hereinafter mentioned, upon the exportation from the port of London of coals exceeding in quantity in one vessel twenty tons, which shall not have been landed, a drawback of the full amount of all the rates or duties which shall have been paid in respect of such coals; and in every case in which the owner of any such coals, or his agent, is desirous of obtaining such drawback, he shall give notice to the clerk of the coal market before such coals shall have been unloaded, according to the form number (1) in schedule (C.) to this act annexed; and in case the clerk of the coal market shall not be satisfied with the coal-weigher named in such notice, he may refuse to grant any certificate; but if and when the clerk of the coal market shall be satisfied with the coal-weigher named in such notice, he shall grant to the owner of the coals or his agent a certificate according to the form numbered (2) in schedule (C.) to this act annexed; and after such certificate shall have been granted the coals intended to be exported shall be weighed or delivered out of one vessel, either by lighter or otherwise, into the other; and thereupon the master of the vessel out of which such coals shall be weighed or delivered shall give a certificate to such coal-weigher according to the form number (3) in schedule (C.) to this act annexed; and the master of the vessel into which such coals shall be delivered shall give a certificate to such coal-weigher according to the form numbered (4) in schedule (C.) to this act annexed; and such coal-weigher shall deliver such two last-mentioned certificates to the clerk of the coal market, together with another certificate, to be signed by such coal-weigher, according to the form number (5) in schedule (C.) to this act annexed; and upon the receipt of such three certificates as last aforesaid, and, where such coals are exported to foreign parts, upon the production of a certificate from the proper officer of her Majesty's customs, if required, that the vessel mentioned in such certificate into which the coals have been delivered hath sailed from the port of London for foreign parts with such coals on board the same, the clerk of the coal market shall give to the owner of such coals or his agent an order for the payment of such drawback according to the form number (6) in schedule (C.) to this act annexed; and in every case in which any part of the coals (exceeding in quantity twenty tons in one vessel), upon which all the rates or duties shall have been paid, shall, without having been unloaded or transhipped, be left in and exported by the same vessel, the clerk of the coal market, if he shall be satisfied that the vessel in which such coals have been left has sailed from the port of London, with such coals on board the same, but not otherwise, shall give to the owner of such coals or his agent an order for the payment of such drawback according to the form number (7) in schedule (C.) to this act annexed; and upon the receipt and delivery of any such order as hereinbefore is mentioned for the payment of drawback at the chamber of the city of London the chamberlain shall pay to the bearer of such order the drawback therein ordered to be paid; and if the master of any vessel or any coal-weigher shall, in any certificate to be given according to the directions hereinbefore contained, state any circumstance which is not true for the purpose of enabling the owner of such coals or his agent to obtain any such drawback as aforesaid, or if any lighterman or other person employed to carry such coals from one vessel to another shall not deliver the whole quantity of such coals into the vessel named in the certificate, every such master or coal-weigher, lighterman, or other person so offending shall for every such offence forfeit and pay any sum not exceeding one hundred pounds."

Vessels laden with coals departing without discharging their cargo to be exempt from

Sect. 11. "That in case the master of any vessel laden with coals shall, within ten days after the arrival of such vessel in the port of London and being duly entered at the office of the clerk of the coal market, be desirous of departing from the said port without discharging any part of the coals on

board such vessel, the master of such vessel shall deliver a notice thereof to the clerk of the coal market according to the form number (1.) in schedule (D.) to this act annexed; and if no part of the cargo of such vessel has been delivered in the port of London, the clerk of the coal market shall deliver to the master of such vessel a permit according to the form number (2.) in schedule (D.) to this act annexed; and upon the receipt of such permit from the clerk of the coal market it shall be lawful for the said vessel to sail or depart from the port of London without having paid the duties upon such cargo, any statute, charter, usage, or custom to the contrary notwithstanding: provided always, that in case any part of the cargo of such vessel shall have been delivered in the port of London, the master of such vessel and all other persons concerned shall be liable to and pay the penalties in the said act of the first and second years of the reign of King William the Fourth contained for breaking bulk without payment of duties."

2. *Regulations, &c. in London, &c.*

1 & 2 Vict. c. ci. payment of duties upon obtaining a permit.

Proviso.

The 6 & 7 Vict. c. ci. s. 23, enacts, "That immediately after the discharge of the cargo or the part thereof undertaken to be discharged by the coalwhippers sent from the coalwhippers' office shall be finished, the master of the vessel in which they were employed, or such other person as aforesaid, shall pay to some person authorised by the said commissioners the full hire and wages due in respect of the labour of such coalwhippers in current money of the United Kingdom; and from and after the establishment of the coalwhippers' office under this act so much of the said act passed in the first and second years of the reign of her present Majesty as relates to the payment of the wages of persons employed in the discharge or delivery of coals from vessels laden therewith in the port of London shall be and the same is hereby repealed: provided always, that such master or other person as aforesaid shall not be compellable to pay such hire or wages except on board the vessel."

After discharge of cargo, ship-master to pay wages to person authorised from coalwhippers' office.

Repeal of 1 & 2 Vict. c. 101, s. 12.

Sect. 24. "That the person so authorised as aforesaid by the said commissioners shall receive the money to be paid as hire or wages for the labour of the coalwhippers so discharging the cargo of such vessel as aforesaid, and shall deduct therefrom the sum or proportion prescribed under the authority of this act, not exceeding one farthing in each shilling, and shall, either immediately on board such vessel or forthwith thereafter at the nearest head office or branch office or station of coalwhippers, pay and divide the residue of the monies so received to and among the coalwhippers so employed, without any other deduction or abatement, and without imposing any terms or conditions whatever; and if any such authorised person as aforesaid shall neglect or refuse to pay such residue at the time and place aforesaid, or shall make any other deduction than as aforesaid, or shall impose any terms or conditions on making such payment, he shall for every such offence forfeit any sum not exceeding ten pounds."

Such authorised person to make deduction and pay the residue among coalwhippers.

Penalty.

By 1 & 2 Vict. c. ci. s. 13. "And whereas great inconvenience has been caused to the navigation of the port of London in consequence of the collection of large numbers of vessels laden with coals in different parts of the said port: and whereas it is expedient that the mayor, aldermen, and commons of the city of London, in common council assembled, should, in exercise of the powers vested in them for that purpose by the 10 Geo. 4, c. cxxiv. make bye laws for remedying the inconveniences aforesaid, and that such bye laws should be subjected to the consideration and supervision of the committee of her Majesty's privy council for managing the affairs of trade; be it therefore enacted, that within three calendar months next after the passing of this act the mayor, aldermen, and commons of the city of London, in common council assembled, shall and they are hereby required to make such bye laws as shall be necessary for regulating or removing vessels laden with coals, and otherwise remedying the inconveniences hereinbefore mentioned, and shall from time to time alter and vary such bye laws as shall be necessary: provided always, that all bye laws which shall relate to the navigation to the river Thames by vessels engaged in carrying coals or returning in ballast from carrying coals within the said port of London, which shall from and after the passing of this act be made, altered, or varied by the mayor, aldermen, and commons of the city of London, in common council assembled, shall be submitted to the committee of her Majesty's privy council for ma-

Bye laws for regulating coal vessels in the port of London to be made by the corporation of London, and allowed by the board of trade.

10 G. 4. c. 124.

2. *Regulations, &c. in London, &c.*

1 & 2 Vict. c. ci.

A copy of such bye laws to be fixed on some place in the coal market.

naging the affairs of trade, for their consideration and supervision, and within one week after such bye laws have been so submitted to the said committee, a copy thereof shall be published in the coal market in London, by being fixed on some conspicuous place therein; and such bye laws shall not have legal effect until eight weeks after they shall have been so submitted to the committee aforesaid, and so published in the said coal market as aforesaid; and it shall be lawful for such committee as aforesaid to approve of and sanction such bye laws, or to suggest such alterations and amendments therein, or from time to time to suspend or rescind the same, as to them shall seem fit; and if the said mayor, aldermen, and commons, in common council assembled, shall concur in the said amendments, or if the said bye laws shall be approved without alteration, then and in that case the bye laws so sanctioned or amended shall be forthwith made public in manner hereinafter mentioned, and shall have full legal effect at the expiration of four weeks after such publication; but no bye law shall have legal effect unless in accordance with the expressed or implied sanction of the said committee: provided also, that if the said committee shall for four weeks after the receipt of any such bye laws fail to express an opinion on the bye laws so submitted to them, then and in that case it shall be lawful for the said mayor, aldermen, and commons, in common council assembled, at the termination of such four weeks, to make public such bye laws in manner hereinafter mentioned; and such bye laws shall have full legal effect at the termination of four weeks from the time of the publication thereof: provided also, that before any such bye laws as aforesaid shall have legal effect, the same shall be made public by the advertisement thereof twice in the London Gazette in two succeeding weeks, and by affixing copies thereof to some conspicuous place or places in the coal market and custom house in the city of London, and in the custom house at Gravesend, and in such other manner as to the said mayor, aldermen, and commons, in common council assembled, shall seem fit."

Bye laws to be published in the Gazette and at the custom houses in London and Gravesend.

Expenses of this act how to be paid.

Sect. 14. "That the costs, charges, and expenses incident to and incurred in obtaining and passing this act shall be paid and discharged by and out of the money received or to be received in respect of the duty or sum of one penny per ton, made payable by the said act of the first and second years of the reign of King William the Fourth."

Meaning of the word "exportation."

Sect. 15. "That where in this act the word "exportation" is used, the same shall be understood to mean the conveyance of coal from the port of London in any ship or vessel below Gravesend beyond the limits of the port of London, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction."

Public act.

Sect. 16. "That this act shall be deemed to be a public act, and shall be judicially taken notice of as such by all judges, justices, and others."

See the schedule to this act, *post*, 733.

6 & 7 Vict. c. 2.

By 6 & 7 Vict. c. 2, intituled "*An act to discontinue certain Actions under the Provisions of an Act of the Second Year of King William the Fourth, for regulating the Vend and Delivery of Coals in the Cities of London and Westminster, and in certain parts of the adjacent Counties,*" (3*d March*, 1843,) reciting that by the 1 & 2 Will. 4, c. lxxvi, it was amongst other things enacted, that every fitter or other person vending or delivering coals for the port of London should send, in a letter directed to the clerk of the coal market, and put into the general post office on the day on which the ship or vessel containing any coals should sail on any such voyage, or should give to the ship-master of such ship or vessel before the same should sail on every or any such voyage, a certificate, signed by such fitter, containing the day of the month and year of such loading, the master's and ship's names, and the quantity of tons, and the usual names of the several and respective collieries out of which the said coals were and should be wrought and gotten, and the price paid by the master or masters for each and every sort of coals that each and every fitter or other person vending or delivering coals as aforesaid, his or their agent or servant, had sold and loaded on board each and every ship or vessel; and in case any person or persons should omit or refuse to give such certificate as aforesaid, or should give or make any false

certificate, every person so offending should for every such offence forfeit and pay the sum of one hundred pounds; and whereas by the said act the said penalty and forfeiture is made recoverable in manner in the said act directed: and that divers fitters and other persons have inadvertently omitted to comply with the aforesaid provision of the said act, and many actions, bills, plaints, and informations have been brought and may be commenced against such fitters and other persons, or some of them, by persons who sue, inform, and prosecute, as well on their own behalf as on behalf of her Majesty, to recover various penalties incurred or alleged to have been incurred under or by virtue of the said act, by reason of such neglect; and it is expedient that all further proceedings in such actions, bills, plaints, and informations should be prevented:" it is therefore enacted, "that immediately from and after the passing of this act it shall be lawful for any person or persons against whom any action, bill, plaint, or information shall have been or may be sued out, commenced, or prosecuted for the recovery of any pecuniary penalty or penalties incurred on or before the day of the passing of this act, under the aforesaid provision of the said act, for not inserting in the fitter's certificate the usual names of the several and respective collieries out of which the said coals should be wrought and gotten, to apply to the Court in which such action, bill, plaint, or information shall have been or may be sued out, commenced, or prosecuted, or to any judge of any of the Superior Courts at Westminster, for an order that such action, bill, plaint, or information shall be discontinued upon payment of the costs thereof incurred to the time of such application being made, such costs to be taxed according to the form of such Court; and every such court or judge is hereby authorised and required, upon such application, to make such order as aforesaid, and upon the making such order, and payment or tender of such costs as aforesaid, such action, bill, plaint, or information shall be forthwith discontinued: provided always, that if it shall be made to appear to the said court or judge, by affidavit or otherwise, that any penalty or penalties sought to be recovered in any such action, bill, plaint, or information, has been incurred by the fraud of the defendant or defendants in such action, bill, plaint, or information, then and in every such case it shall be lawful for such court or judge to refuse to make such order as to such penalty or penalties, and thereupon to make such other order as to the said court or judge shall seem expedient.

2. *Regulations, &c. in London, &c.*

6 Vict. c. 2.

Actions and informations to be discontinued, upon application to the courts of law.

Proviso as to penalties incurred by fraud.

Sect. 2. "That this act shall be a public act, and shall be judicially taken notice of as such."

Public act.

The 6 & 7 Vict. c. ci. s. 45, also contains a clause enabling the court or a judge to stay an action or information for a penalty under the 1 & 2 Will. IV. c. lxxvi. s. 75, *ante*, 722; and see the case of *Grant* v. *Browne*, *C. P.* 25 Nov. 1843, 13 *Law Jour.* (*N. S.*), 23.

The Schedule to which the 1 & 2 Will. IV. c. lxxvi. refers.

"*A. B. of , maketh oath and saith, that the Schedule hereunder written, and signed by this deponent, contains a true account and particular of all the coals vended and shipped by this deponent* [and *C. D.* of , this deponent's partner, as the case may be], *for delivery in the port of London, from the day of to the day of , both inclusive.*

Day of the Month and Year of Lading.	Ship's Name.	Master's Name.	Quantity of tons.	Name of Colliery.	Price paid.	Certificate sent by Post or delivered to the Master.

2. *Regulations, &c. in London, &c.*

THE SCHEDULES TO THE 1 & 2 VICT. CAP. CI.

SCHEDULE (A.)

"*Mr. A. B.* [here insert the name of the buyer], *take notice, that you are to receive herewith* [here insert the number] *tons* [here insert the name of the coal, if any particular sort is ordered or contracted for, and if ordered or contracted for as Wall's End, specify the name of the colliery] *coals in* [here insert the number] *sacks, containing* [here insert the weight] *pounds of coal in each sack.*"

(Signed) "*C. D.*" [here insert the name or names of the seller or sellers in words at full length.]

"*E. F.*" [here insert the name of the carman in words at full length.]

It is directed that with any quantity of coals exceeding five hundred and sixty pounds, a paper or ticket describing the quantity, and if any particular sort is ordered or contracted for, the sort of the coals sent by the seller, shall be delivered to the purchaser, or his agent or servant, before any part of such coals shall be unloaded; that a weighing machine or proper scales and weights shall be carried with every waggon, cart, or other carriage, and the carman is required to weigh gratuitously any sack or sacks of coals which shall be chosen by the purchaser or his agent or servant; and if any carman refuses to weigh such sack or sacks of coals as aforesaid, or drives away the waggon, cart, or other carriage before the coals are weighed, or otherwise obstructs the weighing thereof, he is liable to a penalty not exceeding twenty pounds; also, that a proper machine or proper scales and weights for weighing coals shall be kept at every watch-house or police station, and at any other place appointed for that purpose by two or more of her majesty's justices of the peace.

SCHEDULE (B.)

"*I, A. B., of , do solemnly and sincerely declare, that the schedule hereunder written and signed by me contains a true account and particular of all the coals vended and shipped by me* [*and C. D. of , my partner*, as the case may be] *for delivery in the port of London, from the day of to the day of , both inclusive; and I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of an act passed in the sixth year of the reign of King William the Fourth, intituled* "An Act to repeal an Act of the present Session of Parliament, intituled 'An Act for the more effectual Abolition of Oaths and Affirmations taken and made in various Departments of the State, and to substitute Declarations in lieu thereof, and for the more entire Suppression of voluntary and extra-judicial Oaths and Affidavits;' and to make other Provision for the Abolition of unnecessary Oaths."

(Signed) "*A. B.*"

Day of the Month and Year of Lading.	Ship's Name.	Master's Name.	Quantity of tons.	Name of Colliery.	Price paid.	Certificate sent by Post or delivered to the Master.

SCHEDULE (C.)

(No. 1.)

"*I hereby give you notice of my intention of transhipping from on board the ship* [here insert the name] *of* [here insert the name of the place to which the ship belongs] *G. H. master* [here insert the number] *tons of* [here insert the name] *coals for exportation; and that A. B., coal-weigher, is appointed to superintend such transhipment. Dated this day of , one thousand eight hundred and .*"

(Signed) "*C. D.*"

"*To Mr. E. F., clerk and registrar of the coal market.*"

2. Regulations, &c. in London, &c.

(No. 2.)

"*Mr. C. D. having given me notice that he intends to tranship from the ship* [here insert the name] *of* [here insert the name of the place to which the ship belongs], *G. H. master* [here insert the number] *tons of* [here insert the name] *coals for exportation, and that you are appointed to weigh or superintend the delivery of the same, I do hereby give you notice, that I shall require, before I can allow the claim for drawback, a certificate from you of such transhipment* [and if the same be done by means of barges, the certificate must contain the names of the barges and lightermen employed, and the number of tons put into each barge.] *Dated this day of , one thousand eight hundred and .*

(Signed) "*E. F., clerk and registrar of the coal market.*"

"*To Mr. A. B., coal-weigher.*"

(No. 3.)

"*I hereby certify, that* [here insert the number of tons, or the whole cargo, as the case may be], *of* [here insert the name] *coals have been weighed or delivered out of the ship* [here insert the name] *of* [here insert the name of the place to which the ship belongs], *to be transhipped* [or *delivered by means of barges*, as the case may be]. *Witness my hand, this day of , one thousand eight hundred and .*"

(Signed) "*G. H., master of the .*"

"*To Mr. E. F., clerk and registrar of the coal market.*"

(No. 4.)

"*I hereby certify, that* [here insert the number] *tons of* [here insert the name] *coals have been received from the ship* [here insert the name] *of* [here insert the name of the place to which the ship belongs] *on board of the ship* [here insert the name] *of* [here insert the name of the place to which the ship belongs], *for exportation to* [here insert the name of the place to which the coals are to be exported or to which the ship is bound]. *Witness my hand, this day of , one thousand eight hundred and .*

(Signed) "*J. K., master of the .*"

"*To Mr. E. F., clerk and registrar of the coal market.*"

(No. 5.)

"*I hereby certify that* [here insert the number] *tons of* [here insert the name] *coals were this day weighed* [or *delivered out of the ship*] [here insert the name] *of* [here insert the name of the place to which the ship belongs] *to be transhipped* [or *delivered by the means of barges*, as the case may be] *for exportation, and that the same were put on board the following barges* [here insert the names of the barges and lightermen employed]. *Witness my hand, this day of , one thousand eight hundred and .*

(Signed) "*A. B., coal-weigher.*"

"*To Mr. E. F., clerk and registrar of the coal market.*"

(No. 6.)

"*I hereby certify, that the sum of pounds shillings and pence may be paid to C. D. for the drawback on* [here insert the number] *tons of* [here insert the name] *coals, out of the ship* [here insert the name] *of* [here insert the name of the place to which the ship belongs], *shipped for exportation on board the ship* [here insert the name] *for* [here insert the name of the place to which the coals are to be exported or to which the ship is bound]. *Witness my hand, this day of , one thousand eight hundred and .*

(Signed) "*E. F.,*"

"*Clerk and registrar of the coal market.*"

"*To L. M., chamberlain, Guildhall, London.*"

(No. 7.)

"*I hereby certify, that the sum of pounds shillings and pence may be paid to C. D. for the drawback on* [here insert the number] *tons of* [here insert the name] *coals remaining in the ship* [here insert the name] *of* [here insert the name of the place to which the ship belongs], *and again exported on board such ship. Witness my hand, this day of , one thousand eight hundred and .*"

(Signed) "*E. F.,*"

"*Clerk and registrar of the coal market.*"

"*To L. M., chamberlain, Guildhall, London.*"

2. *Regulations, &c. in London, &c.*

SCHEDULE (D.)

(No. 1.)

"*Whereas I delivered or caused to be delivered into the office of the clerk of the coal market the certificate of* [here insert from the certificate the name of the fitter, the place and the date of the certificate, the name of the ship or vessel and of the place to which she belongs, and the name of the master, and also the number of tons and the description of the coals on board the ship or vessel], *with which the said ship or vessel arrived in the port of London on the* [here insert the date]. *I do hereby give you notice that I intend to proceed with the said ship or vessel to* [here insert the name of the place to which the ship or vessel is to proceed], *without discharging any part of the said cargo in the port of London; and I request to be relieved from the city dues of one shilling and one penny per ton, agreeably to the act of the first and second years of the reign of Queen Victoria, chapter . Dated this day of one thousand eight hundred and .*"

(Signed) . "*I. K., master of the*

"*To Mr. E. F., clerk and registrar of the coal market.*"

(No. 2.)

"*Having received notice from* [here insert the name], *master of the ship or vessel called the* [here insert the name] *of* [here insert the name of the place to which the ship or vessel belongs], *laden with* [here insert the number] *tons of* [here insert the name] *coals, that he intends proceeding with the said ship or vessel to* [here insert the name of the place to which the vessel is to proceed], *without discharging any part of the said coals in the port of London, and requesting, by virtue of the act of the first and second years of the reign of Queen Victoria, chapter , to be relieved from the payment of the city dues thereon, I do hereby, agreeably to the said act, permit the said vessel to depart from this port for* [here insert the name of the place to which the vessel is to proceed], *without paying the city dues on the said coals, provided that no part is unladen within the limits of the city of London, and that a certificate is produced to me from the clearing officer of her Majesty's customs that the said ship or vessel has so departed for* [here insert the name of the place to which the vessel is to proceed, as aforesaid]. *Dated this day of , one thousand eight hundred and .*

(Signed) "E. F."

"*Clerk and registrar of the coal market.*"

"*To the master or owner of the ship .*"

III. Offences as to Coals and Coal Mines.

Stealing from.

As to the offence of stealing from, see "*Larceny,*" Vol. III.

As to drowning or obstructing mines, 7 & 8 Geo. IV. c. 30, s. 6; destroying mining engines, &c. (*Id.* s. 7;) and injuries by rioters to mines, &c. (*Id.* s. 8,) affecting mines in general, will be found treated of under "*Malicious Injuries to Property,*" Vol. V. p. 31.

Disputes, &c. between colliers, &c.

As to disputes between colliers, keelmen, pitmen, and miners, and their masters in general, and other matters relative to offences by colliers, and who are forbidden to work in collieries, see 5 & 6 Vict. c. 99, and title "*Servants,*" Vol. V.

Setting fire to.

By 7 Will. IV. & 1 Vict. c. 89, s. 9, "whosoever shall unlawfully and maliciously set fire to any mine of coal or cannel coal, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

By sect. 12, the punishment of imprisonment may be with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year.

This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1.

Conspiracy to raise price.

Independently of the offence at common law, by the 28 Geo. III. c. 53, s. 2, it is enacted, that any number of persons united in covenants or partnerships, or in any way whatsoever, consisting of more than five persons, for purchasing coals for sale or making regulations with respect to the manner of carrying on

the said trade in coals, shall be deemed an unlawful combination to advance the price of coals, and every person concerned therein shall be liable to an indictment or information. 3. *Offences, &c.*

[Commencement as usual, as *ante*, p. 9, (No. 1)] *on the day of , A. D. , at the parish of , in the county of , unlawfully, maliciously, and feloniously, did set fire to a certain mine of coal* [or *cannel coal*], *the property of A. B. there situate: against the form of the statute in that case made and provided. And you the said keeper, &c.* [as usual, *ante*, p. 9, to the end.] Commitment for setting fire to a coal mine.

—— [to wit.] *THE jurors for our Lady the Queen upon their oath present, that C. D., late of the parish of , in the county of , labourer, on the day of , in the year of the reign of our Lady the now Queen Victoria, with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully, maliciously, and feloniously, did set fire to a certain mine of coal* [or *cannel coal*], *the property of A. B. there situate; to the great damage of the said A. B., against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.* Indictment for a like offence.

Cock Fighting, *see* 3 & 4 *Will. IV. c.* 19, *s.* 29; "*Police*," Vol. V. *It is illegal, and it seems is indictable; see* "*Gaming*," Vol. III. p. 311.

Cocoa-Nuts, *see* "*Excise*," Vol. II.

Coffee, *see* "*Excise*," Vol. II.

Coffee Shops, *see* "*Police*," Vol. V.

Coin.

COIN, in French, signifieth a corner, and from thence hath its name, because in ancient times money was square with corners, as it is in some countries to this day. (1 *Inst.* 207.) Origin of the word.

The word doth properly signify a wedge, as the Latin *cuneus;* and hath a verb belonging to it in the several languages; and is translated to lawful money; either from the form of a wedge, ingot, or lingot, (*linguetta,*) in which bullion was transported from all antiquity, or else from the instrument, a wedge or chisel, with which in trade these lingots were occasionally cut to the weight required, as they are at this day in the East Indies with shears.

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XXI. *Tokens*, 757.

XXII. *Forms, as to*, 764.

I. Repeal of Statutes by 2 Will. IV. c. 34, and Commencement of that Act.

Repeal of acts.

The 2 Will. IV. c. 34, intituled "*An Act for consolidating and amending the Laws against Offences relating to the Coin*," [passed the 23d May, 1832,] reciting that "The offence of counterfeiting the coin, as well as certain other offences relating to the coin, are now by virtue of several statutes punishable with death:" and that "it is expedient to abolish the punishment of death in all such cases, and to repeal the several statutes against offences relating to the coin, in order that the provisions thereof may be amended and consolidated into one act;" repeals the former statutes and parts of statutes relating to the offence, "except so far as any of the said acts may repeal the whole or any part of any other acts, or may be in force in any part of his majesty's dominions out of the United Kingdom, and except as to offences and other matters committed or done before or upon the said last day of April, which shall be dealt with and punished as if this act had not been passed: provided always, that if any person shall, after the commencement of this act, be convicted of any offence against any of the said acts committed before or upon the said last day of April, and such offence shall have been punishable with death by virtue of any of the said acts, in every such case the person convicted of such offence shall not suffer the punishment of death, but shall in lieu thereof be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding four years."

Offences committed previously to.

Commencement of act.

By sect. 2, "this act shall commence and take effect on the 1st day of May, in the year of our Lord 1832."

II. Rules of Interpretation of 2 Will. IV. c. 34.

Rules of interpretation as to current coin, counterfeit coin, and criminal possession.

By the 2 Will. IV. c. 34, s. 21, it is declared and enacted, "that where 'the king's current gold or silver coin, or 'the king's current copper coin,' shall be mentioned in any part of this act, the same shall be deemed to include and denote any gold or silver coin or any copper coin respectively coined in any of his majesty's mints, and lawfully current in any part of his majesty's dominions, whether within the United Kingdom or otherwise; and that any of the king's current coin which shall have been gilt, silvered, washed, coloured or cased over, or in any manner altered so as to resemble, or be apparently intended to resemble or pass for, any of the king's current coin of a higher denomination, shall be deemed and taken to be counterfeit coin within the intent and meaning of those parts of this act wherein mention is made of 'false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the king's current gold or silver coin;' and that where the having any matter in the custody or possession of any person is in this act expressed to be an offence, if any person shall have any such matter in his personal custody or possession, or shall knowingly and wilfully have any such matter in any dwelling-house or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or benefit, or for that of another, every such person shall be deemed and taken to have such matter in his custody or possession within the meaning of this act."

III. Counterfeiting Gold or Silver Coin.

Offence of counterfeiting gold and silver coin.

By the 2 Will. IV. c. 34, s. 3, "if any person shall falsely make or counterfeit any coin, resembling or apparently intended to resemble or pass for any of the king's current gold or silver coin, every such offender shall, in England and Ireland, be guilty of felony, and in Scotland, of a high crime and offence, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and every such offence shall be deemed to be complete, although the coin so made or counterfeited shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected."

Offence when deemed complete.

By 7 Will. IV & 1 Vict. c. 90, s. 5, the imprisonment may be with or without hard labour, and with or without solitary confinement. (Sect. 19, *post*, 756.) Such confinement not exceeding one month at any one time, nor three months in any one year.

This offence is not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1.

Nature of the coin.

We have seen, *supra*, that by the interpretation clause of the statute, it is declared that where "the king's current gold or silver coin" shall be mentioned in any part of the act, the same shall be deemed to include and denote any gold or silver coin respectively coined in any of his majesty's mints, and lawfully current in any part of his majesty's dominions, whether within the United Kingdom or otherwise.

A proclamation has been sometimes made as a more solemn manner of giving coin currency. But this in general cases is certainly not necessary, and in prosecutions for coin need not be proved. Neither is it necessary in the same case to produce the indentures, though it may be of use in case of any new coin, with a new impression, not yet familiar to the people, to produce either the indentures or one of the officers of the mint cognizant of the fact, or the stamps used, or the like evidence. But in general, whether the coin, upon a question of counterfeiting or impairing it, be the king's money or not is a mere question of fact, which may be found upon evidence of common usage or notoriety. (1 *East's P. C.* 149; and see 1 *Hale*, 213.)

Any coin once legally made and issued by the Queen's authority continues to be the current coin of the kingdom until recalled, notwithstanding any change in the authority which constituted it. (*Id.*)

3. *Counterfeiting Gold or Silver Coin.*

What a sufficient counterfeiting.

We have just seen, *ante*, 739, that the statute declares that the offence shall be deemed complete although the coin made or counterfeited be not in a fit state to be uttered or the counterfeiting of it has not been finished or complete. By the old law the monies charged to be counterfeited must have *resembled the true and lawful coin*, but this resemblance was a matter of fact, of which the jury were to judge upon the evidence before them; the rule being, that the resemblance need not be perfect, but such as might in circulation ordinarily impose upon the world. Thus a counterfeiting with some little variation in the inscription, effigies or arms, done probably with intent to evade the law, was yet within it; and so is the counterfeiting in a different metal, if in appearance it were made to resemble the true coin. (1 *Hawk.* c. 17, s. 81; 1 *Hale*, 178, 184, 211, 215; 1 *East's P. C.* 163.) In one case the shillings produced in evidence against the prisoner were quite smooth, without the smallest vestige of either head or tail, and without any resemblance of the shillings in circulation, except their colour, size and shape; and the master of the mint proved that they were bad, but that they were very like those shillings the impression on which had been worn away by time, and might very probably be taken by persons having less skill than himself for good shillings. And the Court were of opinion that a blank that is smoothed, and made like a piece of legal coin, the impression of which is worn out, and yet suffered to remain in circulation, is sufficiently counterfeited to the similitude of the current coin of this realm to bring the counterfeiters and coiners of such blanks within the statute; these blanks having some reasonable likeness to that coin which has been defaced by time, and yet passes in circulation. (*Wilson's case, O. B.* 1783, 1 *Leach*, 285.) And in the subsequent case of *Patrick and John Welsh, Hertford Lent Assizes*, 1785, 1 *East's P. C.* 164; 1 *Leach*, 364; the point received the more solemn consideration of the twelve judges; the counsel for the prisoners having objected upon the fact of no impression of any sort or kind being discernible upon the shillings produced in evidence, that they were not counterfeited *to the likeness and similitude of the good and legal coin of this realm*. But the judges were of opinion, that it was a question of fact whether the counterfeit monies were of the likeness and similitude of the lawful current silver coin called a shilling. And the jury having so found it, the want of an impression was immaterial; because, from the impression being generally worn out or defaced, it was notorious that the currency of the genuine coin of that denomination was not thereby affected; the counterfeit, therefore, was perfect for circulation, and possibly might deceive the more readily from having no appearance of an impression; and in the deception the offence consists. But in *Varley's case*, where the impression of money was forged on an irregular piece of metal, not rounded, without finishing it, so as not to be in a state to pass current, the offence was holden to be incomplete, although he had actually attempted to pass it in that condition. (*Varley's case*, 1771; 2 *Blac. R.* 632; 1 *MS. Sum.* 46.) And where the prisoners were convicted upon a count in the indictment, framed upon stat. 25 Edw. III. c. 2, and upon the evidence it appeared that no one piece of the base metal found upon the prisoners was in such a state as to make it passable, the conviction was held to be wrong. (*R.* v. *Harris and Minion*, 1 *Leach*, 135.) The case was referred to the judges; but the grounds of their decision are not stated in the report And query, if the case was not disposed of upon a defect in the indictment. Besides the count on the 25 Edw. III. c. 2, there was another count upon the 8 & 9 Will. III. c. 26, s. 4. (1 *Russ.* 60.)

Mr. Roscoe, in his work on Coining, p. 4, observes, "that the provision of the new statute, s. 3, would certainly be held to extend to a case like that of *Harris* and *Minion* (*supra*), where every thing was done but the last finishing operation, although the coin could not deceive even the most unwary. But it seems that it would still be necessary that the offence should not be merely in its initiatory stage; for the statute speaks of the false coin as coin 'so made or counterfeited,' and of the counterfeiting as 'not *finished or perfected*;' and therefore, the preparing the metal or perhaps cutting out rough blanks intended to be afterwards stamped and worked up, would not come

within this section of the statute. In another clause of the statute, where it is intended to include the initiatory stage of the offence, express words are introduced for that purpose, it being enacted by sect. 10, 'that if any person shall make or mend, or *begin* or proceed to make or mend, any puncheon,' &c."

3. *Counterfeiting Gold or Silver Coin.*

Officers of the mint are within the statute. (See *Rosc. on Coining*, p. 5; 1 *East's P. C.* 166; 1 *Hale*, 213; 1 *Hawk.* b. 1, c. 17, s. 55.)

Officers of mint.

As to accessaries in counterfeiting, see *post*, 755.

Accessaries.

It is rarely the case that the counterfeiting can be proved directly by positive evidence; it is usually made out by circumstantial evidence, such as finding the necessary coining tools in the defendant's house, together with some pieces of the counterfeit money in a finished, some in an unfinished state, or such other circumstances as may fairly warrant the jury in presuming that the defendant either counterfeited, or caused to be counterfeited, or was present aiding and abetting in counterfeiting the coin in question. Before the recent statute, if several conspired to counterfeit the Queen's coin, and one of them actually did so in pursuance of the conspiracy, it was treason in all, and they might all have been indicted for counterfeiting the Queen's coin generally; (1 *Hale*, 214); but now, only the party who actually counterfeits would be the principal felon, and the others accessaries before the fact. (*Jervis's Arch. C. L.* 509.)

Evidence of offence.

A variance between the indictment and the evidence, in the number of the pieces of coin alleged to be counterfeited, is immaterial; but a variance as to the denomination of such coin, as guineas, sovereigns, shillings, &c. would be fatal. (*Id.*)

Proof that a man occasionally visited coiners; that the rattling of money was occasionally heard with them; that he was seen counting something as if it was money when he left them; that on coming to the lodgings just after the apprehension, he endeavoured to escape, and was found to have had money about him; is not sufficient evidence to implicate him as counselling, procuring, aiding and abetting the coining. Two women were indicted for colouring a shilling and sixpence, and a man (Isaacs) as counselling them, &c. The evidence against him was, that he visited them once or twice a week; that the rattling of copper money was heard whilst he was with them; that once he was counting something just after he came out; that on going to the room just after the apprehension, he resisted being stopped, and jumped over a wall to escape; and that there were then found upon him a bad 3*s.* piece, five bad shillings, and five bad sixpences; but upon a case reserved, the judges thought the evidence too slight to convict him. (*R.* v. *Isaacs*, Hil. T. 1813, *cor. Bayley*, J., 1 *Russ.* 62.)

Any credible witness may prove the coin to be counterfeit, and it is not necessary for this purpose to produce any moneyer or other officer from the mint. (2 Will. IV. c. 34, s. 17, *post*, 756.)

If it become a question whether the coin, which the counterfeit money was intended to imitate, be the Queen's coin, it is not necessary to produce the proclamation to prove its legitimation; it is a mere question of fact, to be left to the jury, upon evidence of usage, reputation, &c. (1 *Hale*, 196, 212, 213; *ante*, 739.)

It is not necessary to prove that the counterfeit coin was uttered or attempted to be uttered. (1 *Hale*, 215, 229; 3 *Inst.* 16; 1 *East's P. C.* 165.)

IV. Colouring, filing, or altering Gold or Silver Coin.

Colouring counterfeit coin or any pieces of metal with intent to make them pass for gold or silver coin;

By the 2 Will. IV. c. 34, s. 4, "if any person shall gild or silver, or shall with any wash or materials capable of producing the colour of gold or of silver, wash, colour or case over, any coin whatsoever resembling or apparently intended to resemble or pass for any of the king's current gold or silver coin, or if any person shall gild or silver, or shall, with any wash or materials, capable of producing the colour of gold or of silver, wash, colour, or case over, any piece of silver or copper, or of coarse gold or coarse silver,

4. *Colouring, &c.*

or of any metal or mixture of metals respectively, being of a fit size and figure to be coined, and with intent that the same shall be coined, into false and counterfeit coin resembling or apparently intended to resemble or pass for any of the king's current gold or silver coin; or if any person shall gild, or shall, with any wash or materials capable of producing the colour of gold, wash, colour, or case over, any of the king's current silver coin, or file, or in any manner alter such coin, with intent to make the same resemble or pass for any of the king's current gold coin; or if any person shall gild or silver, or shall, with any wash or materials capable of producing the colour of gold or of silver, wash, colour or case over, any of the king's current copper coin, or file or in any manner alter such coin, with intent to make the same resemble or pass for any of the king's current gold or silver coin; every such offender shall, in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years."

colouring or altering genuine coin, with intent to make it pass for a higher coin;

transportation for life, &c.

By the 7 Will. IV. & 1 Vict. c. 90, the imprisonment may be with or without hard labour, and with or without solitary confinement (s. 19, *post*), such confinement not exceeding one month at any one time, nor three months in any one year.

The offences specified in this section are not triable at quarter sessions. (5 & 6 Vict. c. 38, s. 1.)

What a colouring within the old law.

As to what amounted to a colouring within the now repealed act 8 & 9 Will. III. c. 26, s. 4, the following case was determined by the judges. (*R.* v. *W. Case, Lancaster Spring Assizes*, 1795, *cor. Heath*, J., 1 *East's P. C.* 165.) *William Case* was found guilty, on an indictment for traitorously colouring, with materials producing the colour of silver, a piece of base coin resembling a shilling. The prisoner was taken in the very act of making counterfeit shillings in the ordinary way, by steeping round blanks composed of brass and silver in aquafortis. The round blanks were found, some steeped in aquafortis, and some already taken out of it. They had the appearance of lead, and by rubbing they would resemble silver coin, but as they were, none would pass current. The judges, except two, thought the conviction right. They considered that the offence was complete when the piece was coloured, for it was then coloured with materials which produce the colour of silver, and that it was not necessary that the piece so coloured should be current, for the colouring of blanks was an offence within the clause.

A case under the like circumstances had been before expressly decided by the unanimous opinion of the judges to come within the same statute. But there the doubt was not, as in the last instance, upon the necessity of rubbing the blank after it was taken out of the wash, in order to give it the appearance of silver, but whether the legislature did not intend such a colouring only as is altogether produced by some outward application. But they all thought that the process of extracting the latent silver, by the power of the wash, from the body to the surface of the blank, was a colouring within the words of the act. They thought, besides, that it might be charged as a colouring with silver; for the effect of the aquafortis is to corrode the base metal, and leave the silver only on the superficies, and so the copper is coloured or cased with silver. (*R.* v. *Lavey and Parker, O. B. December*, 1776, 1 *East's P. C.* 166; 1 *Leach*, 153, S. C.)

But these cases were decided upon the statutes 8 & 9 Will. III. c. 26, and 15 Geo. II. c. 28; and the words "capable of producing," seem to have been introduced into the present statute for the purpose of obviating the doubt.

Evidence.

As observed by Mr. Roscoe in his work on Coining, p. 17, the act of colouring or gilding, &c., the nature of the wash or materials, and of the substance to which they are applied, must be shown; and it must appear that the prisoner committed the act with the intention of making counterfeit coin. The wash or materials must be shown, either from the application of

them by the prisoner in the particular instance, or from an examination of their properties, to be such as are capable of producing the colour of gold or silver. But an indictment charging the use of such materials will be supported by proof of a colouring with gold itself. (*Reg.* v. *Turner*, 2 *Mood. C. C.* 41.) Where direct evidence of the act of colouring cannot be obtained, circumstances may be shown from which the act may be presumed, as that the prisoner was in possession of false coin, and that blanks coloured and materials for colouring were found in his house.

4. *Colouring, &c.*

It is not necessary to prove the offence that a moneyer or other officer from the Mint should be subpœnaed. (2 Will. IV. c. 34, s. 17, *post*, 756.)

V. Impairing Gold or Silver Coin.

By the 2 Will. IV. c. 34, s. 5, "if any person shall impair, diminish, or lighten any of the king's current gold or silver coin, with intent to make the coin so impaired, diminished, or lightened, pass for the king's current gold or silver coin, every such offender shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding three years.

Impairing the gold or silver coin, with intent, &c.

transportation for fourteen years, &c.

The imprisonment may be with or without hard labour, and with or without solitary confinement (s. 19, *post*, 756), such confinement not exceeding one month at any one time, nor three months in any one year. (7 Will. IV. & 1 Vict. c. 90, s. 5; *post*, 757; "*Larceny*," Vol. III.)

The act of impairing must be shown, either by direct evidence of persons who saw the prisoner engaged in it, or by presumptive evidence, such as the possession of filings and of impaired coin, or of instruments for filing, &c. The intent to pass off the impaired coin must then appear. This may be done by showing that the prisoner attempted to pass the coin so impaired, or that he carried it about his person, which would raise a presumption that he intended to pass it. And if the coin were not so defaced by the process of impairing as not apparently to affect its currency, it would, under the circumstances, without further evidence, be a question for the jury, whether the diminished coin was intended to be passed. (*Rosc. on Coin.* 19.)

Evidence.

VI. Buying or selling Counterfeit Gold or Silver Coin for less Value than its Denomination imports.(*a*) Importing Counterfeit Coin current in this Kingdom.

By the 2 Will. IV. c. 34, s. 6, "if any person shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off, any false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the king's current gold or silver coin, at or for a lower rate or value than the same by its denomination imports or was coined or counterfeited for; or if any person shall import into the United Kingdom from beyond the seas any false or counterfeit coin, resembling, or apparently intended to resemble or pass for, any of the king's current gold or silver coin, knowing

Buying or selling, &c. counterfeit gold or silver coin for lower value than its denomination;

importing counterfeit coin from beyond seas

(*a*) The coining and legitimation of money, and the giving it its current value, are the unquestionable prerogatives of the crown; though great doubt has been entertained whether by force of the stats. 25 Edw. III. c. 13, 9 Hen. V. st. 2, c. 6, and other acts settling the standard of sterling, the king is not now restrained from altering it by increasing the alloy. But at this day it is the less necessary to consider the point, because the impolicy of the act is alone sufficient to prevent the attempt from being made, unless the marketable and relative value of gold and silver should sensibly alter. (1 *East's P. C.* 148; 1 *Hale*, 188; 4 *Bla. Com.* 88.)

6. *Buying, &c.* the same to be false or counterfeit; every such offender shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years."

transportation for life, &c.

The imprisonment may be with or without hard labour, and with or without solitary confinement (s. 19, *post*, 756), such confinement not exceeding one month at any one time, nor three months in any one year. (7 Will. IV. & 1 Vict. c. 9, s. 5, *post*, 757.)

This offence is not triable at any quarter sessions. (5 & 6 Vict. c. 38, s. 1.)

What an offence of putting off, &c.

The putting off under these repealed statutes meant an actual passing or getting rid of the money, and not merely an attempt to do so; as by tendering it to another, who returned it again, refusing to accept it; which was a distinct offence, provided for by stat. 15 Geo. II. c. 28. (See 1 *East's P. C.* 179.) In the case of Wooldridge, who was indicted on stat. 8 & 9 Will. III. c. 26, s. 6, for putting off counterfeit money to a Mrs. Levy, it appeared that he had carried a large quantity of such money to her house, which he had agreed to put off to her, and she to receive from him, at the rate of 29*s.* for every guinea; and having laid the shillings down on a table, she was proceeding to count them out at that rate, and counted out part of the heap, when the officers entered the room and apprehended them before she could pay the prisoner for those she had selected. This was ruled not to be a completion of the offence charged, and the prisoner was acquitted. (*R.* v. *Wooldridge*, 1 *Leach*, 251, *O. B. Feb.* 1784; 1 *East's P. C.* 179, S. C.) By the above new enactment it will be observed that the words used are "*offer* to buy, sell," &c., which would include the case just cited.

Under the now repealed act, 8 & 9 Will. III. it was necessary to constitute the offence that the money should be *milled*.(*a*) But the words of the new statute are "any false or counterfeit coin, resembling, or apparently intended to resemble or pass for the king's current gold or silver coin."

It will be observed that the new statute does not include the putting off, &c. of money unlawfully diminished and not cut in pieces, for less value.

It is necessary, in order to bring a case within the statute, that the money be vended at a *lower value* than the coin imports, and that it should be so stated in the indictment and proved. And if the names of the persons to whom the money was put off can be ascertained, they ought to be mentioned, and laid severally in the indictment; but if they cannot be ascertained, the same rule will apply which prevails in the case of stealing the property of persons unknown. (1 *Russ.* 81.)

Where an indictment stated that five counterfeit shillings were put off for two shillings, and the proof was that they were sold for two shillings and sixpence, *Thompson*, C. B., and *Heath*, J. held that as this was a contract, it must be proved as laid, and directed an acquittal. (*R.* v. *Joyce*, *Car. Sup.* 184; 3 *C. & P.* 411.) But where the indictment stated that the defendant put off a counterfeit sovereign, and three counterfeit shillings, for five shillings, and the evidence was that the sovereign was sold for four shillings, and the shillings for one shilling, *Vaughan*, B. held the evidence to be sufficient, because the whole was one transaction. (*R.* v. *Hedges*, 3 *C. & P.* 410.)

What an offence of importing, &c.

It would seem to be no offence within the enactment as to importing counterfeit coin, to import from the king's dominions beyond the seas; (1

(*a*) The meaning of "milled money" in this statute was considered in the case of *Bunning*. (1 *East's P.C.* 180.) Milled money is so called to distinguish it from hammered money, and all the money now current is milled, *i. e.* passed through a mill or press to make the plate out of which it is cut of a proper thickness, though by a vulgar error it is frequently supposed to mean the marking on the edges, which is properly termed *graining*. Mr. *East* says he has been informed that there has been no *hammered* money since the time of Car. II. (1 *East's P. C*, 180, *notis.*)

Hawk, c. 17, s. 87; 1 *East*, *P. C.* 175;) because the counterfeiting there is punishable by the laws of England.

6. *Buying*, &c.

It was no offence by the old law (nor is it by the new statute), unless the importer knew the coin to be counterfeit, and such knowledge must be averred in the indictment and proved. (1 *Hale*, 228; 1 *East*, *P. C.* 175; *Ros. Coin.* 24.)

As to importing counterfeit coin not current here, see *post*, 750.

VII. Uttering Counterfeit Gold or Silver Coin. (*a*)

Uttering counterfeit gold or silver coin, imprisonment.

By the 2 Will. IV. c. 34, s. 7, "if any person shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the king's current gold or silver coin, knowing the same to be false or counterfeit, every such offender shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof, shall be imprisoned for any term not exceeding one year; and if any person shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the king's current gold or silver coin, knowing the same to be false or counterfeit, and such person shall, at the time of such tendering, uttering, or putting off, have in his possession, besides the false or counterfeit coin so tendered, uttered, or put off, one or more piece or pieces of false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the king's current gold or silver coin, or shall either on the day of such tendering, uttering, or putting off, or within the space of ten days then next ensuing, tender, utter, or put off any more or other false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the king's current gold or silver coin, knowing the same to be false or counterfeit, every such offender shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof, shall be imprisoned for any term not exceeding two years; and if any person who shall have been convicted of any of the misdemeanors, or crimes and offences hereinbefore mentioned, shall afterwards commit any of the said misdemeanors, or crimes and offences, such person shall, in England and Ireland, be deemed guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years."

Uttering, accompanied by possession of other counterfeit coin, or followed by a second uttering, imprisonment.

Every second offence of uttering after a previous conviction shall be felony;

Punishment.

Sect. 9. "Where any person shall have been convicted of any offence against this act and shall afterwards be indicted for any offence against this act committed subsequent to such conviction, a copy of the previous indictment and conviction, purporting to be signed and certified as a true copy by the clerk of the court or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk

What is sufficient evidence of a conviction for a previous offence against this act.

(*a*) The stat. 9 Geo. III. c. 37, s. 7, contains a provision for the purpose of preventing the parish poor being paid in base or counterfeit coin, which enacts, that if any churchwarden or overseer of any parish, township, or place, or other person authorised by them to make payments to or for the use of the poor within such parish, township, or place respectively, shall wilfully and knowingly make any such payments in any base or counterfeit money, or in any other than lawful money of Great Britain, one justice may, and he is hereby required, on complaint, to summon the churchwarden, overseer, or other person charged, and in a summary way, upon his or their non-appearance or confession, or proof upon oath of one witness, adjudge the party so offending to forfeit for each offence a sum not less than 10*s.* nor more than 20*s.*; and to levy the same by distress and sale of the goods and chattels of such offender, and to be applied to the use of any poor person or persons of the parish or place respectively as the justice shall appoint.

No person can be enforced to take in payment any money but of lawful metal, that is, of silver or gold, except for sums under sixpence. (2 *Inst.* 5, 7; 1 *Hale*, 195; see *Tidd*, *Supp. Tender.*)

7. *Uttering, &c.*

or officer, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the previous indictment and conviction, without proof of the signature or official character of the person appearing to have signed and certified the same; and for every such copy a fee of six shillings and eightpence, and no more, shall be demanded or taken; and if any such clerk, officer, or deputy shall certify or utter as true any false copy of any indictment or conviction for any offence against this act, knowing the same to be false, or if any person other than such clerk, officer, or deputy, shall sign or certify any copy of any such indictment or conviction, as such clerk, officer, or deputy, or shall utter any copy thereof with a false or counterfeit signature thereto, knowing the same to be false or counterfeit, every such offender shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned for any term not exceeding two years."

Making false certificate of conviction, &c.

Punishment.

To the imprisonment inflicted under this section may be added hard labour and solitary confinement, as directed by section 19, and 7 Will. IV. & 1 Vict. c. 90, s. 5, *post*, 757.

What an uttering within act.

Where a good shilling was given to a Jew boy for fruit, and he put it into his mouth, under pretence of trying if it were good, and then taking a bad shilling out of his mouth instead of it, returned it to the party, saying that it was not good; this (which is called ringing the changes) was holden to be an uttering within the meaning of the statute 15 Geo. II. c. 28. (*R.* v. *Franks*, 2 *Leach*, 644, 736.)

As to what is a "putting off," see *ante*, 744.

Under an indictment for uttering counterfeit coin, it must be proved that the defendant knew it to be a counterfeit sovereign at the time he uttered it. This proof must, of course, rest on circumstantial evidence. If it be proved that he uttered, either on the same day or other times, base money of the same description to the same or to a different person, or had other pieces of base money about him when he uttered the counterfeit money in question, this will be evidence from which the jury may presume a guilty knowledge. (*Per Thompson*, B., *in R.* v. *Whiley et al.*, 2 *Leach*, 983; see *R.* v. *Ball*, 1 *Campb.* 324; *R.* v. *Millard*, *Bayley on B.* 449.)

If a man utter a bad shilling, and fifty other bad shillings are found upon him, this would bring him within the description of a common utterer; but if the indictment do not contain that charge, yet these circumstances may be given in evidence among other charges of uttering, to show that he uttered the money with a knowledge of its being bad. (*Per eund.* 2 *Leach*, 983; see also *Ball's case*, 1 *Campb.* 325; and *Phil. on Ev.* 137.)

The giving of a piece of counterfeit money in charity is not an uttering within the statute, although the person may know it to be counterfeit; as in cases of this kind there must be some intention to defraud. (*Reg.* v. *Page*, 8 *C. & P.* 122.)

An indictment for uttering counterfeit coin, knowing it to be counterfeit, (after a previous conviction), charged that the prisoner did utter a counterfeit half-crown to E. H., "knowing the same to be false and counterfeit:" it was held that the allegation of the scienter was sufficient, and that the word "knowing" must be taken to apply to the prisoner, and not to E. H., who was the last antecedent; and that the scienter must be taken to apply to the time of the uttering, although it was not stated to be "then and there." (*Reg.* v. *Page*, 9 *C. & P.* 756.)

Joint uttering.

Where several persons are charged with an uttering it must appear either that they were all present, or so near to the party actually uttering as to be able to afford him aid and assistance. (See *R.* v. *Soares*, *R. & R.* 25; 2 *East's P. C.* 794, S. C.; *R.* v. *Davis*, *R. & R.* 113; "*Forgery*," Vol. III.)

If two persons jointly prepare counterfeit coin, and then utter it in different shops, apart from each other, but in concert, and intending to share the proceeds, the utterings of each are the joint utterings of both, and they may be convicted jointly. (*Reg.* v. *Hurse*, 2 *M. & R.* 360.)

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But if two utterers of counterfeit coin, with a general community of purpose, go different ways, and utter coin apart from each other, and not near enough to assist each other, their respective utterings are not joint utterings by both. (*R.* v. *Manners*, 7 *C. & P.* 801.)

What a possession of other counterfeit money.

As to what shall be a sufficient custody of the other false coin, the following case was decided upon the 15 Geo. II. c. 28, s. 3. A man and a woman were jointly indicted for uttering a counterfeit shilling, having about them in their custody, at the same time, another counterfeit shilling, knowing, &c. It appeared that they came together to a public-house and slept there, and the woman in the absence of the man paid away the counterfeit shilling; that on the same day the man went to another public-house and offered to sell a large quantity of counterfeit shillings; and that on the following day the prisoners were apprehended while in bed. Near the bed was found a quantity of bad halfpence, some silver (four shillings and sixpence) in the man's pocket, which was good, and one shilling and sixpence bad; and concealed under his arm was found a paper parcel of bad shillings, which, if good, would have been worth 14*l.*; in the woman's pocket were found a good half-crown, seven good shillings, and six counterfeit shillings, like the counterfeits found in the paper under the man's arm. Upon this evidence it was insisted for the prisoners that there was no ground to convict the man, he not having uttered the shilling in question, nor being present at the time the woman uttered it. And that, with respect to the woman, she could only be convicted of uttering the shilling (the offence in the former part of the count), knowing it to be counterfeit, it not appearing that at the time of uttering it (not having been searched that day), she had any other counterfeit money about her. Both the prisoners being convicted, the judges held the conviction of the woman for the single offence good, but not good for uttering and having about her at the time other money; and as to the conviction of the man, they held it could not be supported. (*R.* v. *Else*, *R. & R.* 142.) And where one of two persons in company utters counterfeit coin, and other counterfeit coin is found on the other person, they are jointly guilty of the aggravated offence under section 7, if acting in concert, and both knowing of the possession. (See *R.* v. *Gerrish*, 2 *M. & R.* 829; see *R.* v. *Manners*, 7 *C. & P.* 801; *Reg.* v. *Jones*, 9 *C. & P.* 761.)

In the following case two persons were convicted of a joint uttering, having another counterfeit shilling in their possession, although the latter coin was found upon the person of one of them only. It appeared that one of the prisoners went into a shop and there purchased a loaf, for which she tendered a counterfeit shilling in payment. She was secured, but no more counterfeit money was found upon her. The other prisoner, who had come with her and was waiting at the shop-door, then ran away, but was immediately secured, and fourteen bad shillings were found on her, wrapped in gauze paper. It was objected that the complete offence stated in the indictment was not proved against either of the prisoners, and the above case of *R.* v. *Else* was cited. *Garrow*, B., was of opinion, "that the two prisoners coming together to the shop, and the one staying outside, they must both be taken to be jointly guilty of the uttering, and that it was for the jury to say, whether the possession of the remaining pieces of bad money was not joint." The jury found both the prisoners guilty. (*R.* v. *Skerritt*, 2 *C. & P.* 427; *Rosc. on Coin.* 40; see *Reg.* v. *Rogers*, 2 *Mood. C. C.* 85.

By the interpretation clause of the 2 Will. IV. c. 34, s. 21, "where the having any matter in the custody or possession of any person in this act expressed to be an offence, if any person shall have any such matter in his personal custody or possession, or shall knowingly and wilfully have any such matter in any dwelling-house or other building, lodging, apartment, field or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or benefit, or for that of another, every such person shall be deemed and taken to have such matter in his custody or possession within the meaning of this act."

Uttering twice in ten days.

Under an indictment for an uttering twice in ten days, the double uttering

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must be charged in one count. (*R.* v. *Tundy*, 2 *Leach*, 835; 1 *East's P. C.* 182, S. C.; and see *R.* v. *Martyn*, 2 *Leach*, 923; 1 *East's P. C.* Add. XVIII.; 1 *Russ.* 82.) On a conviction for two separate offences of uttering coin in two counts, one judgment for two years' imprisonment under the 7th sect. (*ante*, 745) is bad. (*R.* v. *Robinson*, 1 *Mood. C. C.* 413.)

After conviction of previous offence.

Where the party is indicted for a second offence, rendered felony by the statute, it is necessary to set forth the previous conviction in the indictment, with a *prout patet per recordum.* (*R.* v. *Turner*, *R. & M. C. C.* 47; and see *R.* v. *Smith*, *R. & R. C. C.* 7.) And where an indictment stated, that, at the assizes holden at H., on the 3rd August, 4 Will. IV. "C. P. (the present prisoner) together with one J. P., by the name and description of C. P., late of B., in the county of H., labourer, and J. P., late of the same, labourer, was in due form of law tried and convicted," by a certain jury duly taken "between our said late lord the king and the said C. P. and T. P.," upon an indictment against them for uttering counterfeit coin, they having other counterfeit coin in their possession; and thereupon it was considered by the Court there, that the said C. P. should be imprisoned for two years." The record of the conviction of C. P. stated his conviction, and the acquittal of T. P.; it was held, that this was no variance; and that this allegation in the indictment did not import that T. B. was convicted. (*Reg.* v. *Page*, 9 *C. & P.* 756.)

A conviction under the old law cannot be joined with an offence under the new statute. (*Jervis's Arch. C. L.* 9th ed. 520.)

VIII. Having Possession of Three or more Pieces of Counterfeit Gold or Silver Coin.

Having three or more pieces of counterfeit gold or silver coin in possession, &c. with intent, &c. imprisonment.

By the 2 Will. IV. c. 34, s. 8, "if any person shall have in his custody or possession three or more pieces of false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the king's current gold or silver coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same, every such offender shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding three years; and if any person so convicted shall afterwards commit the like misdemeanor, or crime and offence, such person shall, in England and Ireland, be deemed guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years."

Second offence, felony and transportation.

To the imprisonment inflicted under this section may be added hard labour and solitary confinement, as directed by sect. 19, and 7 Will. IV. & 1 Vict. c. 90, s. 5, *post*, 756, 757.

Sect. 9 (*ante*, 745) provides as to what shall be deemed a second offence within the act.

As to what shall be a sufficient "custody or possession" within the act, see *ante*, 747.

As to what will be evidence of a guilty knowledge and intention, see *ante*, 746.

In order to convict a person charged on this section, it is not necessary that the possession should be individual possession, but it is enough if the coin be in the possession of the person charged, or his immediate agent, as the interpretation clause of the same statute (sect. 21, *ante*, 747) provides for such a case. Therefore, where two persons were taken into custody together, one of them having on him sixteen pieces of counterfeit coin, and the other only two pieces, the judges held that the person who had only the two pieces might, in point of law, be convicted as well as the person who had the sixteen. (*Reg.* v. *Williams*, 1 *Car. & M.* 259.)

At common law it was no offence to have possession of counterfeit coin with intent to utter it. (*R.* v. *Stewart*, *R. & R.* 288; *R.* v. *Heath*, *Id.* 184.)

The unlawful *procuring* of counterfeit coin with intent to circulate it, though no act of uttering be proved, is a *misdemeanor* at common law, and the possession of a large quantity of counterfeit coin, all newly finished, never having been in circulation, and of the same denomination, unaccounted for, is evidence of an unlawful procurement, with intent to circulate. (*R.* v. *Robinson and Fuller*, 1 *Russ.* 47, 48; *R. & R.* 308.)

8. *Having Possession, &c.*

IX. Counterfeiting, and other Offences as to Copper Coin.

Various offences relating to the copper coin.

By the 2 Will. IV. c. 34, s. 12, "if any person shall falsely make or counterfeit any coin resembling, or apparently intended to resemble or pass for, any of the king's current copper coin; or if any person shall knowingly, and without lawful authority, (the proof of which authority shall lie on the party accused,) make or mend, or begin or proceed to make or mend, or buy or sell, or shall knowingly, and without lawful excuse, (the proof of which excuse shall lie on the party accused,) have in his custody or possession any instrument, tool, or engine adapted and intended for the counterfeiting any of the king's current copper coin; or if any person shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off, any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the king's current copper coin, at or for a lower rate or value than the same by its denomination imports, or was coined or counterfeited for; every such offender shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding seven years, or to be imprisoned for any term not exceeding two years; and if any person shall tender, utter, or put off (*a*) any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the king's current copper coin, knowing the same to be false or counterfeit, or shall have in his custody or possession three or more pieces of false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the king's current copper coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same, every such offender shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be liable to be imprisoned for any term not exceeding one year."

To imprisonment inflicted under this section may be added hard labour and solitary confinement, as directed by sect. 19 of 7 Will. IV. & 1 Vict. c. 90, s. 5, *post*, 756, 757.

The evidence on prosecutions for the various offences relating to the copper coin, will in general be the same as on prosecutions relating to the counterfeiting of the gold and silver coin. It may be observed, however, that on an indictment for counterfeiting the copper coin, the false coin, in order to sustain the indictment, must be in a fit state to be issued. (*Rosc. on Coin.* 54.)

By the interpretation clause of the new statute, sect. 21, (*ante*, 747,) it is enacted, that where "the king's current copper coin" shall be mentioned in any part of the act, the same shall be deemed to include and denote any copper coin coined in any of his majesty's mints, and lawfully current in any part of his majesty's dominions, whether within the united kingdom or otherwise.

(*a*) This creates a new offence; see the old law. (*R.* v. *Ciruan*, 1 *East's P. C.* 182; 2 *Leach*, 834, S. C.) In that case the prisoner was indicted (*Oxford Sum. Ass.* 1794, 1 *East's P. C.* 182) for "unlawfully uttering and tendering in payment to J. H. ten counterfeit halfpence, knowing them to be counterfeit;" and this was laid in the one count against the form of the statute, and in another generally. The defendant was convicted on the general count, it being admitted at the trial that there was no statute applicable to the fact. But upon reference to all the judges, (*Hil. T.* 1795,) they held the conviction wrong, it not being an indictable offence.

X. Counterfeiting, and other Offences relative to Foreign Coin.

Counterfeiting foreign gold or silver coin, felony; transportation for seven years.

Counterfeiting Foreign Gold or Silver Coin.]—By stat. 37 Geo. III. c. 126, reciting, that "the practice of counterfeiting foreign gold and silver coin, and the bringing into this realm, and uttering within the same, false and counterfeit foreign gold and silver coin, and particularly pieces of gold coin commonly called *louis d'or*, and pieces of silver coin commonly called *dollars*, hath of late greatly increased, and it is expedient that provision should be made more effectually to prevent the same," sect. 2, it is enacted, "that if any person or persons shall, from and after the passing of this act, make, coin, or counterfeit any kind of coin, not the proper coin of this realm, nor permitted to be current within the same, but resembling, or made with intent to resemble, or look like any gold or silver coin of any foreign prince, state, or country, or to pass as such foreign coin, such person or persons offending therein shall be deemed and adjudged to be guilty of felony, and may be transported for any term of years not exceeding seven years."

By the words in this act, "not permitted to be current within the realm," must be understood not permitted to be current by proclamation under the great seal. (1 *East's P. C.* 161.) The queen may by her proclamation legitimate foreign coin, and make it current money of this kingdom, according to the value imposed by such proclamation. (1 *Hale*, 192.)

Importing foreign counterfeit coin not current, with intent to utter, felony.

Importing Foreign Coin not Current.]—Stat. 37 Geo. III. c. 126, s. 3, "if any person or persons shall bring into this realm any such false or counterfeit coin as aforesaid, resembling, or made with intent to resemble or look like any gold or silver coin of any foreign prince, state, or country, or to pass as such foreign coin, knowing the same to be false or counterfeit, to the intent to utter the same within this realm, or within any dominions of the same, all and every such person or persons shall be deemed and adjudged to be guilty of felony, and may be transported for any term of years not exceeding seven years." (See the 2 Will. IV. c. 34, s. 6, *ante*, 743, as to importing counterfeit foreign coin resembling the coin of the realm.)

Accessaries before are not mentioned in this statute; but these are incident to every felony. Yet *quære*, if they are liable to the punishment of transportation. (See 1 *Russ.* 3rd ed. 65.)

The collecting of the counterfeit monies of foreign countries from the vendors of it in this country, with intent to utter it in this realm, or the dominions of the same, is not an offence within the 37 Geo. III. c. 126, s. 3, which requires *a bringing* into the realm. (See 1 *East's P. C.* 177.)

An importation *with intent to utter* is sufficient, without any actual uttering; which intent must be collected from circumstances. But though an actual uttering may be the best evidence of such intent, yet it seems safest that the indictment should follow the words of the statute. (1 *East's P. C.* 176; 1 *Russ.* 3rd ed. 65.)

Importing light silver coin.

Considerable quantities of old silver coin of the realm, or coin purporting to be such, below the standard of the mint in weight, were formerly imported to the public detriment at that time; in consequence of which, stat. 14 Geo. III. c. 42, prohibited the bringing into the kingdom any such coin, and provided that if any silver coin, being or purporting to be the coin of this realm, exceeding in amount the sum of 5*l.*, should be found by any officer of his majesty's customs on board any ship, &c. or in the custody of any person coming directly from the water-side, or upon the information of one or more persons, in any house or other place, on search there made in the manner directed by stat. 14 Car. II. c. 11, s. 5, the officer might seize the same; and if upon examination it should appear to be of the standard weight, it should be restored: but if it should be less in weight than the standard of the mint, that is to say, at and after the rate of 62*s.* to every pound troy, it shall be forfeited. This act was revived and made perpetual by stat. 39 Geo. III. c. 75; but by stat. 56 Geo. III. c. 68, s. 2, so much of stat. 14 Geo. III. as enacts that any silver coin of the realm less in weight than after the rate of

62s. for every pound troy, shall be forfeited, and of any act or acts for reviving or continuing or making perpetual the provisions of the said last recited act in this respect, is repealed. (See 1 *Russ.* 3rd ed. 65, 66.)

10. *Counterfeiting, &c.*

Uttering, Tendering, &c. Foreign Counterfeit Gold or Silver Coin.]—The stat. 37 Geo. III. c. 126, enacts by sect. 4, "That if any person or persons shall, from and after the passing of this act, utter or tender in payment, or give in exchange, or pay or put off to any person or persons, any such false or counterfeit coin as aforesaid, resembling or made with intent to resemble or look like, any gold or silver coin of any foreign prince, state or country, or to pass as such foreign coin, knowing the same to be false or counterfeit, and shall be thereof convicted, every person so offending shall suffer six months imprisonment, and find sureties for his or her good behaviour for six months more, to be computed from the end of the said first six months; and if the same person shall afterwards be convicted a second time for the like offence of uttering or tendering in payment, or giving in exchange, or paying or putting off any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, such person shall, for such second offence, suffer two years' imprisonment, and find sureties for his or her good behaviour for two years more, to be computed from the end of the said first two years; and if the same person shall afterwards offend a third time, in uttering or tendering in payment, or giving in exchange, or paying or putting off any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, and shall be convicted of such third offence, he or she shall be adjudged guilty of felony, without benefit of clergy."

Tendering in payment such counterfeit coin, first offence six months' imprisonment;

second offence, two years;

third offence, felony.

This latter part of the clause, as far as regards the capital punishment, is repealed by the 11 Geo. IV. & 1 Will. IV. c. 66; and see that enactment also, sect. 26, and 1 Vict. c. 90, s. 5, *post*, 757.

Certificate of Conviction.]—Sect. 5. "If any person shall be convicted of uttering or tendering any such false or counterfeit coin as aforesaid, and shall afterwards be guilty of the like offence in any other county, city or place, the clerk of the assize or clerk of the peace for the county, city or place where such former conviction shall have been had, shall, at the request of the prosecutor or any other on his majesty's behalf, certify the same by a transcript in a few words, containing the effect and tenor of such conviction; for which certificate two shillings and sixpence, and no more, shall be paid, and such certificate being produced in court shall be sufficient proof of such former conviction."

Clerk of assize or of peace to certify conviction of person for uttering counterfeit coin.

Search Warrants, &c.]—Sect. 7. "It shall and may be lawful to and for any one justice of the peace, on complaint made before him upon the oath of one credible person, that there is just cause to suspect that any one or more person or persons is or are or hath or have been concerned in making or counterfeiting any such false or counterfeit coin as aforesaid, resembling or made with an intent to resemble or look like any gold or silver coin of any foreign prince, state or country, or to pass as such foreign coin, by warrant under the hand of such justice to cause the dwelling-house, room, workshop, outhouse, or other building, yard, garden or other place belonging to such suspected person or persons, or where any such person or persons shall be suspected to carry on any such making or counterfeiting, to be searched for any such false or counterfeit coin, or for tools or implements for coining such false or counterfeit coin, or for materials for making or coining the same; and if any such false or counterfeit coin, or any such tools or instruments, or any such materials for making any such false or counterfeit coin, shall be found in any place so searched, or if any such tools, implements or materials shall be found in the custody or possession of any such person or persons whomsoever, not having the same by some lawful authority, it shall and may be lawful to and for any person or persons whatsoever discovering the same to seize, and he and they are hereby authorised and required to seize such false or counterfeit coin, tools, implements and materials, and to carry the

Justices may grant warrants for searching suspected places.

Such counterfeit coin and tools and materials may be seized and carried before a justice, who shall secure same as evidence, and to be afterwards destroyed.

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same forthwith to a justice of the peace of the county, city or place where the same shall be seized, who shall cause the same to be secured and produced in evidence against any person or persons who shall or may be prosecuted for any of the offences aforesaid, in some court of justice proper for the determination thereof; and after such time as any such false or counterfeit coin, or any such tools, implements or materials shall have been produced in evidence as aforesaid, as well so much and such parts thereof as shall have been so produced as every other part thereof so seized and not made use of in evidence, shall forthwith, by order of the court where such offender or offenders shall be tried, or by order of some justice or justices of the peace in case there shall be no such trial, be defaced or destroyed or otherwise disposed of as such court or such justice shall direct."

Limitation of actions, &c.

Sect. 9 limits actions for acts, &c. to three months, and gives the general issue treble costs.

Having more than five pieces of false foreign coin in possession.

Having in Custody Foreign Gold or Silver Coin.]—Having in custody a greater number than five pieces of counterfeit foreign coin, whether current here or not, makes the party liable to punishment by proceedings before a justice of the peace.

This is provided for by the 6th section of 37 Geo. III. c. 126, which enacts, that "if any person or persons shall have in his, her or their custody, without lawful excuse, any greater number of pieces than five pieces of false or counterfeit coin, of any kind or kinds, resembling, or made with intent to resemble or look like, any gold or silver coin or coins of any foreign prince, state or country, or to pass as such foreign coin, every such person, being thereof convicted upon the oath of one or more credible witness or witnesses, before one of his majesty's justices of the peace, shall forfeit and lose all such false and counterfeit coin, which shall be cut in pieces and destroyed by order of such justice, and shall, for every such offence, forfeit and pay any sum of money not exceeding five pounds nor less than forty shillings, for every such piece of false or counterfeit coin which shall be found in the custody of such person, one moiety to the informer or informers, and the other moiety to the poor of the parish where such offence shall be committed; and in case any such penalty shall not be forthwith paid, it shall be lawful for such justice to commit the person who shall be adjudged to pay the same to the common gaol or house of correction, there to be kept to hard labour, for the space of three calendar months, or until such penalty shall be paid."

Counterfeiting foreign coin not current by proclamation, but resembling copper or mixed metal coin of foreign state, a misdemeanor.

Counterfeiting Foreign Copper Money.]—The counterfeiting of foreign coin of *copper*, or of other metal, of less value than silver, *not current here*, is made a misdemeanor by stat. 43 Geo. III. c. 139, s. 3, which enacts, that "if any person shall, within any part of the United Kingdom of Great Britain and Ireland, make, coin or counterfeit any kind of coin not the proper coin of this realm, nor ordered by his majesty's proclamation to be deemed current money, but resembling or made with intent to resemble any copper coin or other coin made of any metal or mixed metals of less value than the silver coin of any foreign prince, state or country, or to pass as such foreign coin, such person shall be guilty of a misdemeanor and breach of the peace; and on conviction shall for the first offence be imprisoned not exceeding a year, and for the second offence shall be transported for seven years."

Sect. 4. No traverse to be allowed to a subsequent assizes or sessions, without cause shown to and allowed by the Court.

Sect. 5 enacts, that certificates of former convictions shall be produced in cases where persons are tried for second offences.

And a penalty of not exceeding 40*s.* nor less than 10*s.* is inflicted by sect. 6 for every such piece of counterfeit foreign coin in possession of any person who shall have more than five pieces thereof in his custody without lawful excuse.

Sect. 7 provides that houses of suspected persons may be searched by warrant of one justice, and counterfeit coin seized, &c.

By sect. 8 proceedings not to be quashed for want of form or removed by *certiorari*. 10. *Counterfeiting, &c.*

XI. Making Coining Tools.

Making, mending or having possession of any coining tools, felony.

By the 2 Will. IV. c. 34, s. 10, "if any person shall knowingly, and without lawful authority, (the proof of which authority shall lie on the party accused), make or mend, or begin or proceed to make or mend, or buy or sell, or shall, knowingly and without lawful excuse (the proof of which excuse shall lie on the party accused), have in his custody or possession any puncheon, counter-puncheon, matrix, stamp, die, pattern or mould, in or upon which there shall be made or impressed, or which will make or impress, or which shall be intended to make or impress, the figure, stamp or apparent resemblance (*a*) of both or either of the sides of any of the king's current gold or silver coin, or any part or parts of both or either of such sides; or if any person shall, without lawful authority (the proof whereof shall lie on the party accused), make or mend, or begin or proceed to make or mend, or buy or sell, or shall, without lawful excuse (the proof whereof shall lie on the party accused), have in his custody or possession, any edger, edging tool, collar, instrument or engine adapted and intended for the marking of coin round the edges with letters, grainings or other marks or figures apparently resembling those on the edges of any of the king's current gold or silver coin, such person knowing the same to be so adapted and intended as aforesaid; or if any person shall, without lawful authority, to be proved as aforesaid, make or mend, or begin or proceed to make or mend, or buy or sell, or shall, without lawful excuse, to be proved as aforesaid, have in his custody or possession, any press for coinage, or any cutting engine for cutting by force of a screw or of any other contrivance round blanks out of gold, silver or other metal, such person knowing such press to be a press for coinage, or knowing such engine to have been used or to be intended to be used for or in order to the counterfeiting of any of the king's current gold or silver coin, every such offender shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years." The imprisonment with or without hard labour, and with or without solitary confinement, as enacted by s. 19, and 6 & 7 Will. IV. & 1 Vict. c. 90, s. 5, *post*.

Punishment.

The offences under this section are not triable at any quarter sessions. 5 & 6 Vict. c. 38, s. 1.

Making a puncheon for coining

To constitute the offence of making, &c. a puncheon, &c. for coining, it is not necessary that the instrument should be capable of making an impression of the whole of one side of the coin; for the words, "or any part or parts," &c. are introduced into this statute, and consequently the difficulty in *R.* v. *Sutton*; (2 *Str.* 1074; *Hardw.* 370;) where the instrument was capable of making the sceptre only, cannot now occur. (*Jerv. Arch. C. L.* 523). It is not necessary to prove, under this branch of the statute, the knowledge or intent of the defendant; for the mere similitude is treated by the legislature as evidence of the intent; neither is it essential to show that money was actually made with the instrument in question. (*R.* v. *Ridgeley*, 1 *East, P. C.* 171; *Jerv. Arch. C. L.* 397.) Where an indictment charged making a mould, "intended to make and impress the figure and apparent resemblance of the obverse side of a shilling," it is sufficient to prove that the prisoner made the mould and a part of the impression, though he had not completed the entire impression. (*R.* v. *Foster*, 7 *C. & P.* 495.)

Although in an indictment for making, &c. an instrument for coining, it is more accurate to describe the instrument according to its actual use, it may be described either way. (*R.* v. *Lennard*, 1 *Leach*, 85; 1 *East, P. C.* 170, S. C.; 1 *Russ.* 74.)

(*a*) See 1 *East's P. C.* 172; *R.* v. *Ridgeley*, 1 *Leach*, 189.

11. *Making Coining Tools.*

Making a press for coining.

As to the offence of making a press for coining, it is to be observed, that in this section there is no qualification applicable to the coining press, though there is as to the cutting engine in the same branch of the section. In *John Bell's case*, (*Fost.* 430; 1 *East, P. C.* 169), it was decided, that a press for coinage, proper to be used for the coining of guineas, shilling and *louis d'ors*, was within stat. 8 & 9 Will. III. c. 26. But that if it be in the person's possession for the purpose of coining foreign coin only, that circumstance alone took it out of the act. However, Lord C. J. *Ryder*, and Lord *Hardwicke*, and *Foster*, J. doubted of this, and *Mansfield*, J. concurred. (See *Dodson's Life of Sir M. Foster*, p. 44.)

Where a prisoner was indicted for having in his possession a mould on which was impressed a resemblance of the obverse side of a shilling, it was held, that in order to convict the jury must be satisfied that at the time he had it in his possession the *whole* of the obverse side was impressed on the mould. (*R.* v. *Foster*, 7 *C. & P.* 491.)

Being possessed of coining tools.

The having tools for coining in possession, with intent to use them, has been held to be a misdemeanor *at common law*. (*R.* v. *Sutton*, *Cas. temp. Hardw.* 370; 1 *East's P. C.* 172.) This is, however, a very questionable doctrine; and in evidence to support an indictment for the offence it will be necessary to prove that the defendant had in his possession the pieces of coin mentioned in the indictment, and that he knew them to be false and counterfeit, which can of course be only implied from circumstances or from the defendant's admission. Merely having counterfeit silver in the party's possession with intent to utter it as good, is no offence, for there is no criminal act done; (*R.* v. *Stewart*, *R. & R.* 288; *R.* v. *Heath*, *id.* 184); but procuring it with intent to utter it as good, is a misdemeanor; and having a large quantity of such coin is evidence that it was procured with such intent, unless there be circumstances to show that the defendant was the maker of it. (*R.* v. *Fuller*, *id.* 308.)

XII. Conveying Tools or Monies out of Mint.

Conveying tools or monies out of the mint without authority, felony.

By the 2 Will. IV. c. 34, s. 11, "if any person shall, without lawful authority, (the proof whereof shall lie upon the party accused), knowingly convey out of any of his majesty's mints any puncheon, counter-puncheon, matrix, stamp, die, pattern, mould, edger, edging tool, collar, instrument, press or engine, used or employed in or about the coining of coin, or any useful part of any of the several matters aforesaid, or any coin, bullion, metal or mixture of metals, every such offender shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years." The imprisonment may be with or without hard labour, and with or without solitary confinement, as directed by s. 19, and 7 Will. IV. & 1 Vict. c. 90, s. 5, *post*, 757.)

Transportation for life, &c.

The offences under this section are not triable at quarter sessions. 5 & 6 Vict. c. 30, s. 1.

XIII. Diminishing, or cutting suspected Coin. Discovery and seizure of Counterfeit Coin and Tools, &c.

Coin suspected to be diminished or counterfeit may be cut by any person to whom it is tendered.

By the 2 Will. IV. c. 34, s. 13, "where any gold or silver coin shall be tendered to any person, who shall suspect any piece or pieces thereof to be diminished otherwise than by reasonable wearing, or to be counterfeit, it shall be lawful for such person to cut, break or deface such piece or pieces; and if any piece so cut, broken or defaced shall appear to be diminished otherwise than by reasonable wearing, or to be counterfeit, the person tendering the same shall bear the loss thereof; but if the same shall be of due weight, and appear to be lawful coin, the person cutting, breaking or defacing

Who shall bear the loss.

the same is hereby required to receive the same at the rate it was coined for; and if any dispute shall arise, whether the piece so cut, broken or defaced be diminished in manner aforesaid, or counterfeit, it shall be heard and finally determined in a summary manner by any justice of the peace, who is hereby empowered to examine upon oath as well the parties as any other person, in order to the decision of such dispute; and the tellers at the receipt of his majesty's exchequer, and their deputies and clerks, and the receivers general of every branch of his majesty's revenue, are hereby required to cut, break or deface, or cause to be cut, broken or defaced, every piece of counterfeit or unlawfully-diminished gold or silver coin which shall be tendered to them in payment of any part of his majesty's revenue."

13. *Diminishing, &c.*

In case of dispute justice of peace to dispose of case.

Sect. 14. "If any person shall find or discover in any place whatever, or in the possession of any person having the same without lawful excuse, any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the king's current gold, silver or copper coin, or any instrument, tool or engine whatsoever adapted and intended for the counterfeiting of any such coin, it shall be lawful for the person so finding or discovering, and he is hereby required, to seize the same, and to carry the same forthwith before some justice of the peace; and where it shall be proved, on the oath of a credible witness before any justice of the peace, that there is reasonable cause to suspect that any person has been concerned in counterfeiting the king's current gold, silver or copper coin, or has in his custody or possession any such counterfeit coin, or any instrument, tool or engine whatsoever adapted and intended for the counterfeiting of any such coin, it shall be lawful for such justice, by warrant under his hand, to cause any place whatsoever belonging to or in the occupation or under the control of such suspected person to be searched, either in the day or in the night, and if any such counterfeit coin, or any such instrument, tool, or engine, shall be found in any place so searched, to cause the same to be seized and carried forthwith before the said justice, or some other justice of the peace; and wherever any such counterfeit coin, or any such instrument, tool, or engine as aforesaid, shall in any case whatever be seized and carried before a justice of the peace, he shall cause the same to be secured, for the purpose of being produced in evidence against any person who may be prosecuted for any offence against this act; and all counterfeit coin, and all instruments, tools, and engines adapted and intended for the counterfeiting of coin, after they shall have been produced in evidence, or where they shall have been seized, and shall not be required to be produced in evidence, shall forthwith be delivered up to the officers of his majesty's mint, or to their solicitor, or to any person authorised by them or him to receive the same."

Provision for the discovery and seizure of counterfeit coin and coining tools, for securing them as evidence, and for ultimately disposing of them.

Search warrants, &c.

If false or clipt money be found in a man's hands, if he be suspicious, he may be arrested till he have found his warrant. (3 *Inst.* 18; 1 *Hawk.* c. 17, s. 68; *Hale's Sum.* 21.)

As to search warrants for counterfeit foreign coin, see *ante*, 751; and as to search warrants in general, see "*Search Warrant*," Vol. V.

XIV. Accessaries.

By the 2 Will. IV. c. 34, s. 18, "in the case of every felony punishable under this act, every principal in the second degree and every accessary before the fact shall be punishable in the same manner as the principal in the first degree is by this act punishable; and every accessary after the fact to any felony punishable under this act shall, on conviction, be liable to be imprisoned for any term not exceeding two years; and in so far as relates to Scotland, every person who shall become accessary after the fact to any of the offences to which the punishment of transportation is by this act attached, shall, on conviction, be liable to be imprisoned for any term not exceeding two years; the general law of Scotland as to accession, or art and

As to accessaries.

14. *Accessaries.* part, being in all other respects to regulate the punishments to be awarded under this act."

As to accessaries in general, see *ante*, "*Accessary.*"

If A. counterfeits, and, by agreement before that counterfeiting, B. is to take off and vend the counterfeit money, B. is an aider and abettor (1 *Hale*, 514); but if B., knowing that A. has counterfeited money, puts off the false money for him after the fact, without any such agreement precedent to the counterfeiting, he seems to be all one with a receiver of him, because he maintains him. (*Id.*) In the latter case the offender would now be an accessary after the fact, and as such, by sect. 18 of the new act, subject to imprisonment for two years, though the proper course would be to proceed against such an offender for the substantive offence of uttering. (*Rose. on Coin*, 6.)

XV. Venue in Indictments under the 2 Will. IV. c. 34.

Venue.

By 2 Will. IV. c. 34, s. 15, "where two or more persons, acting in concert in different counties or jurisdictions, shall commit any offence against this act, all or any of the said offenders may be dealt with, indicted, tried, and punished, and their offence laid and charged to have been committed, in any one of the said counties or jurisdictions, in the same manner as if the offence had been actually and wholly committed within such one county or jurisdiction; provided always, that crimes and offences against this act committed in Scotland shall be proceeded against and tried in Scotland, in such manner and form as crimes and offences generally have been heretofore tried in that country."

See as to the venue in indictments in general, "*Indictment*," Vol. III.

XVI. Traverses of Indictments under 2 Will. IV. c. 34.

Indictments not to be traversed except for cause shown.

By 2 Will. IV. c. 34, s. 16, "no person against whom any bill of indictment shall be found at any assizes or sessions of the peace, for any misdemeanor against this act, shall be entitled to traverse the same to any subsequent assizes or sessions, but the Court before which the bill of indictment shall be returned as found shall forthwith proceed to try the person against whom the same is found, *unless such person or the prosecutor shall show good cause*, to be allowed by the Court, for the postponement of trial: provided always, that the rights and liabilities of persons indicted under this act in Scotland, so far as relates to the postponement or time of trial, shall remain and be dealt with in the same manner as in the cases of all other persons indicted for crime in that country." As to traverses in general, see "*Traverse*," Vol. VI.

XVII. Officer of Mint need not be called to prove Coin being Counterfeit.

What shall be sufficient proof of coin being counterfeit.

By the 2 Will. IV. c. 34, s. 17, it is declared and enacted, "that where, upon the trial of any person charged with any offence against this act, it shall be necessary to prove that any coin produced in evidence against such person is false or counterfeit, it shall not be necessary to prove the same to be false and counterfeit by the evidence of any moneyer or other officer of his majesty's Mint, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of any other credible witness." (See *ante*, 741.)

XVIII. Punishment of Hard Labour or Solitary Confinement.

The Court may order hard labour or solitary confinement.

By the 2 Will. IV. c. 34, s. 19, "where any person shall be convicted of any offence punishable under this act for which imprisonment may be awarded, it shall be lawful for the Court to sentence the offender to be impri-

soned, with or without hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, as to the Court in its discretion shall seem meet." 18. *Punishment, &c.*

But now the 7 Will. IV. & 1 Vict. c. 90, s. 5, enacts that it shall not be lawful for any Court to direct that any offender shall be kept in solitary confinement for any longer period than one month at a time, or than three months in the space of one year. By the Prisons Regulation Act, 2 & 3 Vict. c. 56, s. 4, the separate solitary confinement directed by that act, is not to be deemed confinement within the meaning of any act forbidding solitary confinement for more than a limited time. See further, title "*Hard Labour*," Vol. III.

XIX. Offences at Sea.

By the 2 Will. IV. c. 34, s. 20, "where any offence punishable under this act shall be committed within the jurisdiction of the Admiralty, the same shall be dealt with, inquired of, tried, and determined in the same manner as any other offence committed within that jurisdiction." See *ante*, "*Admiralty*." As to offences committed at sea.

XX. Indemnity to Persons acting under the 2 Will. IV. c. 34.

By 2 Will. IV. c. 34, s. 24, for the protection of persons acting in the execution of this act, it is enacted, "that all actions and prosecutions to be commenced against any person for any thing done in pursuance of this act shall, in England or Ireland, be laid and tried in the county where the fact was committed, and shall, in England, Ireland, or Scotland, be commenced within six calendar months after the fact committed, and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant or defender one calendar month at least before the commencement of the action; and in any such action brought in England or Ireland, the defendant may plead the general issue, and give this act and the special matter in evidence, at any trial to be had thereupon, and in Scotland the defender may insist on all relevant defences; and no plaintiff or pursuer shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into Court after such action brought by or on behalf of the defendant or defender; and if, in England or Ireland, a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action after issue joined, or if, upon demurrer or otherwise, judgment shall be given against the plaintiff, or if in Scotland the verdict shall be for the defender, or if the pursuer shall abandon the action or the Court shall dismiss it as irrelevant or improperly laid; in every such case the defendant or defender shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant or defender hath by law in other cases; and though a verdict shall be given for the plaintiff or pursuer in any such action, such plaintiff or pursuer shall not have costs against the defendant or defender, unless the judge before whom the trial shall be, shall certify his approbation of the action and of the verdict obtained thereupon." Venue in proceedings against persons acting under this act. General issue. Tender of amends, &c. Costs. Judge's certificate.

XXI. Tokens.

Bank Tokens.]—The governor and company of the Bank of England, for the convenience of the public, were by stat. 44 Geo. III. c. 71, empowered to issue certain silver dollars, and provision was therein made against the counterfeiting and uttering counterfeits; and the governor and company, for the further convenience of the public, were by stat. 51 Geo. III. c. 110, authorised to issue certain silver pieces called tokens, for 3*s.* and 1*s.* 6*d.* each; Bank tokens.

21. *Tokens.* and persons uttering or vending counterfeits were by 52 Geo. III. s. 138, subject to certain punishments imposed by the said acts.

But upon the issuing of the new current silver coin, the further circulation of these tokens was prohibited, after the 25th of March, 1818, by 57 Geo. III. c. 113; extended (by stat. 58 Geo. III. c. 14,) to the 5th July, 1818, and further to the 5th April, 1819, &c.

Penalty for circulating them.

By 57 Geo. III. c. 113, s. 1, if "any person or persons shall from and after the said 25th day of March, 1818, utter, offer, or tender in payment, or give in exchange, or pass, circulate, or put off, any such dollar or tokens, whether the value thereof shall be paid or given in money or goods, or in any other manner whatsoever, every person so offending, and being thereof convicted upon the oath of one or more credible witness or witnesses, before one or more of his majesty's justices of the peace acting for the county, riding, city or place within which such offence shall be committed, shall for every such dollar or token so uttered, offered, tendered in payment, given in exchange, or passed, circulated, or put off, contrary to the prohibition hereinbefore contained, forfeit and pay any sum not exceeding 5*l.* nor less than 40*s.*, at the discretion of the justice or justices of the peace who shall hear and determine such offence: provided that nothing in this act contained shall extend or be construed to extend to prevent any person or persons from presenting any such dollars or tokens for payment to the governor and company of the Bank of England, or at any time before the 25th day of March, 1820, or to any of their officers or servants, or to discharge or excuse the said governor and company from their liability to pay the same before the said 25th day of March, 1820: provided also, that nothing herein contained shall restrain or prevent any person or persons, after the 25th day of March next, from selling or disposing of any such dollars or tokens as aforesaid as old silver, according to the weight thereof, at the current price of silver, and without regard to the nominal or current value at which the same shall have been circulated."

May be presented at the Bank till 25th March, 1820.

May be sold as old silver.

Justices of peace empowered to hear and determine offences.

Sect. 2. "It shall be lawful for any justice or justices of the peace acting for the county, riding, city or place within which any offence against this act shall be committed, to hear and determine the same in a summary way; and such justice or justices, upon any information exhibited, or complaint made upon oath in that behalf, shall summon the person or persons accused, and also the witnesses on either side, and shall examine into the matter of fact, and upon due proof made thereof, either by the voluntary confession of the person or persons accused, or by the oath of one or more credible witness or witnesses, which oath such justice or justices is or are hereby authorised to administer, shall convict the offender or offenders, and adjudge the penalty for such offence."

Witnesses not attending.

Sect. 3. "If any person shall be summoned as a witness to give evidence before such justice or justices, either on the part of the informer or prosecutor, or of the person or persons accused, and shall neglect or refuse to appear at the time or place to be for that purpose appointed, without a reasonable excuse for such his neglect or refusal, to be allowed by such justice or justices, then such person shall forfeit for every such offence the sum of 20*l.*, to be levied and paid in such manner and by such means as are directed for recovery of other penalties under this act."

Penalties, how levied and how applied.

Sect. 6. "The pecuniary penalties and forfeitures hereby incurred and made payable upon any conviction against this act, shall be forthwith paid by the person or persons convicted as follows: one moiety of the forfeiture to the informer, and the other moiety to the poor of the parish or place where the offence shall be committed; and in case the person or persons so convicted shall refuse or neglect to pay the same, or to give sufficient security, to the satisfaction of such justice or justices, to prosecute any appeal against such conviction, such justice or justices shall, by warrant under his or their hand and seal, or hands and seals, cause the same to be levied by distress and sale of the offender's goods and chattels, together with all costs and charges attending such distress and sale, returning the overplus (if any) to the owner or owners."

Appeal.

21. *Tokens.*

Sect. 8. "If no sufficient distress can be had, then and in such case the said justice or justices shall and may commit such offender or offenders to the common gaol or house of correction of the county, riding, division, city or place where the offence shall be committed, for the space of three calendar months, unless the money forfeited shall be sooner paid, or unless or until such offender or offenders, thinking him, her, or themselves aggrieved by such conviction, shall give notice to the informer that he, she or they intend to appeal to the justices of the peace at the next general quarter sessions of the peace to be holden for the county, riding, division, city or place wherein the offence shall be committed, and shall enter into recognizance before some justice or justices, with two sufficient sureties, conditioned to try such appeal, and to abide the order of and pay such costs as shall be awarded by the justices at such quarter sessions; which notice of appeal being given not less than eight days before the trial thereof, the person or persons so aggrieved is or are hereby empowered to give; and the said justices at such sessions, upon due proof of such notice being given as aforesaid, and of the entering into such recognizance, shall hear and finally determine the causes and matters of such appeal in a summary way, and award such costs to the parties appealing or appealed against as they the said justices shall think proper; and the determination of such quarter sessions shall be final, binding, and conclusive to all intents and purposes.

Offenders committed for want of distress.

Appeal on notice.

Recognizance.

Notice not less than eight days before trial.

Costs.

Final.

Local tokens.

Local Tokens.]—The 52 Geo. III. c. 157, prohibited the circulation of *local tokens* of gold, silver, or mixed metal, after the 25th of March, 1813, but that period was extended, by 53 Geo. III. c. 19, to the 5th of July, 1813. By stat. 53 Geo. III. c. 114, after reciting that "an act passed in this session of parliament, intituled '*An Act to amend an Act of the last Session of Parliament, to prevent the issuing and circulating of Pieces of Gold and Silver, or other Metal, usually called Tokens, except such as are issued by the Banks of England and Ireland respectively*;' and whereas it is expedient that the period limited in the said act for the circulation of pieces of gold or silver and mixed metals, in the said act specified and denominated tokens, should be further extended, and that the said act should be amended," it is enacted, "that so much of the said recited act as prohibits the circulation of any such tokens as are in the said recited act described, after the 5th of July, 1813, shall be and the same is hereby repealed."

Tokens not to be circulated after a certain time.

Sect. 2. "From and after six weeks from the commencement of the next session of parliament, no piece of gold or silver, or of any mixed metal composed partly of gold or silver, of whatever name the same may be, shall pass or circulate as a token for money, or as purporting that the bearer or holder thereof is entitled to demand any value denoted thereon, either by letters, words, figures, marks or otherwise, whether such value is to be paid or given in money or goods, or other value, or in any manner whatsoever; and every person who shall, after six weeks from the commencement of the next session of parliament, circulate or pass as for any nominal value in money or goods any such token, shall for every such token so circulated or passed, whether such person shall be or have been concerned in the original issuing or circulation of any such token, or only the bearer or holder thereof for the time being, forfeit any sum not less than 5*l.* nor more than 10*l.*, at the discretion of such justice or justices of the peace who shall hear and determine such offence: provided that nothing in this act contained shall extend or be construed to extend to prevent any person from presenting any such token for payment to the original issuer thereof, or to discharge or excuse any such original issuer from his liability to pay the same."

Original issuer.

Act not to authorise issue of promissory notes under 20*s.*

Sect. 4. "Nothing in this act contained shall extend or be construed to extend to authorise or make legal the issuing of any promissory note, not being a token composed of gold or silver, or of mixed metal composed partly of gold or silver, which cannot now be issued by law."

Act not to extend to tokens of Bank of England or Ireland.

Sect. 5. "Nothing in this act contained shall extend, or be construed to extend, to any tokens issued or circulated by or under the authority of the governor and company of the Bank of England, or by or under the authority

21. *Tokens.*

52 Geo. 3, c. 157.

of the governor and company of the Bank of Ireland respectively; or in any manner to affect any such tokens or the circulation thereof; or to subject any company or companies, or person or persons, to any penalty for issuing or circulating any such tokens."

Sect. 4. Justices of the peace are empowered to hear and determine offences in a summary way.

Sect. 5. Witnesses not attending on summons to forfeit 20*l.*, to be levied (as other penalties under these acts) by distress.

Sect. 9. Justices are empowered to detain offenders in custody until return can be had of any warrant of distress.

Sect. 10. In default of distress offenders may be committed to the common gaol or house of correction for three calendar months, unless the penalty be sooner paid, or the offender give notice of appeal to the next general quarter sessions, and enter into recognizance to try such appeal. Determination of sessions to be final.

57 Geo. 3, c. 46.

Copper tokens.

By stat. 57 Geo. III. c. 46, s. 1, after reciting that "various pieces of copper, and mixed metals composed in part of copper, usually denominated tokens, have lately been, and are issued and circulated, by persons residing in various parts of the United Kingdom, in great quantities, as money, and for a nominal value of the metals of which they are composed; and whereas it is expedient that the further making and issuing of such tokens should be prohibited, and that the circulation of those already made or issued should also be prohibited after a limited period," it is enacted, "that from and after the passing of this act, no piece of copper, or mixed metal composed in part of copper, of whatever value the same may be, shall be made or manufactured or originally issued as a token for money, or as purporting that the bearer or holder thereof is entitled to demand any value denoted thereon, either by letters, words, figures, marks or otherwise, whether such value is to be paid or given in money or goods, or in any manner whatsoever; and every person who shall, after the passing of this act, make or manufacture or originally issue, or cause or procure to be made, manufactured, or originally issued, or permit or suffer to be so issued, on his or her behalf, as for nominal value in money or goods, any such token, shall for every token so made, manufactured or issued, or procured or permitted to be so made, manufactured or issued as aforesaid, forfeit any sum not less than 1*l.* nor more than 5*l.*, at the discretion of the justice or justices of the peace who shall hear and determine such offence."

No copper or mixed metal tokens to be made or issued.

Penalty.

Circulating such tokens.

Sect. 2. "From and after the 1st day of January, 1818, no piece of copper, or of any mixed metal composed partly of copper, of whatever value the same may be, shall pass or circulate as a token for money, or as purporting that the bearer or holder thereof is entitled to demand any value denoted thereon, either by letters, words, figures, marks, or otherwise, whether such value is to be paid or given in money or goods or other value, or in any manner whatsoever; and every person who shall, after the said 1st day of January, 1818, circulate or pass, as for any nominal value in money or goods, any such token, shall, for every such token so circulated or passed, whether such person shall be or have been concerned in the original issuing or circulation of any such token, or only the bearer or holder thereof for the time being, forfeit any sum not less than 2*s.* nor more than 10*s.*, at the discretion of the justice or justices of the peace who shall hear and determine such offence; provided that nothing in this act contained shall extend or be construed to extend to prevent any person from presenting any such token for payment to the original issuer thereof, or to discharge or excuse any such original issuer from his liability to pay the same: provided always, that nothing in this act contained shall be construed as affecting any tokens which have been or may be issued by the Bank of England."

Issuer to be liable for payment.

Proviso for Bank of England tokens.

Sect. 3. "And whereas certain tokens made of copper or of a mixed metal composed partly of copper, and bearing the superscription, 'Sheffield Penny Token,' were issued from time to time during the years 1812, 1813, 1814, and 1815, by the overseers of the poor of the township of Sheffield, in the county of York; and whereas the immediate suppression of the circulation of

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57 Geo. 3, c. 46.

the aforesaid tokens would be attended with great loss to the said township of Sheffield and to the holders thereof, who are for the most part labourers and mechanics, as well as with great inconvenience to the inhabitants of the town of Sheffield and the neighbourhood thereof; be it further enacted, that nothing in this act contained shall be construed to prevent such tokens as aforesaid from being passed and circulated at any time previous to the 25th day of March which will be in the year of our Lord 1823; provided always, that from and after the 25th day of March, 1823, all and every the provisions of this act shall be construed to prevent such tokens as aforesaid from being passed or circulated."

Sheffield penny tokens issued for the relief of the poor may circulate until 25th March, 1823.

Sect. 4. "In case any token or tokens made of copper or of a mixed metal composed partly of copper, with the superscription, 'Sheffield Penny Token,' and which has or have been issued by the overseers of the poor of the township of Sheffield, at any time previous to the passing of this act, shall, after the 25th day of March, 1823, and previous to the 25th day of September, 1823, be presented to the overseers of the poor of the township of Sheffield for the time being, or their agent, at the workhouse of the said township, the said overseers shall receive and take such token or tokens as aforesaid, paying to the holder or holders thereof one penny of the current coin of the realm for each and every token so presented as aforesaid; and in case such overseers or their agent shall neglect or refuse to receive and take such token as aforesaid, and to pay one penny for the same as aforesaid, it shall and may be lawful for one justice of the peace, upon complaint upon oath in that behalf made, to summon such overseers or their agent, and after hearing the parties upon both sides, to direct and order (if he shall see just cause) the said overseers of the poor or their agent to take and receive such token as aforesaid, and to pay one penny for the same as aforesaid, together with all costs and charges whatever attending such complaint so made before such justice: provided always, that it shall and may be lawful for the overseers of the poor of the said township of Sheffield to pay such penny as aforesaid out of any money received by them for the relief and maintenance of the poor of the said township; but that it shall not be lawful for the said overseers of the poor to pay the costs and charges attending any such complaint as aforesaid out of any money received by them as aforesaid."

Overseers of the poor of Sheffield to pay 1*d.* for their tokens.

Justice upon complaint may summon overseers.

Overseers may pay such penny out of poor's rates.

Sect. 5. "In case the overseers of the poor for the township of Sheffield for the time being shall at any time previous to the said 25th of March, 1823, deem it advisable to call in such tokens as aforesaid, or any amount of them, it shall and may be lawful for them to take such measures as may to them seem necessary for that purpose; paying, however, for each and every token so called in, one penny of the current coin of the realm, out of any money received by them for the relief and maintenance of the poor of the said township of Sheffield."

Overseers of the poor of Sheffield may call in tokens before 25th March, 1823.

Sect. 6. "And whereas certain other tokens made of copper, or of a mixed metal composed partly of copper, and bearing the superscription '*Birmingham, One Penny*,' were issued from time to time during the years 1811, 1812, 1813, 1814, and 1815, by the overseers of the poor of the parish of Birmingham, in the county of Warwick: and whereas the immediate suppression of the circulation of the aforesaid tokens would be attended with great loss to the said parish of Birmingham, and to the holders thereof, as well as with great inconvenience to the inhabitants of the town of Birmingham and the neighbourhood thereof; be it further enacted, that nothing in this act contained shall be construed to prevent such tokens as aforesaid from being passed and circulated at any time previous to the 25th day of March, 1820: provided always, that from and after the said 25th of March, 1820, all and every the provisions of this act shall be construed to prevent such tokens as aforesaid from being passed and circulated."

Birmingham penny tokens issued for the relief of the poor may circulate until 25th March, 1820.

Sect. 7. "In case any token or tokens made of copper, or of a mixed metal composed partly of copper, with the superscription '*Birmingham, One Penny*,' and which have been issued by the overseers of the poor of Birmingham at any time previous to the passing of this act, shall, after the 25th day of March, 1820, and previous to the 25th day of September, 1820, be

Overseers of the poor of Birmingham to pay 1*d.* for their tokens.

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57 Geo. 3, c. 46.

presented to the overseers of the poor of Birmingham, or their agents, at the workhouse of the said parish, the said overseers shall receive and take such token or tokens as aforesaid, paying to the holder or holders thereof one penny of the current coin of the realm for each and every token so presented as aforesaid; and in case such overseers or their agents shall neglect or refuse to receive and take such token as aforesaid, and to pay one penny as aforesaid for the same, it shall and may be lawful for one justice of the peace, upon complaint upon oath in such behalf made, to summon such overseers or their agent, and after hearing the parties upon either side to direct and order (if he shall see just cause) the said overseers of the poor or their agent to take and receive such token as aforesaid, and to pay one penny as aforesaid for the same, together with all costs and charges whatever attending such complaint so made before such justice: provided always, that it shall and may be lawful for the overseers of the poor of the parish of Birmingham to pay such penny as aforesaid out of any money received by them for the relief and maintenance of the poor of the said parish; but that it shall not be lawful for them to pay the costs and charges attending any complaint out of such money.

Justice upon complaint may summon overseers.

Overseers may pay such penny out of poor's rates.

Overseers of the poor of Birmingham may call in tokens before 25th March, 1820.

Sect. 8. "In case the overseers of the poor of Birmingham shall, at any time previous to the said 25th day of March, 1820, deem it advisable to call in such tokens as aforesaid, or any amount of them, it shall and may be lawful for them to take such measures as may to them seem necessary for that purpose; paying, however, for each and every such token so called in, one penny of the current coin of the realm, from and out of any money received by them for the relief and maintenance of the poor of the said township of Birmingham."

Justices to determine offences.

Sect. 9. "It shall be lawful for any justice or justices of the peace acting for the county, riding, city or place within which any offence against this act shall be committed, to hear and determine the same in a summary way; and such justice or justices, upon any information exhibited, or complaint made upon oath in that behalf, shall summon the party accused, and also the witnesses on either side, and shall examine into the matter of fact; and upon due proof made thereof, either by the voluntary confession of the party, or by the oath of one or more credible witness or witnesses or otherwise, (which oath such justice or justices is or are hereby authorised to administer,) shall convict the offender, and adjudge the penalty for such offence."

Witnesses not attending to forfeit 50*l.*

Sect. 10. "If any person shall be summoned as a witness to give evidence before such justice or justices, either on the part of the prosecutor or the person accused, and shall neglect or refuse to appear at the time or place to be for that purpose appointed, without a reasonable excuse for such his neglect or refusal, to be allowed by such justice or justices, then such person shall forfeit for every such offence the sum of 50*l.* to be levied and paid in such manner and by such means as are directed for recovery of other penalties under this act."

Conviction.

Sect. 11. "The justice or justices before whom any offender shall be convicted as aforesaid, shall cause the said conviction to be made out in the manner and form following; (that is to say,)

"*BE it remembered, that on the day of , in the year of our Lord , A. B. having appeared before me* [or *us*] *one* [or more] *of his majesty's justices of the peace* [as the case may be] *for the county, riding, city or place* [as the case may be], *and due proof having been made upon oath by one or more credible witness or witnesses, or by confession of the party,* [as the case may be,] *is convicted of* [specifying the offence,] *in the sum of . Given under my hand and seal* [or *our hands and seals*] *the day and year aforesaid.*"

"which conviction the said justice or justices shall cause to be returned to the then next general quarter sessions of the peace of the county, city, riding or place where such conviction was made, to be filed by the clerk of the peace, to remain and be kept among the records of such county, riding, city, or place."

Clerk of the peace to deliver a copy

Sect. 12. "It shall be lawful for any clerk of the peace for any county, riding, city or place, and he is hereby required, upon application made to

him by any person or persons for that purpose, to cause a copy or copies of any conviction or convictions filed by him under the directions of this act, to be forthwith delivered to such person or persons, upon payment of 1*s.* for every such copy."

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57 Geo. 3, c. 46.

thereof on payment of 1*s.*

Recovery and distribution of penalties.

Sect. 13. "The pecuniary penalties and forfeitures hereby incurred and made payable upon any conviction against this act, shall be forthwith paid by the person convicted as follows; one moiety of the forfeiture to the informer, and the other moiety to the poor of the parish or place where the offence shall be committed; and in case such person shall refuse or neglect to pay the same, or to give sufficient security to the satisfaction of such justice or justices to prosecute any appeal against such conviction, such justice or justices shall by warrant under his or their hand and seal, or hands and seals, cause the same to be levied by distress and sale of the offender's goods and chattels, together with all costs and charges attending such distress and sale, returning the overplus (if any) to the owner; and which said warrant of distress the said justice or justices shall cause to be made out in the manner and form following; (that is to say,)

Warrant.

"*To the Constable, Headborough or Tithingman of* .

"*WHEREAS A. B. of , in the county of , is this day convicted before me* [or *us*] *one* [or more] *of his majesty's justices of the peace* [as the case may be,] *for the county of* , [or *for the riding of the county of York,* or *for the town, liberty or district of* ,] [as the case may be,] *upon the oath of* , [or , *a credible witness or witnesses,*] [or *by confession of the party,*] [as the case may be,] *for that the said A. B. hath* [here set forth the offence,] *contrary to the statute in that case made and provided, by reason whereof the said A. B. hath forfeited the sum of* , *to be distributed as herein is mentioned, which he hath refused to pay: these are therefore in his majesty's name to command you to levy the said sum of by distress of the goods and chattels of him the said A. B.; and if within the space of days next after such distress by you taken, the said sum, together with the reasonable charges of taking the same, shall not be paid, then that you do sell the said goods and chattels so by you distrained, and out of the money arising by such sale, that you do pay one half of the said sum of* , *to of who informed me* [or *us* as the case shall be,] *of the said offence, and the other half of the said sum of to the overseer of the poor of the parish* [*township* or *place*] *where the offence was committed, to be employed for the benefit of such poor, returning the overplus* (*if any*) *upon demand to the said A. B., the reasonable charges of taking, keeping and selling the said distress being first deducted; and if sufficient distress cannot be found of the goods and chattels of the said A. B. whereon to levy the said sum of* , *that then you certify the same to me* [or *us*, as the case shall be,] *together with this warrant. Given under my hand and seal,* [or *our hands and seals,*] *the day of in the year of our Lord* ."

For detaining offenders till return of warrant.

Sect. 14. "It shall be lawful for such justice or justices to order such offender to be detained in safe custody until return may conveniently be had and made to such warrant of distress, unless the party so convicted shall give sufficient security to the satisfaction of such justice or justices for his appearance before the said justice or justices on such day as shall be appointed by the said justice or justices for the day of the return of the said warrant of distress, (such day not exceeding five days from the taking of such security,) which security the said justice or justices is and are hereby empowered to take by way of recognizance or otherwise."

Committal of defaulters.

Sect. 15. "If upon such return no sufficient distress can be had, then and in such case the said justice or justices shall and may commit such offender to the common gaol or house of correction of the county, riding, division or place where the offence shall be committed, for the space of one calendar month, unless the money forfeited shall be sooner paid, or unless or until such offender, thinking him or herself aggrieved by such conviction, shall give notice to the informer that he or she intends to appeal to the justices of the peace at the next general quarter sessions of the peace to be holden for the county, riding or place wherein the offence shall be committed, and shall enter into recognizances before some justice or justices, with two sufficient sureties, conditioned to try such appeal, and to abide the order of and pay

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57 Geo. 3, c. 40.

such costs as shall be awarded by the justices at such quarter sessions; which notice of appeal, being not less than eight days before such quarter sessions, such person so aggrieved is hereby empowered to give; and the said justices at such sessions, upon due proof of such notice being given as aforesaid, and of the entering into such recognizance, shall hear and finally determine the causes and matters of such appeal in a summary way, and award such costs to the parties appealing or appealed against, as they the said justices shall think proper; and the determination of such quarter sessions shall be final, binding and conclusive to all intents and purposes."

Competency of witnesses.

Proceedings not to be removed by *certiorari.*

Sect. 16. "No person shall be disabled from being a witness in any prosecution for any offence against this act, by reason of his being an inhabitant of the parish wherein such offence was committed: provided always, that no proceeding to be had touching the conviction or convictions of any offender or offenders against this act shall be quashed or vacated for want of form, or be removed by writ of *certiorari*, or any other writ or process whatsoever, into any of his majesty's courts of record at Westminster or elsewhere."

Limitation of actions.

Sect. 17. "If any action or suit shall be commenced against any person or persons for any thing done or acted in pursuance of this act, then and in every such case such action or suit shall be commenced or prosecuted within three calendar months after the fact was committed, and not afterwards; and the same and every such action or suit shall be brought within the county where the fact was committed, and not elsewhere; and the defendant or defendants in every such action or suit shall and may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon, and that the same was done in pursuance and by the authority of this act; and if the same shall appear to have been so done, or if any such action or suit shall be brought after the time limited for bringing the same, or be brought or laid in any other place than as afore-mentioned, then the jury shall find for the defendant or defendants; or if the plaintiff or plaintiffs shall become nonsuit, or discontinue his, her or their action after the defendant or defendants shall have appeared, or if upon demurrer judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall and may recover treble costs, and have the like remedy for the recovery thereof as any defendant or defendants hath or have in any other cases by law."

Not to extend to copper monies of the realm.

Sect. 18. "Nothing in this act contained shall extend or be construed to extend to any copper monies of the realm now current or to be current, by virtue of any proclamation or proclamations that shall have been or may be issued by his majesty."

XXII. Forms as to Offences relating to Coins and Coining.

(1.) Indictment on 2 Will. 4, c. 34, s. 3, for counterfeiting gold or silver coin, (see *ante*, 739.)

—— [to wit.] *THE jurors for our Lady the Queen upon their oath present, that C. D. late of the parish of , in the county of , labourer, on the day of , in the year of the reign of our Sovereign Lady Victoria, at the parish aforesaid, in the county aforesaid,* two pieces of false and counterfeit coin, each piece thereof resembling* [or *apparently intended to resemble*, or *pass for*] *a piece of the Queen's current gold* [or *silver*] *coin called a sovereign* [or *half-crown, &c.*] *falsely, deceitfully and feloniously did make and counterfeit,* [or *make* or *counterfeit,*] *against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.*

(2.) Indictment on s. 4, for colouring coin, (see *ante*, 741.)

[Commence as *supra*, (No. 1.) to the asterisk*,] *falsely, deceitfully and feloniously did gild* [or *silver*, or *wash*, or *colour*, or *case over*,] *with a certain wash* [or *with certain materials*] *capable of producing the colour of gold,* [or *silver*,] *a certain false and counterfeit coin, resembling,* [or *apparently intended to resemble*, or *pass for*,] *a certain piece of the Queen's current gold coin* [or *silver coin*] *called a sovereign* [or *half-crown, &c.* or if the coin which has been coloured is foreign coin, say *a certain foreign coin called a* ——, *resembling a certain piece of the Queen's current gold* (or *silver*) *coin called a sovereign;*] *against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.*

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[Commence as *supra*, (No. 1.) to the asterisk*,] *falsely, deceitfully, and feloniously did gild* [or *silver*, or *wash*, or *colour*, or *case over*,] *with a certain wash* [or *with certain materials*] *capable of producing the colour of gold*, [or *silver*,] *two pieces of silver*, [or *two pieces of copper*, or *coarse gold*, or *coarse silver*, or *metal*, or *mixed metal*,] *each piece thereof being respectively of a fit size and figure to be coined into a piece of false and counterfeit coin, resembling* [or *apparently intended to resemble*, or *pass for*,] *a piece of the Queen's current gold coin* [or *silver coin*] *called a sovereign*, [or *half-crown*, &c.] *and with intent that each of the said pieces of coarse silver* [or as the case may be] *should be coined into a piece of such false and counterfeit coin, so resembling a piece of the Queen's current gold coin called a sovereign, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.*

(3.) Indictment on same section for colouring coin, (*ante*, 741.)

[Commence as *supra*, (No. 1.) to the asterisk*,] *two pieces of the Queen's current coin called sixpences, falsely, deceitfully and feloniously did file.* [or *alter*,] *with intent to make each of the said pieces respectively resemble* [or *pass for*] *a piece of the Queen's current gold coin called a half sovereign, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.*

(4.) Indictment on same section, for filing or altering coin, (*ante*, 741.)

[Commence as *supra*, (No. 1.) to the asterisk*,] *two pieces of the Queen's current gold* [or *silver*] *coin called sovereigns*, [or *half-crowns*, &c.] *falsely, deceitfully, and feloniously did impair*, [or *diminish*, or *lighten*,] *with intent to make each of the pieces of the coin so impaired* [or *diminished*, or *lightened*] *pass for a piece of the Queen's current gold* [or *silver*] *coin called a sovereign*, [or *half-crown*,] *against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.*

(5.) Indictment on s. 5, for impairing gold or silver coin, (*ante*, 743.)

[Commence as *ante*, 764, (No. 1.) to the asterisk*,] *two pieces of false and counterfeit coin, each piece thereof resembling* [or *apparently intended to resemble*, or *pass for*] *a piece of the Queen's current gold* [or *silver*] *coin called a sovereign* [or *half-crown*, &c.] *falsely, deceitfully and feloniously did put off* [or *did offer to put off*, see the other words of the act, *ante*, 743, which should be adopted in describing the offence,] *to one A. B., at and for a lower rate and value than the said pieces of false and counterfeit coin by their denomination did then and there import, and were respectively coined and counterfeited for, that is to say, for the sum of ten shillings; against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.*

(6.) Indictment on s. 6, for buying or selling, or putting off counterfeit coin at a lower rate than its denomination imports, (*ante*, 743.)

[Commence as *ante*, 764, (No. 1.) to the asterisk*,] *one hundred pieces of false and counterfeit coin, each piece thereof resembling*, [or *apparently intended to resemble* or *pass for*] *a piece of the Queen's current gold* [or *silver*] *coin called a sovereign*, [or *half-crown*, &c.] *falsely, deceitfully and feloniously did import from beyond the seas, into that part of the United Kingdom called England, he the said C. D., at the time when he so imported the said pieces of false and counterfeit coin, then and there well knowing the same to be false and counterfeit; against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.*

(7.) Indictment on same section, for importing counterfeit coin, (*ante*, 743.)

[Commence as *ante*, 764, (No. 1.) to the asterisk*,] *one piece of false and counterfeit coin resembling* [or *apparently intended to resemble*, or *pass for*] *a piece of the Queen's current gold* [or *silver*] *coin called a sovereign, unlawfully and unjustly and deceitfully did utter* [or *tender*, or *put off*] *to one A. B., he the said C. D. at the time he so uttered* [or *tendered*, or *put off*] *the said piece of false and counterfeit coin, then and there well knowing the same to be false and counterfeit;*† *against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.*

An indictment for this offence, omitting the words "then and there," was held sufficient. (*Reg.* v. *Page*, 9 *C. & P.* 756.)

(8.) Indictment on s. 7, for uttering gold or silver coin, (*ante*, 745.)

[Commence as in the preceding form to the dagger†, and then proceed thus:] *and*

(9.) Indictment on same section, for

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uttering counterfeit coin, having at same time counterfeit coin in possession.

that he the said C. D. at the time when he so uttered [or *tendered*, or *put off*] *the said piece of false and counterfeit coin as aforesaid, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, had in his possession, besides the said piece of false and counterfeit coin so uttered* [or *tendered*, or *put off*], *one other piece of false and counterfeit coin resembling* [or *apparently intended to resemble* or *pass for*] *a piece of the Queen's current gold* [or *silver*] *coin called a shilling; against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.*

(10.) Indictment on same section, for uttering twice in ten days, (*ante*, 745.)

[Proceed as in the form, *supra*, (No. 8.) to the dagger †, and then thus:] *And that he the said C. D. on &c. at &c. and on the day of* [or *within the space of ten days next ensuing*] *such uttering* [or *tendering*, or *putting off*] *as aforesaid, one other piece of false and counterfeit coin resembling* [or *apparently intended to resemble* or *pass for*] *a piece of the Queen's current silver coin called a shilling, unlawfully, unjustly and deceitfully did utter* [or *tender* or *put off*] *to one E. F., he the said C. D. at the time when he so uttered* [or *tendered*, or *put off*] *the said last-mentioned piece of false and counterfeit coin then and there well knowing the same to be false and counterfeit; against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.*

(11.) Indictment on same section for uttering after a previous conviction, (*ante*, 745.)

—— *to wit. THE jurors for our Lady the Queen upon their oath present, that heretofore, that is to say, at the general quarter sessions of the peace, holden at* , *that is to say, on the day of* , *in the year of the reign of* , *before, &c.* [so continuing the record of the conviction of the first offence to the end of the judgment inclusive, stating it, however, in the past and not in the present tense, then proceed thus:] *as by the record thereof more fully and at large appears; which said judgment still remains in full force and effect, and not in the least reversed or made void. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said C. D. afterwards, and after he had been so convicted as aforesaid, to wit, on the day of* , *in the year last aforesaid, at the parish of* , *in the county of* , *one other piece of false and counterfeit coin, resembling, &c.* [conclude as in either of the three last precedents, except that the offence must be stated to have been done *feloniously*.

(12.) Indictment on s. 8, for having in possession three or more pieces of counterfeit coin, (*ante*, 748.)

[Commence as *ante*, 764, (No. 1.), to the asterisk*,] *two pieces of false and counterfeit coin, each piece thereof resembling* [or *apparently intended to resemble*, or *pass for*] *a piece of the Queen's current silver coin, called a half-crown, unlawfully, unjustly and deceitfully had in his custody* [or *possession*], *with intent to utter* [or *put off*] *the said pieces of false and counterfeit coin, he the said C. D. at the time of his so having in his custody* [or *possession*] *the said pieces of false and counterfeit coin, then and there well knowing the same to be false and counterfeit; against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.*

(13.) Indictments as to offences relative to the copper coin.

[An indictment for the offence against the copper coin may be readily framed from the preceding forms.]

(14.) Indictment on s. 10, for making, &c. a puncheon, (*ante*, 753.)

[Commence as in form, *ante*, 764, (No. 1.) to the asterisk*,] *one puncheon* [see the other instruments named *ante*, 753,] *in and upon which there was then and there made and impressed* [or *which would then and there make and impress*, or *which was then and there intended to make and impress*] *the figure* [or *stamp*, or *apparent resemblance*] *of one of the sides* [see the words of the act, *ante*, 753,] *that is to say, the head side, of a piece of the Queen's current gold* [or *silver*] *coin, called a shilling,* † *knowingly, falsely, deceitfully and feloniously, and without lawful authority, did make* [or *mend*, or *did proceed* or *begin to mend*, see the words of the act, *ante*, 753,] *against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.*

(15.) Indictment on same section, for having a puncheon in possession.

[Proceed as in the above form to the †, and then thus:] *knowingly, falsely, deceitfully and feloniously, and without lawful excuse, had in his custody and possession; against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.*

22. *Forms.*

(16.) Indictment on same section, for making, &c. a collar.

[Commence as in the form, *ante*, 764, (No. 1.) to the asterisk*,] *one collar* [or *any edger, edging tool, collar, instrument or engine,*] *adapted and intended for the working of coin round the edges with grainings,* [or *letters, grainings, or other marks or figures,*] *apparently resembling those on the edges of a piece of the Queen's current gold* [or *gold or silver*] *coin called a sovereign, falsely, deceitfully and feloniously, and without lawful authority, did make,* [or *make or mend,* or *begin or proceed to make or mend,* or *buy or sell,* or *without lawful excuse,* the proof whereof shall lie on the party accused, *have in his custody or possession,*] *he the said C. D. then and there well knowing the same to be so adapted and intended as aforesaid; against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.*

(17.) Indictment on same section, for making a press for coinage.

[Commence as *ante*, 764, (No. 1.) to the asterisk*,] *one press for coinage,* [see the words of the act, *ante*, 753,] *falsely, deceitfully and feloniously, and without lawful authority, did make,* [see the words of the act, *ante*, 753,] *he the said C. D. then and there well knowing such press to be a press for coinage; against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.*

(18.) Indictment on s. 11, for conveying tools or monies out of the mint, (*ante*, 754.)

[Commence as *ante*, 764, (No. 1.) to the asterisk*,] *one puncheon,* [or *any puncheon, counter puncheon, matrix, stamp, die, pattern, mould, edger, edging tool, collar, instrument, press or engine, or any useful part of the several matters aforesaid,*] *used and employed in and about the coining of coin,* [or *ten pieces of the Queen's current gold coin,* or *any coin, bullion, metal, or mixture of metals,*] *without lawful authority, knowingly, falsely, deceitfully and feloniously did convey out of her Majesty's mint; against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.*

Colliery, see *ante*, "*Coals*," p. 736; "*Malicious Injuries to Property*," Vol. V.

Colonies.

[6 & 7 Vict. c. 34; 6 & 7 Vict. c. 94.]

As to the proof of judgments in Courts of, see "*Evidence*," Vol. II. p. 400.

6 & 7 Vict. c. 34.

By 6 & 7 Vict. c. 34, intituled "*An Act for the better Apprehension of certain Offenders*," (28th July, 1843,) reciting that "it is expedient to make more effectual provision for the apprehension and trial of offenders against the laws who may be in other parts of her Majesty's dominions than those in which their offences were committed:" it is enacted, "that from and after the passing of this act, if any person charged with having committed any offence such as is hereinafter mentioned against the laws of any part of her Majesty's dominions not being part of the united kingdom of Great Britain and Ireland, and against whom a warrant shall have been issued for such offence by any person having lawful authority to issue the same within that part of her Majesty's dominions where such offence shall have been committed, shall be in any place within the said united kingdom, it shall be lawful, in Great Britain, for one of her Majesty's principal secretaries of state, and in Ireland for the chief secretary of the lord lieutenant of Ireland, to endorse his name on such warrant, which warrant so endorsed shall be a sufficient authority to the person or persons bringing such warrant, and to all persons to whom such warrant was originally directed, and also to all constables and other peace officers in that part of the united kingdom where the

Offenders in colonies escaping into united kingdom may be there apprehended.

6 & 7 Vict. c. 34.

said warrant shall be so endorsed, to execute the said warrant, by apprehending the person against whom such warrant is directed, and to convey the said person before a justice of the peace for the county or other jurisdiction in which the supposed offender shall be apprehended, or in Scotland either before such justice of the peace or before the sheriff depute or substitute."

For apprehension of offenders escaping to the colonies.

Sect. 2. "And to remedy the like failure of justice by the escape of persons charged with having committed offences into those parts of her Majesty's dominions which do not form part of the said united kingdom, be it enacted, that from and after the passing of this act, if any person charged with having committed any offence such as is hereinafter mentioned, in any part of her Majesty's dominions, whether or not within the said united kingdom, and against whom a warrant shall be issued by any person or persons having lawful authority to issue the same, shall be in any other part of her Majesty's dominions not forming part of the said united kingdom, it shall be lawful for the chief justice or any other judge of her Majesty's superior court of law within that other part of her Majesty's dominions where such person shall be to endorse his name on such warrant, which warrant so endorsed shall be a sufficient authority to the person or persons bringing such warrant, and also to all persons to whom such warrant was originally directed, and also to all peace officers of the place where the warrant shall be so endorsed, to execute the same within the jurisdiction of the person by whom it shall be so endorsed, by apprehending the person against whom such warrant is directed, and to convey him before a magistrate or other person having authority to examine and commit offenders for trial in that part of her Majesty's dominions."

Offender may be committed to gaol until he can be sent back to the place where the offence was committed.

Information of committal to be given.

Sect. 3. "That it shall be lawful for any person duly authorised to examine and commit offenders for trial before whom such supposed offender shall be brought as aforesaid, upon such evidence of criminality as would justify his committal if the offence had been committed in that part of her Majesty's dominions, to commit such supposed offender to prison, there to remain until he can be sent back, in manner hereinafter mentioned, to that part of her Majesty's dominions in which he is charged with having committed such offence; and immediately upon the committal of such person information thereof in writing under the hand of the committing magistrate, accompanied by a copy of the said warrant, shall be given, in Great Britain, to one of her majesty's principal secretaries of state, and in Ireland to the chief secretary of the lord lieutenant, and in any other part of her Majesty's dominions to the governor or acting governor."

Copies of depositions may be given in evidence.

Sect. 4. Provides and enacts, "That in every such case copies of the depositions upon which the original warrant was granted, certified under the hand of the person or persons issuing such warrant, and attested upon the oath of the party producing them to be the true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended."

Offenders apprehended to be sent to the place where the offence was committed;

Sect. 5. "That it shall be lawful, in Great Britain, for any one of her Majesty's principal secretaries of state, and in Ireland for the chief secretary of the lord lieutenant, and in any other part of her Majesty's dominions for the governor or acting governor, by warrant under his hand and seal, to order any person who shall have been so apprehended and committed to gaol to be delivered into the custody of some person or persons, to be named in the said warrant, for the purpose of being conveyed into that part of her Majesty's dominions in which he is charged with having committed the offence, and being delivered into the custody of the proper authorities there, to be dealt with in due course of law as if he had been there apprehended, and to order that the person so committed to gaol be so conveyed accordingly; and if the said person, after he shall have been so apprehended, shall escape out of any custody to which he shall have been committed as aforesaid, it shall be lawful to retake such person, in the same manner as any person accused of any crime against the laws of that part of her Majesty's dominions may be retaken upon an escape."

If not sent within two months after

Sect. 6. "That where any person who shall have been committed to gaol under this act shall not be conveyed out of that part of her Majesty's domi-

nions in which he shall have been so committed to gaol within two calendar months after such committal, over and above the time actually required to convey the prisoner from the gaol to which he was committed by the readiest way out of that part of her Majesty's dominions, it shall be lawful for any of her Majesty's judges in that part of her Majesty's dominions in which such supposed offender shall be in custody, upon application made to him or them by or on behalf of the person so committed, and upon proof made to him or them that reasonable notice of the intention to make such application has been given to one of her Majesty's principal secretaries of state in Great Britain, or in Ireland to the chief secretary of the lord lieutenant of Ireland, or to the governor or acting governor in any other part of her Majesty's dominions, to order the person so committed to be discharged out of custody, unless sufficient cause shall be shown to such judge or judges why such discharge ought not to be ordered."

6 & 7 Vict. c. 34.

committal, may apply to be discharged.

Sect. 7. "That in case any person apprehended under this act shall not be indicted for the offence for which he shall have been so apprehended within the period of six calendar months after his arrival in that part of her Majesty's dominions in which he is charged to have committed the offence, or if upon his trial he shall be acquitted, it shall be lawful, in Great Britain, for one of her Majesty's principal secretaries of state, and in Ireland for the chief secretary of the lord lieutenant of Ireland, and for the governor or acting governor in any other part of her Majesty's dominions, if he shall think fit, upon the request of the person so apprehended, to cause such person to be sent back, free of cost to such person, and with as little delay as possible, to that part of her Majesty's dominions in which he shall have been so apprehended."

Persons apprehended, if not indicted within six months, or if not convicted, may be sent back.

Sect. 8. "That the court before which any person apprehended under this act shall be prosecuted or tried within the said united kingdom may order, if it shall think fit, that the expenses of apprehending and removing the prisoner from any part of her Majesty's dominions not within the said united kingdom to any place within the said united kingdom shall be repaid to the person defraying the same, by the treasurer of the county or other jurisdiction in England or Ireland, or by the sheriff depute or substitute of the county in Scotland, in which the offence is charged to have been committed, the amount of such expenses being previously ascertained by an account thereof, verified by production of proper vouchers before two justices of the peace of such county or other jurisdiction, which last-mentioned justices shall examine into the correctness of the said account, and shall allow the same, or such part thereof as shall to them appear just and reasonable, under their hands and seals; and every treasurer, or sheriff depute or substitute, who shall pay the amount so ascertained, shall be allowed such payment in his accounts respecting the business of such county or other jurisdiction."

Providing for expense of removal of offenders to united kingdom.

Sect. 9 provides and enacts, "That it shall not be lawful for any person to endorse his name on any such warrant, for the purpose of authorising the apprehension of any person under this act, until it shall have been proved to him, upon oath or by affidavit, that the seal or signature upon the same is the seal or signature of the person having lawful authority to issue such warrant whose seal or signature the same purports to be."

Proof of signature of person issuing original warrant.

Sect. 10 provides and enacts, "That it shall not be lawful for any person to endorse his name upon any such warrant, for the purpose of authorising the apprehension of any person under this act, unless it shall appear upon the face of the said warrant that the offence which the person for whose apprehension the said warrant has been issued is charged to have committed is such that, if committed within that part of her Majesty's dominions where the warrant is so endorsed, it would have amounted in law to a treason, or some felony such as the justices of the peace in general or quarter sessions assembled have not authority to try in England under the provisions of an act passed in the sixth year of the reign of her Majesty, intituled '*An Act to define the Jurisdiction of Justices in General and Quarter Sessions of the Peace*,' or unless the depositions appear sufficient to warrant the committal of such person for trial."

Warrant not to be endorsed, except in cases of treason and felony, &c.

5 & 6 Vict. c. 38.

6 & 7 Vict. c. 94.

By 6 & 7 Vict. c. 94, intituled "*An Act to remove Doubts as to the Exercise of Power and Jurisdiction by Her Majesty within divers Countries and Places out of Her Majesty's Dominions, and to render the same more effectual,*" [24th August, 1843,] reciting that "by treaty, capitulation, grant, usage, sufferance, and other lawful means her Majesty hath power and jurisdiction within divers countries and places out of her Majesty's dominions: and that doubts have arisen how far the exercise of such power and jurisdiction is controlled by and dependent on the laws and customs of this realm, and it is expedient that such doubts should be removed:" it is therefore enacted, "that it is and shall be lawful for her Majesty to hold, exercise, and enjoy any power or jurisdiction which her Majesty now hath or may at any time hereafter have within any country or place out of her Majesty's dominions, in the same and as ample a manner as if her Majesty had acquired such power or jurisdiction by the cession or conquest of territory."

The power acquired by her Majesty in countries out of her dominions shall be held on the same terms as her Majesty's authority in the crown colonies.

Sect. 2. "That every act, matter, and thing which may at any time be done, in pursuance of any such power or jurisdiction of her Majesty, in any country or place out of her Majesty's dominions, shall, in all courts ecclesiastical and temporal and elsewhere within her Majesty's dominions, be and be deemed and adjudged to be, in all cases and to all intents and purposes whatsoever, as valid and effectual as though the same had been done according to the local law then in force within such country or place."

Acts done in pursuance of such power to be of the same effect as if done under local laws.

Sect. 3. "That if in any suit or other proceedings, whether civil or criminal, in any court ecclesiastical or temporal within her Majesty's dominions, any issue or question of law or of fact shall arise for the due determination whereof it shall, in the opinion of the judge or judges of such court, be necessary to produce evidence of the existence of any such power or jurisdiction as aforesaid, or of the extent thereof, it shall be lawful for the judge or judges of any such court, and he or they are hereby authorised, to transmit, under his or their hand and seal or hands and seals, to one of her Majesty's principal secretaries of state, questions by him or them properly framed respecting such of the matters aforesaid as it may be necessary to ascertain in order to the due determination of any such issue or question as aforesaid; and such secretary of state is hereby empowered and required, within a reasonable time in that behalf, to cause proper and sufficient answers to be returned to all such questions, and to be directed to the said judge or judges, or their successors; and such answers shall, upon production thereof, be final and conclusive evidence, in such suit or other proceedings, of the several matters therein contained and required to be ascertained thereby."

Courts authorised to procure evidence of such power by application to secretary of state.

Sect. 4. "And whereas it may in certain cases be expedient that crimes and offences committed within such countries or places as aforesaid should be inquired of, tried, determined, and punished within her Majesty's dominions; be it enacted, That it shall and may be lawful for any person having authority derived from her Majesty in that behalf, by warrant under his hand and seal, to cause any person charged with the commission of any crime or offence the cognizance whereof may at any time appertain to any judge, magistrate, or other officer of her Majesty within any such country or place as aforesaid, to be sent for trial to any British colony which her Majesty may by any order or orders in council from time to time appoint in that behalf; and upon the arrival of such person within such colony it shall and may be lawful for the supreme court exercising criminal jurisdiction within the same to cause such person to be kept in safe and proper custody, and, so soon as conveniently may be, to inquire of, try, and determine such crime or offence, and upon conviction of the person so charged as aforesaid to correct and punish him according to the laws in force in that behalf within such colony, in the same manner as if the said crime or offence had been committed within the jurisdiction of such supreme court: provided always, that before any such person shall be sent for trial to any such colony as aforesaid it shall be lawful for him to tender for examination to the judge, magistrate, or other officer of her Majesty to whom the cognizance of the crime or offence with which he is charged may appertain, within the country or place where the same may be alleged to have been committed, any competent witness or witnesses, the

Power to send persons charged with crimes for trial to a British colony.

Before any such person shall be sent to any colony for trial he may tender any material evidence that he would be unable to produce

evidence of whom he may deem material for his defence, and whom he may allege himself to be unable to produce at his trial in the said colony; and the said judge, magistrate, or other officer shall thereupon proceed in the examination and cross-examination of such witness or witnesses in the same manner as though the same had been tendered at a trial before such judge, magistrate, or other officer, and shall cause the evidence so taken to be reduced into writing, and shall transmit a copy of such evidence to the supreme court before which the trial of such person is to take place, together with a certificate under his hand and seal of the correctness of such copy; and thereupon it shall be lawful for the said supreme court, and it is hereby required, to allow so much of the evidence so taken as aforesaid as would have been admissible according to the law and practice of the said supreme court, had the said witness or witnesses been produced and examined at the trial before the said court, to be read and received as legal evidence at such trial: provided also, that if it shall be made to appear at such trial that the laws by which the person charged with any criminal act would have been tried had his trial taken place before a judge, magistrate, or other officer of her Majesty in the country or place in which such act may be alleged to have been committed, vary from or are inconsistent with the laws in force within such colony, in respect either of the criminality of the act charged, or of the nature or degree of the alleged crime or offence, or of the punishment to be awarded for the same, such supreme court is hereby empowered and required to admit and give effect to the laws by which such person would have been so tried as aforesaid, so far as but not further or otherwise than the same relate to the criminality of such act, or to the nature or degree of such crime or offence, or to the punishment thereof: provided also, that nothing herein contained shall be construed to alter or repeal any law, statute, or usage by virtue of which any crime or offence committed out of her Majesty's dominions might, at the time of the passing of this act, be inquired of, tried, determined, and punished within her Majesty's dominions, or any part thereof, but the same shall remain in full force and effect, any thing herein contained to the contrary notwithstanding."

on trial, and which shall be taken down and transmitted.

In case the laws of the place in which the act was committed vary from those of the colony the court may give effect to them.

Nothing herein to alter any law respecting crimes committed out of her Majesty's dominions.

Sect. 5. "And whereas it may likewise in certain cases be expedient that the sentences passed within such countries and places as aforesaid at the trial of crimes and offences within the same should be carried into effect within her Majesty's dominions; be it enacted, That if any offender shall have been sentenced to suffer death or imprisonment for or in respect of any crime or offence of which such offender shall have been lawfully convicted before any judge, magistrate, or other officer of her Majesty within any such country or place as aforesaid, it shall be lawful for any person having authority derived from her Majesty in that behalf, by warrant under his hand and seal, to cause such offender to be sent to any British colony which her Majesty may by any order or orders in council from time to time appoint in that behalf, in order that the sentence so passed upon such offender may be carried into effect within the same; and the magistrates, gaolers, and other officers to whom it may appertain to give effect to any sentence passed by the supreme court exercising criminal jurisdiction within such colony are hereby empowered and required to do all acts and things necessary to carry into effect the sentence so passed upon such offender, in the same manner as though the same had been passed by such supreme court."

Power to send convicts for execution or imprisonment to a British colony.

Sect. 6. "That if any offender shall have been ordered or sentenced to be transported beyond the seas by any judge, magistrate, or other officer of her Majesty within any such country or place as aforesaid, or, having been adjudged to suffer death, shall have received her Majesty's most gracious pardon upon condition of transportation beyond the seas, it shall be lawful for any person having authority derived from her Majesty in that behalf to cause such offender to be sent to any place beyond seas to which convicts may at any time be lawfully transported from any part of her Majesty's dominions, and, if there shall be no convenient means of transporting such offender without bringing him to England, to cause such offender to be brought

Power to transport convicts.

6 & 7 Vict. c. 94.

to England in order to be transported, and to be imprisoned in any place of confinement provided under the authority of any law or statute relating to the transportation of offenders convicted in England, until such offender shall be transported or shall become entitled to his liberty; and as soon as any such offender shall have arrived at the place to which he may be transported, or, if brought to England, shall have been there imprisoned as aforesaid, all the provisions, rules, regulations, authorities, powers, penalties, matters, and things concerning the safe custody, confinement, treatment, and transportation of any offender convicted in Great Britain shall extend and be construed to extend to such offender as fully and effectually, to all intents and purposes, as if such offender had been convicted and sentenced at any session of gaol delivery holden for any county in England."

Limitations of actions.

Sect. 7. "That if any suit or action shall be brought in any court within her Majesty's dominions against any person or persons for any thing done in pursuance of any such power or jurisdiction of her Majesty as aforesaid or of this act, then and in every such case such action or suit shall be commenced or prosecuted within six months after the fact committed, and not afterwards, except where the cause of action shall have arisen out of her Majesty's dominions, and then within six months after the plaintiff or plaintiffs and defendant or defendants shall have been within the jurisdiction of the court in which the same may be brought; and the same and every such action or suit shall be brought in the county or place where the cause of action shall have arisen, and not elsewhere, except where the cause of action shall have arisen out of her Majesty's dominions; and the defendant or defendants shall be entitled to the like notice, and shall have the like privilege of tendering amends to the plaintiff or plaintiffs, or their agent or attorney, as is provided in actions brought against any justice of the peace for acts done in the execution of his office by an act passed in the twenty-fourth year of the reign of King George the Second, intituled '*An Act for the rendering Justices of the Peace more safe in the Execution of their Office, and for indemnifying Constables and others acting in obedience to their Warrants;*' and the defendant or defendants in every such action or suit may plead the general issue, and give the special matter in evidence; and if the matter or thing complained of shall appear to have been done under the authority and in execution of any such power or jurisdiction of her Majesty as aforesaid or of this act, or if any such action or suit shall be brought after the time limited for bringing the same, or be brought and laid in any other county or place than the same ought to have been brought or laid in as aforesaid, then the jury shall find for the defendant or defendants; and if the plaintiff or plaintiffs shall become nonsuit, or discontinue any action after the defendant or defendants shall have appeared, or if a verdict shall pass against the plaintiff or plaintiffs, or if upon demurrer judgment shall be taken against the plaintiff or plaintiffs, the defendant or defendants shall and may recover treble costs, and have the like remedy for recovery thereof as any defendant or defendants hath or have in any cases of law."

24 Geo. 2, c. 44.

Repeal of sect. 4 of 6 Geo. 4, c. 33, and of 6 & 7 Will. 4, c. 78.

Sect. 8. "That from and after the first day of October in the year one thousand eight hundred and forty-four so much of the 6 Geo. IV. c. 33, s. 4, as provides, 'that from and immediately after the enrolment of any such deed or instrument as therein mentioned all such rights and duties of jurisdiction and authority over his majesty's subjects resorting to the ports of the Levant, for the purposes of trade or otherwise, as were lawfully exercised and performed, or which the letters patent or acts by the said act recited, or any of them, authorised to be exercised and performed, by any consul or other officers appointed by the said company, or which such consuls or other officers lawfully exercised and performed under and by virtue of any power or authority whatever, should, from and after the enrolment of such deed or instrument as aforesaid, be and become vested in and should be exercised and performed by such consuls and other officers respectively as his majesty might be pleased to appoint for the protection of the trade of his majesty's subjects in the ports and places respectively mentioned in the said letters patent and acts, or any or either of them;' and also that from and after the passing of this act, the

6 & 7 Will. IV. c. 78, shall be and the same are hereby repealed, save as to any matter or thing theretofore done under the authority of the same respectively." 6 & 7 Vict. c. 94.

As to the trial of indictments for murder committed in the colonies, see "*Homicide*," Vol. III. Trial of murder in.

Combination, see *post*, "*Conspiracy*," Vol. I.

Combination of Workmen, see "*Servants*," Vol. V.

Commission of Judges, see *ante*, "*Assizes*."

Commission of the Peace, see "*Justices*," Vol. III.

Commissioners of Bankrupts, see *ante*, "*Bankrupt*."

Commissioners of Sewers, see "*Sewers*," Vol. V.

Commitment.

COMMITMENT signifies the committing or sending of a person to prison, by a warrant or order, on account of some offence committed, or suspected to have been committed by him; or for the purpose of enforcing obedience to a judgment, conviction, or order. What.

There are two species of commitments, which will be here noticed; 1st, Commitments for *Safe Custody*—and 2d, Commitments *in Execution*.

As to commitments for re-examination, see "*Examination*," Vol. II. p. 470.

Commitment for Safe Custody.

I. *For what, and who may be committed*, 773.
II. *Who may commit*, 775.
III. *To what Prison, and Time, &c. of Imprisonment*, 776.
IV. *How Commitment to be framed*, 778.
V. *Charges of Commitment*, 782.
VI. *Duty of Gaoler as to receiving, &c. Defendant*, 783.
VII. *Certifying Commitment*, 784.
VIII. *Prisoner's right to a Copy of*, 784.
XI. *Discharge of Prisoner*, 784.
X. *Forms as to*, 785.

I. For what, and who may be committed.

All persons apprehended or brought before magistrates for offences which are not bailable, and also all persons who neglect to offer or complete bail for offences which are bailable, must be committed; if a *primâ facie* case is made For what offences.

1. *For what, and who may be committed.*

out against them by witnesses entitled to a reasonable degree of credit. (2 *Hawk.* c. 16, s. 1.)

In 3 *Hawk. P. C.* 7th ed. c. 8, s. 64, it is said, "that it hath been of late settled that justices of the peace have no jurisdiction over *forgery* or *perjury* at the common law," and the author then assigns as a reason "that inasmuch as the chief end of the institution of the office of these justices was for the preservation of the peace against personal wrongs and open violence, and the word 'trespass,' in its most proper and natural sense, is taken for such kind of injuries, it shall be understood in that sense only in the said statute and commission, or at the most to extend to such other offences only as have a direct and immediate tendency to cause such breaches of the peace, as libels, and such like, which, on this account, have been adjudged indictable before justices of the peace."

It seems therefore, that justices cannot commit for the offence of perjury or forgery at common law; and see *R.* v. *Bartlett*, 3 *Dowl. N. S.* 95; 12 *L. J.* (*N. S.*) *M. C.* 127, S.C. There is, however, statutable perjury under the 5 Eliz. c. 9, for which justices may commit. (*Id.*)

A *primâ facie* case must be made out.

It is necessary, that in all cases, before committing a party for safe custody, that some *primâ facie* case be made out against him by witnesses entitled to a reasonable degree of credit; (*Cox* v. *Coleridge*, 1 *B. & C.* 43, 50; 2 *D. & R.* 86, S.C.;) otherwise the magistrate would be subject to an action.

Examinations in writing must be taken.

Also, before a magistrate commits a party for a felony or misdemeanor, he must, (as required by the 7 Geo. IV. c. 64, ss. 2, 3), take the examination of the party charged, and the information upon oath of witnesses, and reduce the same into writing. (See "*Examination*," Vol. II.)

Persons guilty of contempt.

It seems doubtful whether a justice can commit for a contempt when not sitting in court. (See *Petit* v. *Addington*, *Peake*, 62; *R.* v. *James*, 5 *B. & Ald.* 894; 2 *Barnard.* 155; see "*Examination*," Vol. II. p. 470; "*Justices*," Vol. III.; "*Sessions*," Vol. V.) According to the cases of *R.* v. *Revel*, 1 *Stra.* 420; 2 *id.* 786; *Mayhew* v. *Locke*, 7 *Taunt.* 63; he may commit a party for uttering abusive language while acting in the execution of his office, as for a contempt.

Persons refusing to enter into recognizance, &c.

It is said, however, that, wheresoever a justice is empowered by any statute to bind a person over, or to cause him to do a certain thing, and such person being in his presence shall refuse to be bound, or to do such thing, the justice may commit him to the gaol, to remain there till he shall comply. (2 *Hawk.* c. 16, s. 2; *Rex* v. *Twyford*, 5 *Ad. & Ell.* 430, *post.*)

And a justice may commit a *feme covert*, who is a material witness upon a charge of felony brought before him, and who refuses to appear at the sessions to give evidence, or to find sureties for her appearance. (*Bennet and Wife* v. *Watson and another*, 3 *M. & Sel.* 1. And see "*Examination*," Vol. II. p. 466.)

Vagrants.

As to the commitments of vagrants, see "*Vagrants*," Vol. VI.

Surety of the peace.

As to commitments for not finding surety of the peace, see "*Surety of the Peace*," Vol. V.

Re-examination.

As to commitments for further examinations, see "*Examination*," Vol. II. p. 470.

Liability of magistrate for wrongful commitment.

If the magistrate, acting within the scope of his jurisdiction, but taking an erroneous view of the effect of the evidence, should come to a wrong conclusion and commit the defendant, and the defendant should be afterwards discharged by the superior court on an *habeas corpus*, yet he cannot on that account sue the magistrate. (*Burdett* v. *Abbott*, 14 *East*, 82; *Cave* v. *Mountain*, 1 *M. & Gr.* 257; 1 *Scott*, *N. R.* 132, S. C.; *Newman* v. *Hardwicke* (*Earl*), 8 *Ad. & Ell.* 124, S. C.)

Where the plaintiff was summoned before two magistrates on a charge of bastardy, and at the hearing received a verbal order to pay the sum of 1*s.* 6*d.* weekly for the support of the child, and at the same time the magistrates signed and sealed two papers, intended to be orders and exact copies of each other, one of which they delivered to the plaintiff, and the other to the churchwardens. In the paper delivered to the plaintiff, they, by mistake, ordered the mother of the child, instead of the plaintiff, to pay the sum of 1*s.* 6*d.* weekly. In the

paper which was handed to the churchwardens the plaintiff was ordered to pay that sum. It did not appear which paper was first signed and sealed. The plaintiff was served with the latter paper; and, on his refusal to pay the weekly sum, the defendant, on production of the order handed to the churchwardens, committed the plaintiff to prison: it was held, that the defendant was justified in so doing. The order produced before him being valid on the face of it; and therefore that trespass would not lie. (*Wilkins* v. *Hemsworth*, 3 *Nev. & Per.* 55; 7 *Ad. & Ell.* 807, S. C.)

1. *For what, and who may be committed.*

Three magistrates, acting under 5 & 6 Will. IV. c. 76, s. 60, committed the crier of the borough of E. to the county gaol, until he should deliver up the bell, which was stated in the conviction and commitment to be the property of the council of the borough. This conviction was afterwards quashed on appeal: held, that the magistrates had jurisdiction to convict; and, there being nothing on the face of the conviction to make it void, that trespass would not lie against the magistrates. (*Baylis* v. *Strickland*, 1 *Scott, N. R.* 540.)

But a magistrate, who commits a party in a case where he has no jurisdiction, is liable to an action of trespass; but where, supposing the facts alleged to be true, the magistrate has jurisdiction, his liability to be sued, or his exemption from such liability on the ground of jurisdiction, cannot be affected by the truth or falsehood of these facts, or by the sufficiency or insufficiency of the evidence adduced for the purpose of establishing them. (*Cave* v. *Mountain*, 1 *Man. & G.* 257; 1 *Scott, N. R.* 132, S. C.)

An information brought before a magistrate, which charges an offence within his cognizance, is sufficient to give the magistrate jurisdiction, and to protect him in an action for false imprisonment, although the information disclose no legal evidence against the alleged offender, and even although it purports to be founded upon inadmissible hearsay evidence. (*Ib.*)

In a case where the period for which a party has been committed for further examination appeared to the Court to be too long, yet the jurors having, to the satisfaction of the judge at Nisi Prius, found that the detention was not excessive, a rule nisi for a new trial was refused. (*Ib*).

In the same case it was held, that knowledge on the part of the committing magistrate that the prisoner would be subject to restriction unnecessarily severe, in the gaol to which the commitment is made, does not make the magistrate a trespasser, unless he expressly direct such treatment to be adopted in the particular case. (*Ib.*)

II. Who may commit.

Who may commit.

A justice of the peace, or other officer who has power to examine and bail the prisoner, has also in general, as incident to his office, power to commit him. (*R.* v. *Kendal*, 1 *Ld. Raym.* 66; 1 *Salk.* 347, S. C.; 2 *Hawk.* c. 16, s. 3; *Bane* v. *Methuen*, 2 *Bing.* 62; 9 *Moore*, 161, S. C.) The 7 Geo. IV. c. 64, s. 1, expressly recognizes this power in justices of the peace. (See *ante*, 321.)

The privy council and secretaries of state have the power of committing for treason and other offences affecting the public. (*R.* v. *Despard*, 7 *T. R.* 736, 742; 2 *Hawk.* c. 16.)

We have already seen who may bail a prisoner; (*ante*, 320, 321;) and from this may be collected who may commit him.

By several justices.

Before the 3 Geo. IV. c. 23, s. 2, if where two justices were required to convict, the commitment must have been by the two; (1 *Mod.* 68;) but by that act a commitment in such a case by one will suffice.

All acts of judgment required of two or more persons, must be done together; (see *Battye* v. *Gresley*, 8 *East*, 327, and cases cited in note;) and if two or more magistrates are required to commit the party, they should both be present in determining upon the commitment; but the mere act of placing their names and seals to the warrant may perhaps be done separately.

III. To what Prison, and Time, &c. of Imprisonment.

To gaol of county.

Formerly if the party accused of a felony was not bailed, or discharged without bail, he must have been committed to the common gaol of the county, &c. (5 Hen. IV. c. 10; 23 Hen. VIII. c. 2.) Or when charged merely with small offences, or for not finding sureties to keep the peace, (*Ex parte Aston*, 13 *L. J.* (*N. S.*) *M. C.* 52,) either to the common gaol or house of correction, at the option of the committing justice. (6 Geo. I. c. 19.) But now by the 5 & 6 Will. IV. c. 38, s. 3, a justice is empowered to commit any offender, whether the offence be a felony or not, for safe custody to any house of correction near the place where the assizes or sessions are to be holden, at which such offender is to be tried. (See "*Gaols*," Vol. III. p. 365.) By 6 Geo. IV. c. 64, s. 7, vagrants are to be committed to the house of correction only. (See "*Vagrants*," Vol. VI.)

To house of correction.

The right of a county magistrate to commit to Newgate is not taken away by the 6 Geo. IV. c. 64, s. 4. (*R.* v. *Cope*, 6 *Ad. & Ell.* 226; 1 *N. & P.* 515, S. C.)

The Court of Queen's Bench may commit defendants to any prison in England they think fit. (*Bothe's case*, *Moore*, 666.)

Must be in England.

The prison must be within the realm of England. (2 *Hawk.* c. 16, s. 5; and see the *Habeas Corpus* Act, "*Habeas Corpus*," Vol. III. giving a remedy by action for acting to the contrary.)

Where offence in a different county.

Generally, if a man commit felony in one county, and be arrested for the same in another county, he shall be committed to gaol in that county where he is taken. (*Dalt.* c. 170.) Yet if he escape, and be taken on fresh suit in another county, he may be carried back to the county where he was first taken. (*Id.*)

Backing warrants.

Also by statute 24 Geo. II. c. 55, s. 1, if a person be apprehended upon a warrant indorsed in another county, commonly called a backed warrant, for an offence not bailable, or if he shall not there find bail, he shall be carried back by the constable or person having him in custody before a justice of the proper county or place where the offence was committed, and there be dealt with according to law. (See this act at length, "*Warrant*," Vol. VI.)

Justices of a liberty, &c. contributing to house of correction of county, &c. may commit offenders to that house of correction, &c.

Stat. 15 Geo. II. c. 24, recites that "doubts and questions have arisen, touching the commitment of offenders, by justices of the peace of liberties and corporations, to the houses of correction of counties, ridings, or divisions, in which such liberties or corporations are situate, though the inhabitants of such liberties and corporations contribute to the maintenance and support of such houses of correction," and enacts, "that in all cases where any person liable by law to be committed to the house of correction, shall be apprehended within any liberty, city or town corporate, *whose inhabitants are contributory to the support and maintenance of the house or houses of correction of the county, riding or division, in which such liberty, city or town corporate is situate;* it shall and may be lawful for the justices of the peace of such liberty, city, or town corporate, to commit such person to the house of correction of the county, riding or division, in which such liberty, city, or town corporate is situate; which person so committed shall and may be received, detained, dealt with and ordered, and be set and kept to hard labour, or conveyed and sent away, or discharged, and be subject and liable to the same correction and punishment, to all intents and purposes, as if committed by any justice or justices of the peace of the same county, riding, or division."

This act is a declaratory one, and should have a liberal construction; and therefore where justices of a borough, contributing to the county rate, have committed persons to the county house of correction for offences cognizable within the county, the justices at their borough sessions have a right to order such prisoners to be brought before them for trial there. (*R.* v. *Amos*, 2 *B. & Ald.* 533.) It is questionable also where a county magistrate, having concurrent jurisdiction, has committed a prisoner for an offence within the borough, whether the borough sessions have not the same power of ordering such prisoner to be brought before them for trial.

Where the justices of a borough had exclusive jurisdiction within the borough itself, and jurisdiction concurrent with that of the county justices over certain places called the liberties of the borough, it was held that for an offence committed within the liberties they might commit to the county gaol, and cause the prisoner to be brought before them for trial at the borough sessions. (*R.* v. *Musson*, 6 *B. & C.* 74; 9 *D & R.* 172, S. C.)

3. *To what Prison, &c.*

Stat. 60 Geo. III. & 1 Geo. IV. c. 14, after reciting that "the trial of capital offences before justices of peace, within local and exclusive jurisdictions not being counties, may be attended with inconvenience, and it is desirable that some remedy should be provided for the same," enacts, "that the justices of the peace acting within and for any town, liberty, soke, or place, not being a county, *but having an exclusive jurisdiction for the trial of felonies and misdemeanors committed within the same*, shall, from and after the passing of this act, have full power within their respective limits, at their discretion, to commit any person duly charged before them or any of them with any *capital offence* committed within such limits, to the gaol of the county within which such town, liberty, soke or place shall be situated, there to be tried at the next session of oyer and terminer or general goal delivery, to be held in and for such county, in the same manner as if such offence had been committed within any other part of the said county, and as if such person had been committed by any justice of the same county, not being within such limits."

Justices of a town &c. having exclusive jurisdiction for trial of offences may commit for capital felonies to county gaol.

By the 4 & 5 Will. IV. c. 27, intituled "An Act for the better Administration of Justice in certain Boroughs and Franchises," (25th July, 1834), reciting, "Whereas the justices of the peace acting in and for certain boroughs and franchises in that part of the United Kingdom called England, not being empowered by charter or otherwise to hear and determine felonies at the general sessions of the peace held in and for such boroughs and franchises, are by law required to send for trial at the general assizes for the county wherein such borough or franchise may be situated, every person charged with felony, whereby the administration of justice is injuriously delayed, and the expenses to which the county in such cases is liable are grievously increased;" it is enacted, "That from and after the passing of this act, the justices of the peace, and any such justice acting in and for any borough or franchise in that part of the United Kingdom called England, *not being empowered by charter or otherwise to hear and determine felonies*, shall and may commit every person charged with any such felony as the court of quarter sessions may have jurisdiction to try, to be tried at the general quarter sessions of the peace for the county, riding, or division wherein such borough or franchise shall be situate, or at any adjournment thereof; and the justices of the peace acting in and for such county, riding, or division, are hereby empowered to try persons so committed at the general quarter sessions for the peace held for such county, riding, or division, or at any adjournment thereof."

Justices of boroughs and franchises not having power to try felonies, may commit for trial at county sessions.

Sect. 2. "And whereas the justices of the peace acting in and for certain boroughs and franchises in that part of the said United Kingdom called England have jurisdiction at the general sessions of the peace held in and for such borough or franchise to hear and determine divers felonies, and it is expedient that any such justice or justices should have power in certain cases to commit for trial, at the general quarter sessions of the peace for the county, riding, division or shire in which such borough or franchise may be situate, any person charged with felony which the said justices are not authorised or empowered to hear and determine at the general sessions of the peace held in and for such borough or franchise;" be it therefore enacted, "That from and after the passing of this act it shall and may be lawful to and for a justice or for justices of the peace acting in any of the said last-mentioned boroughs or franchises to commit to the gaol of the county, riding, division or shire in which such borough or franchise may be situate, to be tried at the general quarter sessions of the peace in and for such county, riding, division or shire, any person charged with a felony which the said court of quarter sessions may have jurisdiction to try, and to the trial of which the jurisdiction of the justices of such borough or franchise at the general sessions of the peace in and

Justices of boroughs, &c. having jurisdiction at sessions over certain felonies, may commit to county gaol persons charged with a felony the trial of which may legally take place at the quarter sessions, but to which the jurisdiction of the borough justices does not extend.

3. *To what Prison, &c.*

for such borough or franchise does not extend; and the justices of the peace acting in and for such last-mentioned county, riding, division, or shire, are hereby authorised and empowered to try any such person so committed as last aforesaid at the general quarter sessions of the peace held in and for such county, riding, division, or shire."

But in places having a recorder and a fit prison, the magistrates shall commit to such; and the quarter sessions of such places shall have authority to punish offenders.

Sect. 3. "In all such towns or franchises which have a recorder and a prison fit for the confinement of prisoners, the magistrates of such town or franchise shall commit to the prison of such town all persons charged with having committed within such town or franchise any felony or misdemeanor, which might, if the same had been committed out of such town or franchise and within the body of any county, have been tried by the justices of quarter sessions of such county; and the court of quarter sessions of such town or franchise shall have the same authority to inquire of, hear, determine, and punish any persons charged with such felonies or misdemeanors as the Courts of quarter sessions of counties have; which quarter sessions the justices for such town or franchise are hereby required to hold."

County justices may contract with council of boroughs for committal of prisoners to borough gaol.

By the 6 & 7 Will. IV. c. 105, county justices may contract with the council of a borough, in which there is a sufficient gaol, for the committal of county prisoners thereto. See "*Corporations*," Vol. II.

Time of imprisonment.

Time of Imprisonment.]—The time during which the defendant may be imprisoned will be treated of while considering the mode of framing the commitment, *post*, 780. As to the time for which a party may be committed for re-examination, see "*Examination*," Vol. II. p. 470.

Mode of imprisonment, and right to have advisers, &c. in prison.

Mode of Imprisonment and Right to have Attorney, &c. in Prison.]—The 4 Geo. IV. c. 64, provides for the mode and places of imprisonment of persons committed for trial for various offences, and the admissions at proper times and under certain restrictions of persons with whom such prisoners may desire to communicate. See "*Gaol*," Vol. III. 366, 369, &c.

The observance of this act may be enforced by *mandamus* from the Court of Queen's Bench, ordering the sheriff and gaoler to admit an attorney into the prison to consult with the prisoners. (*R.* v. *Thurtell, M. T.* 1823.)

IV. How Commitment to be framed.

Must be in writing under seal, &c.

Must be in writing, &c.]—Commitments to the custody of gaolers, &c. must be in writing under the hand and seal of the justice making the commitment, directed to the gaoler or keeper of the prison, mentioning the time and place of making it. (2 *Hawk. P. C.* c. 16, s. 13; *Hutchinson* v. *Lowndes*, 4 *B. & Ad.* 118.)

The justice may, by parol, order a party to be detained for a reasonable time, until the commitment can be made out, but not further than is necessary for that purpose; (*Hutchinson* v. *Lowndes*, 4 *B. & Ad.* 118; *Still* v. *Walls*, 7 *East*, 533;) or in cases of felony until the prisoner (in case of doubt as to bailing) shall be taken before two justices, in pursuance of the 7 Geo. IV. c. 64, s. 1. The question as to what is a reasonable time is mainly for the jury to decide on. (*Cave* v. *Mountain*, 1 *Scott, N. R.* 132; 1 *M. & Gr.* 257, S. C.; and title "*Examination*," Vol. II. pp. 470, 471.)

Also if by some reasonable occasion, as the absence of a witness or the like, the justice cannot at the return of the warrant take the examination, he may by word of mouth command the constable or any other person to detain in custody the prisoner till the next day, and then to bring him before the justice for further examination. And this detainer is justifiable by the constable or any other person, without showing the particular cause for which he was to be examined, or any warrant in writing. (1 *Hale*, 585; 2 *Hale*, 120; and see *Davis* v. *Capper*, 10 *B. & Cres.* 32.) Where, however, the detainer is for a long time, there had better be a warrant in writing for that purpose.

The time of detainer must not be longer than is necessary for the further examination. The question as to what time is necessary is mainly for a jury. (*Supra.*) 4. *How Commitment to be framed.*

In the case of a breach of the peace within view of a justice, he may instantly order the offender to be taken into custody. (*Ante*, 272.)

Direction.]—The commitment should be directed to the gaoler or keeper of the prison, and not generally to carry the party to prison. (2 *Hawk.* c. 16, s. 13; *R.* v. *Smith*, 2 *Stra.* 934; *R.* v. *Fell*, 1 *Ld. Raym.* 424.) It is usually directed to a constable and to the keeper of the goal, directing the former to convey the prisoner into the custody of the gaoler, and the latter to receive and keep him. In London and the metropolis, the commitment is usually directed to the gaoler only. Direction.

Name and authority of Justice.]—It is said that not only the name but that the office and the authority of the magistrate ought to be shown on the face of the warrant, but this in strictness is not absolutely necessary, for his authority may be supplied by parol evidence. (See 2 *Hawk.* c. 16, s. 13; 2 *Hale*, 122; *Ken. R.* 122; *Mayhew* v. *Locke*, 2 *Marsh. Rep.* 377.) It is however usual and best to state such authority. (*Id.*; *Toone*, 63.) Name and authority of magistrate.

The commitment may be in the Queen's name, but it is most usually in the magistrate's awarding it. (See *Dalt. J.* 125; 2 *Hawk.* c. 16, s. 14.) In Queen's name.

Name of Party.]—It should contain the name and surname of the party committed, if known. If not known, then it may be sufficient to describe the person by his age, stature, complexion, colour of his hair, and the like, and to add that he refuses to tell his name. (1 *Hale*, 577.) Name of defendant.

Oath.]—It is safe, but not absolutely necessary, to set forth that the party is charged upon oath. (2 *Hawk.* c. 17, s. 117; *R.* v. *Wilkes*, 2 *Wils.* 158; 1 *Leach*, 167.) Oath.

The Offence.]—It ought to contain concisely the cause for the commitment and with sufficient certainty to distinguish the nature of the offence; otherwise if it contain no cause at all, if the prisoner escape it is no offence at all; whereas if the *mittimus* contained the cause, the escape were treason or felony, though he were not guilty of the offence; and therefore for the Queen's benefit, and that the prisoner may be the more safely kept, the *mittimus* ought to contain the cause. (2 *Inst.* 52.) The offence.

In *Dr. Groenvelt's case* it was resolved, "that the cause of commitment ought to be certain, to the end that the party may know for what he suffers, and how he might regain his liberty." (1 *Ld. Raym.* 213.)

And hereupon it appeareth, that a warrant or *mittimus* "to answer to such things as should be objected against him," is utterly against law. (2 *Inst.* 591.)

Also it ought to contain the *certainty* of the cause; and therefore if it be for felony, it ought not to be generally for felony, but it must contain the special nature of the felony, briefly, as for felony, "for the death of J. S.;" or for burglary, "in breaking the house of J. S.;" and the reason is, because it may appear to the judges of the Queen's Bench, upon an *habeas corpus*, whether it be felony or not. (2 *Hale*, 122.) In high treason it is sufficient if the commitment be simply for high treason. (2 *Hawk.* c. 16, s. 16; and see *R.* v. *Despard*, 7 *T. R.* 736.)

And although it is not necessary to state in a warrant of commitment on a charge of felony, that the act was done "feloniously," yet unless it sufficiently appears on the facts stated in the commitment to be in law a felony, the judges of the Court of Queen's Bench are bound to bail the defendant. (*R.* v. *Judd*, 2 *T. R.* 25; *R.* v. *Croker*, 2 *Chit. Rep.* 138.)

A warrant of commitment for a riot, under the 7 & 8 Geo. IV. c. 30, s. 8, stating that the defendant began to pull down and destroy "in part" a dwelling-house, was held bad. (*R.* v. *Lowden*, 7 *Dowl.* 538.)

4. *How Commitment to be framed.*

A commitment for perjury, stating "that H. B. in a certain affidavit made and sworn to by him before one C. C., a competent authority by law to administer the same, did falsely, wickedly, wilfully, and corruptly commit wilful and corrupt perjury," is bad as not stating that the oath was administered in a judicial proceeding, or before a competent authority to administer an oath in a judicial proceeding. (*Reg.* v. *Bartlett*, 12 *L. J. Rep.* (*N. S.*), *M. C.* 127; 2 *Dowl. N. S.*, S. C.)

Where the commitment was for a contempt in refusing to give evidence for a specific charge brought before the justice, and it omitted to allege that the party was duly apprised that there was such a charge under inquiry before the justice, it was held bad. (*Cropper* v. *Horton*, 8 *D. & Ry.* 166.)

But a commitment for safe custody before conviction need not be so peculiarly certain, and is not construed so strictly as commitment in execution after conviction, and at all events need not be framed with the same precision as an indictment. (*R.* v. *Gourlay*, 7 *B. & Cres.* 669; 1 *M. & R.* 619, S. C.; *sed vide Fortes.* 272; *post*, 794.)

A commitment stating that A B. had been discovered and apprehended under circumstances that denoted a derangement of mind and a purpose of committing some crime for which, if committed, he would be liable to be indicted, to wit, an assault; and that the said A. B. being brought before the justice, he committed him as a dangerous person, suspected to be insane, under the 39 & 40 Geo. III. c. 94, s. 3, was held to be sufficient, although it did not state the name of the person whom the prisoner intended to assault, and it did not appear that the committing magistrate had received any evidence. (*R.* v. *Gourlay*, 7 *B. & Cres.* 669; 1 *M. & R.* 619, S. C.)

The plaintiff was taken before a magistrate, and by him committed for further examination, on a charge of felony, in unlawfully cutting trees:—Held, that this was no excess of jurisdiction, though it did not appear that the amount of the injury exceeded 20s., as is required to constitute the offence of felony, by the 7 Geo. IV. c. 30, s. 19. (*Cave* v. *Mountain*, 1 *Scott, N. R.* 132; 1 *Man. & G.* 257, S. C.)

A commitment "for treasonable practices" is legal. (*R.* v. *Despard*, 7 *T. R.* 736.) So is a commitment "for high treason." (2 *Hawk.* c. 16, s. 16.) And see as to a libel, *R.* v. *Wilkes*, 2 *Wils.* 153, 159.

Even in cases of felony, the want of the certainty of the cause seems not to make the commitment absolutely void, so as to subject the gaoler to a false imprisonment; but it lies in averment to excuse the gaoler or officer, that the matter was for felony. (1 *Hale*, 584.)

And although the commitment itself, if it be for safe custody and not a commitment in *execution*, be informal, yet if the *corpus delicti* appear on the deposition returned to the court, the defendant will not be bailed but remanded. (*R.* v. *Marks*, 3 *East's Rep.* 157; *Cald.* 295; 1 *Chit. C. L.* 113.)

As to commitments to keep the peace and be of good behaviour, see "*Surety of Peace*," Vol. V.

Conclusion.

Conclusion.]—It must have an apt conclusion; as if it be for felony, or a crime either at common law or created by statute, for which he is punishable by indictment, to detain him "*till he be thence delivered by law*," or "*by order of law*," or "*by due course of law*," or words to that effect. (2 *Hale*, 123; 2 *Hawk.* c. 16, s. 18; *R.* v. *Nash*, 2 *Bla. Rep.* 806.)

But if the commitment be not for an offence so indictable, or being an offence rather of a civil than criminal nature, as for contumacy in refusing to do something which he ought to do, the conclusion ought to be "*until he comply and perform the thing required*," for he is entitled to be discharged immediately upon the performance of his duty. If, therefore, an overseer of the poor be committed for refusing to account, the warrant of commitment must conclude, "*there to remain until he shall account.*" (*Carth.* 152.)

The true distinction is, that where a man is committed for any crime, either at common law or created by act of parliament, for which he is punishable by indictment, then he is to be committed *till discharged by due course of law*; but when the commitment is in pursuance of a *special authority*, the

terms of the commitment must be special, and exactly pursue that authority. (*Nash's case*, 2 *Bla. Rep.* 806.)

4. *How Commitment to be framed.*

In a case, however, where a collector of the parish rates was committed to the county gaol by warrant of two justices, upon complaint made against him for that he having been duly appointed collector of the rates for the parish of Richmond, pursuant to stat. 25 Geo. III. c. 41, refused to account, and pay over the monies collected by him by virtue of the act to W. S., the person duly authorised to receive them; and the justices adjudged that he should be committed to the gaol, there to remain without bail or mainprize, until he should have made a true and fair account, and until such money, as upon the said account shall appear to be remaining in his hands, should be paid by him or his sureties to W. S., and they required the keeper of the gaol to receive and safely keep him until he should be discharged by due course of law, and because the warrant directed that he should be detained "*until he was discharged by due course of law*," a *habeas corpus* was obtained on the ground of the warrant being void; the cases of *Yorley*, 1 *Salk.* 351; 1 *Ld. Raym.* 100, S. C.; *Bracy*, 1 *Ld. Raym.* 99; *Hollingshead*, 2 *Ld. Raym.* 851; and *Baldwin* v. *Blackmore*, 1 *Burr.* 602, having been cited, *Lord Ellenborough*, C.J., after the argument of the case, said, "If there was any uncertainty on the face of the commitment, I should have agreed with the argument. But coupling the premises with the conclusion, is it not in effect the same as if the warrant had directed the gaoler to detain the party until he had accounted? We must read the warrant as if the magistrates had in the conclusion recited over again the adjudication." *Et per Le Blanc*, J. "Some precise authority should be shown to justify the Court in adopting the objection made to this warrant. When the party has accounted and paid over the money, he will be entitled to be discharged by due course of law." The prisoner was remanded. (*Exp. Goff*, 3 *M. & Sel.* 203.)

A conviction by two justices of an overseer, under stat. 17 Geo. II. c. 33, upon complaint of the succeeding overseers, for refusing and neglecting to deliver over to them a "certain book belonging to the parish, called, 'The Bastardy Ledger,'" convicting him of the said offences, and adjudging that he should be committed to the common gaol "*until he shall have yielded up all and every the books concerning his said office of overseer belonging to the parish*," &c.; was held void as to the adjudication in respect to the imprisonment and the commitment made in pursuance thereof, on account of a clear excess of jurisdiction, the imprisonment being for too long a time; and it was held that the imprisonment under the commitment was a trespass in the committing magistrate, for which an action was maintainable, the commitment being void *in toto*. (*Groome* v. *Forrester*, 5 *M. & Sel.* 314; "*Poor*," Vol. IV.)

See further as to the conclusion of the commitment where it is in *execution*, *post*, 792.

Consequences of defect in conclusion.

In the case of warrants of commitment for safe custody, if only part of the conclusion be irregular, it doth not seem to make the warrant void, but the law will reject that which is surplusage, and the rest shall stand; so that if the matter appear to be such, for which he is to remain in custody, or be bailed, he shall be bailed or committed as the case requires, and not discharged, but the wrong conclusion shall be rejected. (1 *Hale*, 584; and see *Davis* v. *Capper*, 10 *B. & Cres.* 37.)

But if a man be committed in execution for non-payment of two sums, one of which is not due, the warrant of commitment is bad for the whole. (*Exp. Addis*, 1 *B. & Cres.* 90; 2 *D. & R.* 167, S. C.; when otherwise, see *Morgan* v. *Brown*, 4 *Ad. & Ell.* 516; *Skingley* v. *Surridge*, 11 *M. & Wels.* 503.)

And we have just seen, though a warrant of commitment for felony be informal, yet if the *corpus delicti* appear in the depositions returned to the Court, they will not bail, but will remand the prisoner. The practice in cases of defective commitments was in this case altered, to prevent in future prisoners thus remanded from renewing the same application to another court or judge. (*R.* v. *Marks and others*, 3 *East*, 157; *R.* v. *Taylor*, 7 *D. & R.* 622; 3 *D. & R. M. C.* 491, S. C.)

4. How Commitment to be framed.

May be a fresh valid detainer after a bad commitment.

In the case of *R.* v. *James Gordon* (1 *B. & Ald.* 572, n.), the prisoner being committed to the New Prison, Clerkenwell, till the next general sessions, for assaulting a custom-house officer's assistant in the execution of his duty, a motion was made for a *habeas corpus*, because the stat. 13 & 14 Car. II. c. 11, directs that such offender shall be committed, without bail, till the next quarter sessions. The writ was granted. Afterwards, the defendant being brought up, the keeper of New Prison returned the warrant of commitment, which appeared to be to the general sessions; but he also returned a warrant of detainer for the same offence, issued the day before he was brought up, by the same justice, which was till the next quarter sessions. The defendant, therefore, was remanded without opposition, the warrant of detainer being strictly regular.

Seal.

Seal.]—It must be under seal; without this, the commitment is unlawful, the gaoler is liable to false imprisonment, and the wilful escape by the gaoler, or breach of prison by the felon, makes no felony. (1 *Hale*, 583.)

But this must not be intended of a commitment by the sessions, or other court of record: for there the record itself, or the memorial thereof, which may at any time be entered of record, are a sufficient warrant, without any warrant under seal. (1 *Hale*, 584.)

Date and place of making

Date and Place of Making.]—It should also set forth the time and place at which it is made. (2 *Hawk.* c. 16, s. 13; and see *Re Fletcher*, 13 *L. J.* (*N. S.*), *M. C.* 16.) A mistake in the date might be fatal. (*Exp. M'Gee*, 6 *Mad. Rep.* 206; *Salt's case*, 13 *Vesey*, 361.) But it seems if dated too soon the commitment would not be bad, if not issued too soon. (See *Newman* v. *Hardwicke*, 3 *Nev. & Per.* 368.)

V. Charges of the Commitment.

Charges to be paid by the offender if able.

By stat. 3 Jac. I. c. 10, s 1, "all and every person and persons whatsoever, that from and after the end of this present session of parliament, shall be committed to the common or usual gaol within any county or liberty within this realm, by any justice or justices of the peace, for any offence or misdemeanor, to any such gaol, that the said person or persons so to be committed as aforesaid, having means or ability thereunto, shall bear their own reasonable charges for so conveying or sending them to the said gaol, and the charges also of such as shall be appointed to guard them to such gaol, and shall so guard them thither: and if any such person or persons so to be committed as aforesaid shall refuse, at the time of their commitment and sending to the said gaol, to defray the said charges, or shall not then pay or bear the same, that then such justice or justices of the peace shall and may by writing under his or their hand and seal, or hands and seals, give warrant to the constable or constables of the hundred, or constable or tithing-man of the tithing or township where such person or persons shall be dwelling and inhabit, or from whence he or they shall be committed as aforesaid, or where he or they shall have any goods within the county or liberty, to sell such and so much of the goods and chattels of the said persons so to be committed, as by the discretion of the said justice or justices of the peace shall satisfy and pay the charges of such his or their conveying and sending to the said gaol, the appraisement to be made by four of the honest inhabitants of the parish or tithing where such goods or chattels shall remain and be, and the overplus of the money, which shall be made thereof, to be delivered to the party to whom the said goods shall belong."

If not able, to be paid out of the county rates.

And by the 27 Geo. II. c. 3, st. 1, reciting that "by an act passed in the third year of the reign of King James the First, intituled '*An Act for the rating and levying of the Charges for conveying Malefactors and Offenders to the Gaol*,' every offender so to be conveyed shall bear the charges of himself and of those who convey him; and if he refuse so to do, his goods within the same county may be distrained and sold to satisfy the same: and if he hath

no goods, the constable, churchwardens, and other inhabitants of the parish where he was taken, shall make a tax on every inhabitant thereof to pay the said charges: and whereas the taxing the parish where such offender was taken to pay such charges is a great discouragement to parishes to take offenders, and it is also found by experience to be very difficult to make a rate on the inhabitants to raise such tax, whereby constables and others are often kept out of their money by them advanced for the service of the public, and sometimes lose the same, to their very great injury and vexation;" enacts, "that from and after the 24th day of June, 1754, when any person, not having goods or money within the county where he is taken, sufficient to bear the charges of himself and of those who convey him, is committed to gaol or the house of correction, by warrant from any justice or justices of the peace, then, on application by any constable or other officer who conveyed him, to any justice of the peace for the same county or place, he shall upon oath examine into and ascertain the reasonable expenses to be allowed such constable or other officer, and shall forthwith, without fee or reward, by warrant under his hand and seal, order the treasurer of the county or place to pay the same, which the said treasurer is hereby required to do, as soon as he receives such warrant; and any sum so paid shall be allowed in his accounts."

5. Charges of. 27 Geo. 2, c. 3.

Sect. 4. "Nothing in this act contained shall extend to empower such court, or any justice or justices of the peace, to make warrants or orders on the treasurer of the county of Middlesex for the payment of the expenses of the constable or other officer in conveying any person to gaol, or for the payment of any person for his time, trouble, and expense, who shall appear on his recognizance to give evidence as aforesaid; but that within the said county of Middlesex the expenses of the constable or other officer, occasioned by his conveying of any person to gaol by virtue of a warrant from any justice or justices of the peace, shall, (after such expenses have been examined into upon oath, and allowed by such justice or justices, and for which no fee or reward shall be taken,) be paid by the overseer or overseers of the poor of the parish or place where the said person was apprehended, who is and are hereby authorised and required to pay the same; and the sum or sums so paid shall be allowed in his or their accounts."

Except in Middlesex.

By the *Habeas Corpus* Act, 31 Car. II. c. 2, s. 2, the charge of conveying an offender is limited not to exceed 12*d.* a mile; which may be an argument for allowing as much in this case, especially as security is to be given before a man is removed on that act by *habeas corpus* that he shall not escape by the way, which renders guards in that case not so necessary.

Rate of charge per mile.

The provisions of the 55 Geo. III. c. 50, do not seem to affect these regulations.

As to the expenses of carrying vagrants to gaol, where they have no effects, see 4 Geo. IV. c. 64, s. 39; 5 Geo. IV. c. 83, s. 22; "*Vagrant*," Vol. VI.

Vagrants.

A justice before whom a deserter is brought and committed to the county gaol may, under the authority of these statutes, if the deserter be unable to bear the charges himself, direct the expenses of conveying him thither to be paid by the treasurer of the county to the constable of the parish who found and apprehended him in the parish, and conveyed him to the gaol. (*R.* v. *Pierce*, 3 *M. & Sel.* 62.)

Deserter

VI. Duty of Gaoler as to Receiving, &c. the Prisoner.

If the gaoler shall refuse to receive a felon, or shall take any thing for receiving him, he shall be punished for the same by the justices of gaol delivery. (*Dalt* c. 170, p. 410. Stat. 4 Edw. III. c. 10. See also stat. 55 Geo. III. c. 50.)

Gaoler to receive a prisoner.

But if a man be committed for felony, and the gaoler will not receive him, the constable must bring him back to the town where he was taken; and that town shall be charged with the keeping of him until the next gaol deli-

6. *Receiving, &c. the Prisoner.*

very; or the person that arrested him may in such case keep the prisoner in his own house, as it seemeth. (*Dalt.* c. 170, p. 410.)

But in other cases it seems that regularly no one can justify detaining a prisoner in custody out of the common gaol, unless there be some particular reason for so doing; as if the party be so dangerously sick that it would apparently hazard his life to send him to the gaol, or there be evident danger of a *rescous* from rebels, or the like. (2 *Hawk.* c. 16, s. 9; see *ante.*)

A gaoler is protected from liability though he should receive by mistake of the constable a person whom it was intended not to confine. (*Sir T. Jones*, 214; *Badkin* v. *Powell, Cowp.* 479; *sed vide Aaron* v. *Alexander*, 3 *Campb.* 35.)

As to the classification and treatment of prisoners in gaols in general, and compelling them to work, see "*Goal,*" Vol. III.

VII. Certifying the Commitment.

Certifying commitment.

By stat. 3 Hen. VII. c. 3, the sheriff or gaoler shall certify the commitment to the next gaol delivery.

VIII. Prisoner's right to a Copy of Commitment.

Copy of commitment.

The Habeas Corpus Act, 31 Car. II. c. 2, s. 5, enacts, "that if any officer or gaoler shall, upon demand made by the prisoner or other person on his behalf, refuse to deliver, or within the space of six hours after demand shall not deliver, to the person so demanding, a true copy of the warrant of commitment or detainer of such prisoner, he shall forfeit to the prisoner or party aggrieved, for the first offence 100*l.*, and for the second offence 200*l.*; and shall also be deprived of his office: and the prisoner suing as the party grieved is entitled to the costs of action. (See *Ward* v. *Snell*, 1 *H. Bla.* 10.)

And where a person is sent over from Ireland under a warrant from a secretary of state for that country, charged with any offence, and is committed to prison until he can be brought before a judge, and the warrant is left with the gaoler, this is such a commitment as entitles the prisoner to a copy under the above act, after it has been demanded. (*Sedley* v. *Arbouin*, 3 *Esp. Rep.* 174.)

But where a person after appearing before a magistrate, and being unable to find bail, at his own request is permitted to continue in the custody of the officer for a short time, he is not entitled to a copy of the commitment. (*Hudson* v. *Ash*, 1 *Stra.* 167.)

And service of a demand of a copy of the commitment on the turnkey of a prison, is not sufficient to support an action against the gaoler for the penalty incurred by him under the Habeas Corpus Act, if the gaoler himself were in the prison: but if he be not there, then the deputy may be served; and if the deputy have no deputy, then in the absence of the deputy, service may be made on the turnkey, or it may be left at the gaol; for it is the duty of the governor to leave some person in his place. (*Huntley* v. *Luscombe*, 2 *Bos. & Pul.* 530.)

As to the right to a copy of the depositions, see "*Examination,*" Vol. II. p. 474; to a copy of conviction, see *post*, "*Conviction;*" and to a copy of indictment, see "*Indictment,*" Vol. III.

IX. Discharge of Prisoner.

Discharge of prisoner.

It seems that a person legally committed for a crime certainly appearing to have been done by some one or other cannot be lawfully discharged by any one but the queen, till he be acquitted on his trial, or have an *ignoramus* found by the grand jury, or none to prosecute him on a proclamation for that purpose by the justices of gaol delivery. But if a person be committed on a bare suspicion, without an indictment, for a supposed crime, where

afterwards it appears that there was none, as for the murder of a person thought to be dead, who afterwards is found to be alive, it hath been holden, that he may be safely dismissed without any further proceeding, so that he who suffers him to escape is properly punishable only as an accessary to his supposed offence; and it is impossible that there should be an accessary where there can be no principal, and it would be hard to punish one for a contempt in disregarding a commitment founded on a suspicion, appearing in so uncontested a manner to be groundless. (2 *Hawk.* c. 16, s. 22.)

9. *Discharge of.*

When a defendant is advised that his commitment is illegal, or that he is entitled to be discharged or bailed by a superior jurisdiction, he may obtain relief by writ of habeas corpus. (See "*Habeas Corpus*," Vol. III.)

X. Forms.

(1.) General form of warrant of commitment for safe custody.

—— (the county where the commitment is made): *J. P. Esquire, one of her Majesty's justices of the peace for the said county, to the constable of in the said county, and to the keeper of the common gaol,* [or if an offence of small degree, say *house of correction,*] *at in the said county.*

These are to command you the said constable, in her Majesty's name, forthwith to convey and deliver into the custody of the said keeper of the said common gaol [or *house of correction,*] *the body of C. D. charged this day before me, the said justice, on the oath of A. B.* [*labourer*], *and others, for that he the said A. B. on the day of in the year of our Lord one thousand eight hundred and , at in the said county, did, &c.* [stating the offence concisely; see various forms under the particular titles of offences.] *And you the said keeper are hereby required to receive the said A. B. into your custody in the same* [*common gaol,*] *and him there safely to keep, until he shall be thence delivered by due course of law. Herein fail you not. Given under my hand and seal the day of , in the year of our Lord* *J. P.* [L. S.]

(2.) The like in the Queen's name.

County of } *VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To the keeper of our* [*gaol*] *at , in our said county of , or to his deputy, greeting.*

Whereas A. O. late of in our said county, [*yeoman,*] *is arrested for suspicion of* [*felony,*] *by him, as it is said, committed, in feloniously* [*taking and carrying away , of the value of , the property of .*] *We therefore command you, and each of you, that you receive him the said A. O. into your custody in our said* [*gaol,*] *or that one of you do receive him, there to remain till he be delivered from your custody according to the law of our kingdom of England. Witness J. P. Esquire, one of the justices assigned to keep the peace in our said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in our said county committed, at in the said county, the day of , in the year of our reign.* *J. P.* (L. S.)

(3.) Commitment of a person for further examination.

See the form, title "*Examination*," Vol. II. 476, No. 5.

(4.) Order on overseers (if in Middlesex), or treasurer of the county (if in any other county), to reimburse expenses of conveying a prisoner to gaol by stat. 27 Geo. 2, c. 3, st. 1. *Ante*, 782.

To the treasurer of the county of [or *to the overseers of the poor of the parish or place of the county of .*]

County of } *WHEREAS application hath been this day made to me, one of her Majesty's justices of the peace in and for the said county, by A. B. one of the constables of the parish of in the said county, to allow the reasonable expenses of his conveying C. D. to the common gaol at , in the county aforesaid, who was by me committed to the said gaol, for* [here state the substance of the offence as in a commitment.]

It having been duly made appear to me, the said justice, that the said C. D. hath not money nor goods within the said county sufficient to bear the charges of himself and those who conveyed him to the said gaol, and I having upon oath examined into the expenses thereof, and made due inquiry into the premises, do hereby ascertain and allow the reasonable expenses thereof, at the sum of , which I hereby order and require you the treasurer of the said county [or *overseers*] *forthwith to pay the said A. B. Given under my hand and seal this day of , in the year of our Lord one thousand eight hundred and , J. P.* (L. S.)

10. *Forms.*

(5.) Warrant of distress for expenses when a person is committed to gaol. *Ante*, 782.

County of } *To the constable of in the said county.*

WHEREAS by warrant under the hand and seal of me J. P. Esquire, one of her Majesty's justices of the peace in and for the said county of , bearing date the day of , in the year of our Lord one thousand eight hundred and , A. O. late of , in the said county, [*labourer,*] *was committed to the common gaol* [or *house of correction*, (see ante, 776)] *of the said county of , for* [here state the substance of the offence,] *he the said A. O. having means or ability to bear his own reasonable charges for so conveying or sending him to the said gaol,* [as the case may be,] *and the charges of those appointed to guard him thither; and whereas A. C., constable of the parish of , in the said county, who in obedience to such warrant conveyed the said A. O. to the said common gaol,* [or *house of correction*] *of the said county of , hath made oath before me the said justice, that the said A. O. refused at the time of his commitment and sending to the said common gaol* [or *house of correction*] *to defray the said charges of conveying him as aforesaid, and did not then pay nor hath since paid the same, which said charges amount to the sum of . These are, therefore, to command you to sell such and so much of the goods and chattels of the said A. O. as shall satisfy and pay the sum of , being the charges of such his conveying to the said gaol* [or *house of correction*], *the appraisement to be made by four of the honest inhabitants of the parish where such goods and chattels shall be; and I do hereby order and direct the goods and chattels so to be distrained to be sold and disposed of at the expiration of four days from the time of taking such distress, unless the said sum of , for which such distress shall be made, together with the reasonable charges of taking and keeping such distress, shall be sooner paid, returning the overplus upon demand to him the said A. O., the reasonable charges of taking, keeping and selling the said distress being first deducted. And if sufficient distress cannot be found of the goods and chattels of the said A. O. whereon to levy the said sum of , that then you certify the same to me, together with this warrant. Given under my hand and seal at , in the said county of , the day of , in the year of our Lord one thousand eight hundred and* J. P. (L. S.)

Commitment in Execution.

I. *For what, and who may be committed*, 786.
II. *Who may commit, and to what Prison*, 787.
III. *How Commitment to be framed and construed, &c.* 788 *to* 793.
IV. *Execution of, Expenses of, Copy and Certificate of*, 795.
V. *Discharge of Prisoner*, 795.
VI. *Forms as to*, 796.

I. For what, and who may be committed.

For what, and who may be committed.

A commitment in execution is used either as an original punishment, or as the means of enforcing payment of a pecuniary fine, or in any other manner enforcing obedience to the sentence of a magistrate or sessions.

The power of making commitments of this nature is derived for the most part from statutory provisions; in many cases, however, it exists at common law as an incidental means of enforcing the law.

If a statute assigns a commitment as a mode of punishment in the first instance, the commitment follows upon and is the legal consequence of the judgment. But where it is assigned merely as a subsidiary to the enforcing a punishment or penalty, the magistrate cannot adopt it till he has ascertained the punishment or penalty cannot be enforced. As if a statute imposes a penalty for an offence to be levied by distress, or a commitment in default of payment, before making the commitment, the want of sufficient goods to answer the penalty should be ascertained, and this is generally done by means

of the officer's return to a warrant of distress. (See *R.* v. *Hawkins, Fort.* 272; *Hill* v. *Bateman*, 1 *Stra.* 710.) The 5 Geo. IV. c. 18, gives magistrates power in all cases to commit an offender convicted in a penalty where there is no distress to be had for the penalty; and he may, under this act, order the party to be detained in custody until the return of the warrant of distress; or may even commit him in the first instance, if it satisfactorily appears to him that the defendant has not sufficient goods to satisfy the penalty and costs.

1. *For what, &c.*

Where an offender is convicted in *one* penalty, under a statute providing a corporal punishment, on failure of sufficient distress, and has effects sufficient only to satisfy *part*, it has been held that the goods ought not to be taken, but the corporal punishment should be resorted to. If, however, the same person be separately convicted in *two* penalties, and his goods are sufficient to satisfy *one* only, they ought to be levied under *one* conviction, and the corporal punishment should be inflicted for the other. (See *Reg.* v. *Wyatt*, 2 *Ld. Raym.* 1195; *Fort.* 132; 11 *Mod.* 54, S. C.; and see *Morgan* v. *Brown*, 4 *Ad. & Ell.* 515; *N. & M.* 56, S. C.) But the law never intended that a man should suffer both punishments for *one* conviction. (*Reg.* v. *Wyatt*, 2 *Ld. Raym.* 1196.)

For a second offence the imprisonment may be from the expiration of the imprisonment under the prior conviction. (4 *Burr.* 2577; 1 *Leach*, 536; 1 *Chit. C. L.* 800.)

A commitment for a contempt is a commitment for punishment. (*R.* v. *James*, 5 *B. & Ald.* 894; 1 *D. & R.* 559, S. C.) A question was there raised, but not decided, as to whether a magistrate could commit for a contempt. (See *Cropper* v. *Horton*, 8 *D. & R.* 166, "*Examination*," Vol. II. p. 470.)

A commitment of an insane person under the 39 & 40 Geo. III. c. 94, s. 3, is not a commitment in execution. (*Ex parte Gourlay*, 7 *B. & Cres.* 669; 1 *M. & R. Mag. Ca.* 282, S. C.; "*Lunatics*," Vol. III.)

II. Who may commit, and to what Prison.

The observations already made as to commitments for safe custody, *ante*, 776, will for the most part here apply.

Who may commit, and to what prison.

In the case of a conviction the commitment is in general made by the justice who convicted the offender. By 3 Geo. IV. c. 23, s. 2, however, a commitment may in all cases be made by one justice, even in cases where the conviction must be by two, and it is immaterial whether the justice who makes the commitment be one of the justices before whom the conviction was made. (See *post*, "*Conviction*.")

If the statute imposing a penalty on conviction for an offence, provide, as it frequently does, that the same shall be recovered in a summary way before two justices, to be levied by distress and sale of the offender's goods, and that if there be no sufficient distress, the offender shall be committed to prison for a certain time without bail; and the conviction be removed into the Queen's Bench by *certiorari*, that Court has no jurisdiction to make such commitment, which is left to the discretion of the justices; and in such case if to a *levari facias* issued out of that Court the sheriff return *nulla bona*, the Court will award a *procedendo*, &c. (*R.* v. *Neville*, 2 *B. & Adol.* 299.)

To house of correction.

By the 5 & 6 Will. IV. c. 38, s. 3, the Court in which the offender is convicted at the assizes or sessions for any offence for which he is liable to the punishment of death, transportation, or imprisonment, may commit such convict to the house of correction in execution of the judgment against him.

How persons convicted of offences for which they are liable to death &c. shall be disposed of.

By sect. 4, "Whenever any person shall be convicted at any assizes or sessions of any offence for which he or she shall be liable either to the punishment of death, transportation or imprisonment, it shall be lawful for the Court (if it shall so think fit) to commit such person to any house of correction for such county, in execution of his or her judgment; and in case of the commitment of any person sentenced to death, execution of such judgment shall and may be had and done by the sheriff of the county; and in case of the com-

2. *Who may commit, &c.*

mitment of any person either sentenced to transportation, or pardoned for any capital offence on condition of transportation, all the powers, provisions and authorities for the removal of offenders sentenced to transportation, given or granted by any former act or acts of parliament to sheriffs or gaolers, shall be and the same are hereby extended and given to the keepers of houses of correction in whose custody such last-mentioned offenders shall be." (See "*Gaols*," Vol. III.)

III. How Commitment to be framed and construed, &c.

Must be in writing, &c.

The commitment must be in writing under the hand and seal of the justice by whom it is made, and expressing his office or authority and the time and place at which it is made, &c. (2 *Hawk. P. C.* c. 16, s. 13; *Hutchinson* v. *Lowndes*, 1 *Nev. & M.* 674; 4 *B. & Ad.* 118, S. C.)

It need not be immediately made out; the detention of the party during the time necessarily required to make it out would be justifiable, but not beyond that time. (*Ante*, 778.)

In cases where a distress may be issued, the magistrate may detain the party in custody till the return of the warrant of distress; such order of detention may be by parol. (*Ante*, 778.)

Several justices.

As to the necessity for both the justices being present together when making the commitment, in the case of a commitment by two or more justices, see *ante*, 775.

Form of commitment.

The observations already made as to the form of the commitment for safe custody will be applicable here, *ante*, 779 to 782.

Construed strictly.

Commitments in *execution*, however, must be more peculiarly certain and construed more strictly than commitments for safe custody. (See *Exparte Gourlay*, 7 *B. & Cres.* 669; 1 *M. & R.* 619, S. C.) It is not a mere matter of form, for by not having the causes of his commitment duly stated, the party imprisoned is for the time deprived of the benefit of a habeas corpus. Sometimes they amount to a conviction, and must have the same rule of construction. (See *Wilkins* v. *Wright*, 2 *C. & M.* 203.) And in general it would seem, that they must be construed as strictly as a conviction. (*Re Peerless*, 1 *Ad. & Ell. N. S.* 143; 10 *Law J.* (*N. S.*) *M. C.* 67, S. C.) But it will not be criticised with the same strictness to which a conviction is subjected, if there be reasonable ground for presuming that the conviction on which the commitment is founded is free from objection, and which in general may be presumed. (*R.* v. *Rogers*, 1 *D. & R.* 156; 1 *D. & R. M. C.* 59; 5 *B. & Ald.* 773, S. C.; and see further, "*Habeas Corpus*," Vol. III.)

Must not be in alternative.

It ought not in any material part to be in the disjunctive. (*R.* v. *Evered*, *Cald.* 26.) Two justices committed Robert Collehole, an apprentice, for running away from his master. An objection was taken to the *form* of the commitment, for the uncertainty thereof, which ran thus: "as an apprentice *or* servant, for disobeying his indentures *or* articles." *Lord Mansfield* said, that the objection to the warrant of commitment as running in the disjunctive must undoubtedly prevail. The counsel for the prosecution consented to the prisoner's discharge. (And see *R.* v. *North*, 6 *D. & R.* 143; 3 *D. & R. M. C.* 119, S. C.; *R.* v. *Sadler*, 2 *Chit. Rep.* 519; *R.* v. *Pain*, 7 *D. & R.* 678; 3 *D. & R. M. C.* 517, S. C.)

Should be an offence within the statute.

Where the offence is created by statute, it should be described accordingly. (*R.* v. *Remnant*, 5 *T. R.* 169; 2 *Leach*, 583.)

But not always sufficient to follow words of statute.

But the commitment may be insufficient, though, in describing the offence, it pursues the words of the statute. Thus a commitment under the Pilot Act was held defective for not alleging the offer of the licensed pilot to have been made to the defendant, or in his presence, though the act does not contain these words. (*Reg.* v. *Chancy*, 6 *Dowl.* 281; *Re Fletcher*, 13 *Law J.* (*N. S.*) *M. C.* 16.)

Need not name the statute.

It is sufficient to state that the offence was "contrary to a certain statute made and passed in the first year of the reign of Geo. I." without pointing out specifically the statute. (*R.* v. *Harpur*, 1 *D. & R.* 222; 1 *D. & R. M. C.* 67, S. C.; and see further, "*Indictment*," Vol. III.; *post*, "*Conviction*.")

If the statute requires the complaint to be on oath, the commitment should show that it was so. (See *R.* v. *Lewis*, 13 *Law J.* (*N. S.*) *M. C.* 46.)

3. *How to be framed.*

If the warrant be on a conviction, it must show before whom the conviction was, (*R* v. *York*, 5 *Burr.* 2684,) and recite a conviction for an offence over which the committing magistrate had jurisdiction, and show that he had such jurisdiction; and the Court will not presume a conviction to be good, which, according to the recital, shows a want of jurisdiction. (*R.* v. *King*, 13 *Law J.* (*N. S.*) *M. C.* 43; *Wickes* v. *Clutterbuck*, 4 *Bing.* 333; *R.* v. *Chaney*, 6 *Dowl.* 281; *Johnson* v. *Reid*, 6 *M. & W.* 124; *Re Peerless*, 1 *Ad. & Ell. N. S.* 143.)

Must show complaint was on oath if statute require such oath.

Must show before whom conviction was and that the justice had jurisdiction.

So a warrant of commitment for not obeying a magistrate's order must show clearly all that is required by the statute to give the magistrate authority to commit; and therefore a commitment for not paying a sum awarded by an order of maintenance on the 49 Geo. III. c. 68, s. 3, was held bad, where it omitted to state that there was a complaint on oath by one of the overseers of the parish liable to maintain the child, an adjudication by the magistrate, that at the time of the commitment a sum was due and unpaid; that the party charged was called upon for his defence, and that he did not show any reasonable or sufficient cause for not paying. (*Wilkins* v. *Wright*, 2 *Crom. & Mee.* 191.)

Thus a commitment under 7 & 8 Geo. IV. c. 29, s. 26, reciting a conviction that the defendant did unlawfully kill and carry away one fallow deer, the property of her majesty Queen Victoria, against the form of the statute, was held bad, for omitting to state that the deer was in the unenclosed part of some forest, chase, or purlieu. (*Reg.* v. *King*, 13 *Law J. Rep.* (*N. S.*) *M. C.* 43; and see *Wickes* v. *Clutterbuck*, *supra.*)

Instances of bad commitment for not showing jurisdiction.

In a case under the Malicious Trespass Act, (1 Geo. IV. c. 56, now the 7 & 8 Geo. IV. c. 30, s. 24,) where it was not stated in the commitment that the damage sustained by the injury amounted to 5*l.* and defendant was convicted in and committed for non-payment of that sum, the Court held it unwarrantable. (*R.* v. *Harper*, 1 *D. & R.* 222; 1 *D. & R. M. C.* 67, S. C.)

A commitment under 4 Geo. IV. c. 34, s. 2, stating that the defendant, a miner, had contracted to serve A. B., but omitting to state "in the employment of a miner," was held bad. (*Reg.* v. *Lewis*, 13 *Law J. Rep.* (*N. S.*) *M. C.* 46.)

So a commitment under that statute alleging a complaint of the master on oath, and then reciting that the magistrate had duly examined the proofs and allegations of both the parties touching the matter of the complaint, and adjudging it to be true, was held bad, for want of an averment that the latter examination was on oath. (*Id.*)

So where a commitment under the 4 Geo. IV. c. 34, s. 3, recited that A. B. contracted to print certain pieces of woollen goods, and adopted such contract, and entered into the service of C. D. under such contract, and refused to perform such contract, wherefore the justices adjudged that the said A. B. be delivered unto the keeper of the house of correction, there to remain and be corrected, and held to hard labour for the space of six weeks, it was held, that contracting to print certain pieces of woollen cotton goods was not contracting to serve within the meaning of the act; that the magistrate had not jurisdiction, and that the party must be immediately discharged on habeas corpus. (*Reg.* v. *Johnson*, 7 *Dowl. P. C.* 702.)

In another case the plaintiff was committed by the defendant, a magistrate, under the 4 Geo. IV. c. 34, s. 3, by a warrant of commitment, which was in the following form:—"To the constable of M., Surrey, &c. Whereas information and complaint hath been made unto me, one, &c., upon the oaths of J. H. and S. M., both of M., in the said county of S., calico printers, that W. J., of M. aforesaid, in the county aforesaid, calico printer, did, on Wednesday, the 8th of May inst., contract with the said S. M. to print certain pieces of woollen cotton goods, and the said W. J. had adopted such contract, and entered into the service of the said S. M. under such contract, and that the said W. J. hath, in his said service, been guilty of divers misdemeanors, miscarriages, and ill-behaviour towards the said S. M., and

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particularly with having, on the 9th of May inst., refused to perform such contract, and left his said work unfinished, and the service of the said S. M., without his license or consent. And whereas in pursuance of the statute in that case made and provided, I have duly examined the proofs and allegations of both the said parties touching the matter of the said complaint, and upon due consideration had thereof, have adjudged and determined, and do hereby adjudge and determine the said complaint to be true." It then commanded the constable to convey the plaintiff to the house of correction, and deliver him to the keeper thereof, who was ordered to detain him in custody: it was held, that this was a commitment in execution, and that it was bad, because it did not show either that the contract was entered into, or the work refused to be done, or the plaintiff found within the jurisdiction of the magistrate. (*Johnson* v. *Reid*, 6 *Mee. & W.* 124.)

Statute 3 & 4 Will. IV. c. 53, enacts, that any subject of the king found within a certain distance of the coast of the United Kingdom, &c. on board any vessel from which part of the cargo has been thrown overboard to prevent seizure, shall forfeit 100*l.*, and any officer of customs, &c. may carry him *before any justice of the peace in the United Kingdom* to be dealt with as after directed. Forfeitures may be recovered *before any two or more justices of the peace in the United Kingdom.* Every offence against the act committed or forfeiture incurred upon the high seas shall, for the purpose of prosecution, be deemed to have been committed or incurred at the place on land in the United Kingdom, &c. into which the person shall be taken, or in which he shall be found, and the justices of the peace for such place shall have jurisdiction. *Any two or more justices* before whom any person liable to be detained, and who shall have been detained for an offence against the act, shall be brought, may, on confession and proof, convict.

The 4 & 5 Will. IV. c. 13, repeals so much of the last-mentioned act as imposes certain pecuniary penalties for any of the offences thereinafter next mentioned, and then enacts, that any subject of the king discovered to have been within the distances mentioned in the former act on board any vessel from which part of the cargo has been thrown overboard to prevent seizure, &c. shall, upon being duly convicted of any of the said offences *before any two justices of the peace*, be imprisoned for a term mentioned; and that all informations and convictions before justices of the peace, and warrants of justices founded on such convictions, shall be drawn up in the form or to the effect in the schedule annexed to the act. The form of warrant in the schedule states, that the party has been duly convicted before two justices in and for ——— of having [*state the offence as in the information*], without further setting out the jurisdiction. A warrant under stat. 4 & 5 Will. IV. c. 13, set forth that P. had been duly convicted before two justices in and for the county of Kent, for that he being a subject, &c. was found on the high seas within, &c. of the coast of the United Kingdom, to wit, the coast of the county of Kent, on board a vessel from which part of the cargo had been then and there thrown overboard to prevent seizure, and that P. was by such conviction adjudged by the justices to be imprisoned, &c. On habeas corpus the warrant of commitment alone was returned. The Court held the prisoner entitled to his discharge, because, 1st, the warrant ought to show a good conviction; and 2ndly, because the justices could have jurisdiction only by the offence being committed in Kent, or by its being committed on the high seas, and the offender found in or brought to Kent; the stat. 4 & 5 Will. IV. c. 13, not creating a new offence, or altering the jurisdiction, but only changing the punishment and the words, "*any two justices*" being applicable only to justices having jurisdiction by the common law, or under the statute, and therefore the conviction as stated in the warrant did not show jurisdiction, and was therefore bad. (*In the matter of Peerless*, 1 *Ad. & Ell. N. S.* 143.)

Must show there was a conviction.

It must show that the offender was *convicted* of the offence. Therefore where one was brought up by *habeas corpus*, and the warrant was returned in the following form, viz. "receive into your custody the body of F. R. herewith, &c. brought before me J. S. one of his majesty's justices, &c. by J. A.

constable, and *charged* before me, on the oath of M. S. for being a rogue and vagabond within the meaning and intent of an act (17 Geo. II.) &c. for that the said F. R. on, &c. at, &c. did unlawfully use a certain craft to deceive, &c. (setting out the offence of acting as a fortune teller) contrary to the statute; 'him the said F. R. therefore safely keep in your custody, &c." The Court, considering this as a commitment by way of punishment and not for safe custody only, were unanimously of opinion that the commitment was bad, because it only stated that the party had been charged with, not that he had been *convicted* of, the offence imputed to him. (*R.* v. *Rhodes*, 4 *T. R.* 220; 12 *East*, 78, n.; S. C. 2 *Inst.* 52; *R.* v. *Cooper*, 6 *T. R.* 509.)

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The commitment when on a conviction should correspond in every material particular with the conviction. Though the conviction may be correct, yet if the commitment be for a different offence, the magistrate would be liable to an action for the imprisonment, &c. under it. (*Rogers* v. *Jones*, 5 *D. & R.* 268; 3 *B. & Cres.* 409; 1 *R. & M.* 129, S. C.; and see *Wickes* v. *Clutterbuck*, 2 *Bing.* 483; 10 *Moore*, 63.)

Should correspond with conviction.

Where a defendant was committed under the Malicious Trespass Act, (then the 1 Geo. IV. c. 56, and now the 7 & 8 Geo. IV. c. 30, s. 24,) and the commitment recited, "that one M. P. had made complaint to the justice that he had lost a post or pale out of his fence, and that he had cause to suspect and did suspect that G. H. on whose premises the same was found, *did cut, spoil*, and take and carry away the same, and that the said G. H. did not appear before the justice, and not giving the justice any satisfactory account how she came by the post, nor producing the party of whom she bought it, nor any credible witness to testify the sale, she was therefore by him committed, '*for wilfully and maliciously carrying away the same.*'" *Per Bailey*, J. "This commitment is clearly bad; the charge recited is, that the defendant had *cut, spoiled and taken away* the post, and the justice convicts her of *carrying it away*. It is perfectly consistent with the statement in the commitment that somebody else may have cut and spoiled the post, and that she might have carried it away, which is no offence within this act. Therefore as she is convicted of no offence she must be discharged." (*R.* v. *Harpur*, 1 *D. & R.* 222; 1 *D. & R. M. C.* 67, S. C.)

Upon a complaint against a servant for absenting himself from his services, made under the 4 Geo. IV. c. 34, s. 3, the conviction adjudged that he should be imprisoned in the House of Correction, *there to remain and be held to hard labour for one month*. The commitment required the keeper to receive him into custody, there to remain "*and be corrected*," and held to hard labour for one month (following the words of the 20 Geo. II. c. 19, s. 2): it was held, that the "*correction*" therein mentioned must be understood to mean something beyond the hard labour, and therefore that the commitment was bad, as varying in this respect from the conviction, and authorising a punishment not warranted by the statute. (*Wood* v. *Fenwick*, 10 *M. & W.* 195.)

In trespass for false imprisonment against two magistrates, the defendants gave in evidence a conviction, under 7 & 8 Geo. IV. c. 30, s. 24, of the plaintiff, for "unlawfully and maliciously damaging," &c a quantity of rushes, for which they adjudged the plaintiff to pay the sum of 10*s.* as a *reasonable compensation*, and 6*s.* 6*d.* for costs, and in default of immediate payment, the plaintiff to be imprisoned *for one calendar month, unless the said sums should be sooner paid*. The warrant of commitment stated the offence to be, that the plaintiff *unlawfully trespassed on land* in the occupation of D. Thomas, and cut down and carried away a quantity of rushes, for which offence he was ordered the sum of 10*s.* *penalty*, and the gaoler was ordered to detain *for the space of one month, or until he should be delivered by the due order of law*, it was held, that the conviction sufficiently supported the commitment. (*Daniell* v. *Philipps*, 1 *C. M. & Ros.* 662.)

A warrant of commitment under the 11 Geo. II. c. 19, s. 4, for a fraudulent removal of goods by a tenant, did not state that there had been a complaint in writing to the justices, or that the examination of witnesses was upon oath; but it referred to the order of the justices (for payment of double

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the value of the goods removed) in which those matters were stated; this was held sufficient, and the justices were considered not liable in trespass. (*Coster* v. *Wilson*, 3 *Mee. & W.* 411.)

But if a warrant of commitment recites, that the prisoner was convicted of an offence, which is stated at length, and such statement is substantially defective, the Court, when the certiorari is taken away, will presume that the conviction contains the same defect, and will discharge the prisoner. In such a case, if the conviction be correct, the proper course is to remove it by certiorari on the part of the crown, in order to support the warrant. (*Reg.* v. *Chaney*, 6 *Dowl.* 281.)

Need not state the conviction in form.

It is not necessary to state the conviction in a precise or technical form; it is only to show that the party has been convicted of some specific offence, and by a person having competent authority for that purpose. (1 *Paley on Conv.* 253; *R.* v. *Helps*, 3 *M. & Sel.* 331; *R.* v. *Rogers*, 1 *D. & R.* 156; 1 *D. & R. M. C.* 59; 5 *B. & Ald.* 773, S. C.)

Need not state evidence or witnesses, &c.

It is not required, therefore, to set forth the evidence or the facts in detail; (*R.* v. *Walter*, 8 *Mod.* 5;) or the name of the witness; and if by mistake a wrong name is mentioned, as that of the witness upon whose oath the conviction was made, it is surplusage and may be disregarded. (*Massey* v. *Johnson*, 12 *East*, 67.)

Statement of want of distress.

Where a commitment is inflicted only by a statute, as an alternative punishment for want of a sufficient distress, such want should be noticed in the commitment. (See *R.* v. *Chandler*, 1 *Ld. Raym.* 545; *R.* v. *Whitelock*, 1 *Stra.* 263.) It is submitted it is no longer necessary to state *how* the want of a sufficient distress appears to the magistrate, (see the 5 Geo. IV. c. 18, s. 1,) unless the act authorising the commitment points out how it must appear, as does the second section of that act. (See "*Distress under Justices' Warrant*," Vol. II.)

Statement of time and manner of imprisonment.

The *time* during which the defendant is to be imprisoned, and the *manner* of the imprisonment, must be stated accurately, and according to the directions of the law or statute from which the authority to commit is derived, and in this respect more accuracy is required than in commitments for safe custody. (*Ante*, 780.)

A commitment directing the gaoler to imprison a party for three months, omitting the day of the month on which it was granted, has been held bad; and as this was a defect arising out of the warrant itself, it was held it could not be aided by a good conviction. (*In re Fletcher*, 13 *L. J. Rep.* (*N. S.*) *M. C.* 16.)

Where a statute appoints imprisonment, but limits no time how long, in such case the prisoner must remain imprisoned at the discretion of the Court. (*Dalt.* c. 170, p. 410.)

Under the Vagrant Act (17 Geo. II. c. 5, s. 7, now the 5 Geo. IV. c. 83, "*Vagrants*," Vol. VI.) which directed the offender to be imprisoned till the next sessions or for any less time, as the justice should think proper, a commitment ordering the party to be detained, not for any limited time but until he should be discharged according to the laws and customs of this realm, was held bad. (*R.* v. *Hall*, 3 *Burr.* 1636.)

A commitment under the 35 Eliz. c. 2, (which empowers a justice to inquire into certain matters and commit such persons as refuse to answer), "till discharged by due course of law," was held bad. (*Yoxley's case*, 1 *Salk.* 351.) And so in a case where magistrates committed for a contempt. (*R.* v. *James*, 1 *D. & R.* 559; 1 *D. & R. M. C.* 131; 5 *B. & Ald.* 894, S. C.; and see *Exparte Leake*, 9 *B. & Cres.* 234.)

A commitment by the Vice Chancellor of Oxford, stating the offence to be carrying goods without a license, and ordering the party to remain in custody until he should give security to carry no more, and to observe the statutes of the University for life, was adjudged to be illegal. (*R.* v. *Barnes*, 2 *Stra.* 917.)

Hard labour.

If a statute order a commitment for hard labour, it must be so signified in the commitment. Where a statute, besides ordering a commitment to prison, adds also, "there to remain and be corrected and kept to hard labour," the

correction understood is by whipping. (*R.* v. *Hoscason*, 14 *East*, 607; and see *Wood* v. *Fenwick*, 10 *M.* & *W.* 195, *ante*, 791.)

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Whipping.

The condition, if any, upon which defendant may be discharged, must be distinctly stated in the commitment. Therefore if he be authorised to be committed till the payment of a penalty or the performance of some other act, the condition must be distinctly expressed and such as is authorised. It ought to be for imprisonment until he has paid the penalty.

Statement of and condition of discharge.

A commitment reciting that the defendant had been convicted by the College of Physicians and fined 20*l.*, and was thereby committed to gaol "till he should be delivered by the said college or otherwise by due course of law," was held bad, as being too general, and not sufficiently ascertaining whether the commitment was a distinct punishment or merely for enforcing the fine. (*Dr. Groenvelt's case*, 1 *Ld. Raym.* 213.)

Must be distinctly expressed.

Where justices committed the late overseer of a parish, under 17 Geo. II. c. 38, upon a conviction (on the complaint of the succeeding overseers) for neglecting and refusing to deliver over a certain book belonging to the parish, called "The Bastardy Ledger," and committed him, in pursuance of their adjudication, "until he should have yielded up all and every the books concerning his said office of overseer belonging to the parish;" the Court held the commitment void *in toto*, for which the magistrates might be sued in trespass for false imprisonment, although the conviction had not been quashed. (*Groome* v. *Forrester*, 5 *M.* & *Sel.* 314, noticed more fully, "*Poor*," Vol. IV.; and see *Exparte Leake*, 9 *B.* & *Cres.* 234; 3 *Y.* & *J.* 46, S. C., as to a commitment by commissioners of bankrupts.)

Where a party was committed as the reputed father of a bastard child, "until he should pay the sum due and legal accustomed fees, or until he should be otherwise delivered by due course of law," the commitment was held bad, the commitment not having been authorised by the 49 Geo. III. c. 68, s. 3. (*Robson* v. *Spearman*, 3 *B.* & *Ald.* 493.)

Amount of penalty and costs.

If the commitment be till payment of a penalty, the sum must be stated and fixed. Thus a conviction and commitment for a forcible entry, "there to remain till they shall have paid a fine to the king," the justices not having assessed any fine, was held to be bad. (*R.* v. *Elwell*, 2 *Ld. Raym.* 1575; *Stra.* 794, S. C.)

So under the 6 Geo. I. c. 16, s. 1, which empowers a justice to commit till the penalty and charges are paid, a commitment for nine months or until the sum of 15*l.* "together with the charges previous to and attending the conviction shall be paid," was held bad, for want of ascertaining the exact sum by the payment of which the defendant might be released. (*R.* v. *Hall*, *Cowp.* 60.) And see a case on the commitment of a toll-keeper for refusing to account, *R* v. *Catherall*, *Fitzg.* 266.

So where a conviction took place on the Stage Coach Act, 50 Geo. III. c. 48 (now repealed), and the commitment recited the conviction, from which it appeared the defendant had been committed by the justices for three months, "unless before that time he pays the sum of 6*l.*, together with the expenses of the warrant, viz. the sum of —— shillings," without expressing the sum which he was to pay for the expenses, the Court held the commitment bad on that account, for the defendant could not know on what terms he might be discharged, and the gaoler was equally in the dark. The conviction and commitment should have ascertained precisely what sum for expenses the defendant was to pay. (*R.* v. *Payne*, 4 *D.* & *R.* 72; 1 *D* & *R. M. C.* 67; *R.* v. *Rogers*, 2 *B.* & *Ald.* 773; 1 *D.* & *R.* 156; 1 *D.* & *R. M. C.* 59, S. C.)

The form of a commitment for costs, in default of a sufficient distress, is given by the 18 Geo. III. c. 19. (See *post*, "*Costs*," Vol. II.)

For two sums.

A commitment for payment of two sums of money, one of which was not due, was held bad altogether, though as to one of the sums it was correct. (*Exparte Addis*, 2 *D.* & *R.* 167; 1 *B.* & *C.* 90; and see *Goff's case*, 3 *M.* & *Sel.* 203; *sed vide Skingley* v. *Surridge*, 11 *M.* & *Wels.* 503.)

Where several offenders.

A statutory conviction of A. and B. for an offence several in its nature (as an assault under stat. 9 Geo. IV. c. 31), adjudging that they the said A. and B. for their said offence do forfeit the sum of, &c. and in default of payment

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be imprisoned for the space of, &c. is bad, inasmuch as the penalty ought to be imposed on the parties severally and not jointly. And a party committed under such a conviction may recover in trespass against the committing magistrate. (*Morgan* v. *Brown*, 4 *Adol. & Ell.* 515; 6 *Nev. & M.* 56, S. C.)

To whom penalty, &c. to be paid.

It is not necessary expressly to state to whom the payment of the pehalty or costs should be made. (See *R.* v. *Rogers*, 1 *D. & R.* 156; 1 *D. & R.* 59; 5 *B. & Ald.* 773, S. C.) It seems, however, that it must appear from some part of the commitment, who is the party entitled to the penalty, and at all events it is better that it should. (See *R.* v. *Helps*, 3 *M. & Sel.* 331.)

Date of.

As regards the date of the commitment, see *ante*, 782. And it seems that if not issued too soon, it is not bad because it is dated too soon. (*Newman* v. *Hardwicke*, 3 *Nev. & Per.* 368.)

Bad in part, bad in whole.

If the commitment in execution be bad in part, it is bad for the whole. (*Ex parte Addis, supra*; *Morgan* v. *Brown, supra*; *Goff's case*, 3 *M. & Sel.* 203.)

Amendment of.

In some cases (though rarely so) the statute allows the magistrate to amend the commitment. A party convicted in a penalty under an act against smuggling, (3 & 4 Will. IV. c. 53,) was committed to gaol by warrant of the convicting justices till he should pay the forfeiture. The act (s. 90) empowers justices to amend any such conviction or warrant of commitment, whether before or after conviction. Four days after the committal, the warrant (which was defective in point of law) was withdrawn from the gaoler's possession, and another substituted; it did not appear by whom. The second warrant was of the same date, and signed and sealed by the same justices as the first, and did not materially vary from it, except that in the recital of the conviction certain cordage was said to be adapted for "*slinging*" casks, instead of "slinging or *sinking*," and the name of the place at which the party was said to have been detained for his offence was altered. The above facts, and copies of the warrants being returned on certiorari and habeas corpus, held, that the Court could not presume, either from the facts returned, or from the warrants, that the second warrant was substituted by the justices, as an amendment of the first, in pursuance of the authority given them by the act. The prisoner was discharged. (*In the matter of Elmy and Sawyer*, 3 *Nev. & M.* 733; 1 *Adol. & Ell.* 843, S. C.)

Defects when cured.

It is a general rule, that if a warrant of commitment in execution on a conviction manifestly defective on the face of it, shows that there has been a conviction, the Court will not notice the defect until the conviction is returned into Court, and if the conviction be right, the defects in the commitment will be cured, provided the latter show the like offence as is stated in the conviction. (*R.* v. *Taylor*, 7 *D. & R.* 622; 3 *D. & R. M. C.* 491, S. C.; *ante*, 781.)

Defect in warrant when aided.

By 7 & 8 Geo. IV. c. 29, s. 73 (the Larceny Act), no warrant of commitment on a conviction under that act shall be held by reason of any defect therein, provided it be alleged that the party has been convicted, and there be a good and valid conviction to sustain the same. The 7 & 8 Geo. IV. c. 30 (the Act against Malicious Injuries to Property), s. 39, contains a similar enactment. So does also s. 36 of 9 Geo. IV. c. 31 (the Act relating to Offences against the Person). And also the 1 & 2 Will IV. c. 32, s. 45 (the Game Act). And see as to clauses of this kind, *Daniell* v. *Philipps*, (1 *C. M. & R.* 662.)

Consequences of defect.

If the commitment be void on the face of it, an action for false imprisonment will lie against the magistrates making the same, and this although the conviction be not quashed. (See *Groome* v. *Forrester*, 5 *M. & Sel.* 514; *Rogers* v. *Jones*, 5 *D. & R.* 268; 3 *B. & Cres.* 409; 1 *R. & M.* 129, S.C.; *Wickes* v. *Clutterbuck*, 2 *Bingh.* 483; 10 *Moore*, 63; "*Justices*," Vol. III. p. 583; and the cases, *ante*, 774.)

Besides this, if the commitment be void, the party may obtain his discharge by *habeas corpus*. (See "*Habeas Corpus*," Vol. III.)

IV. Execution, Expenses, and Copy and Certificate of Commitment.

As to the mode of executing a warrant of commitment, see in general, "*Warrant*," Vol. VI. Execution of.

The observations already made, *ante*, 782 to 784, as to the expenses, copy, or certificate of the commitment for safe custody, will here apply. Expenses, copy, and certificate of.

V. Discharge of Defendant.

A commitment in execution does not, like a commitment for safe custody, in any case admit of bail. (See *Anon.* 11 *Mod.* 45; *Anon. id.* 52.) Discharge of party after commitment.

And although a right of appeal be given by statute to the next sessions, which may not be till after the term of imprisonment has expired, (as is the case with the present Vagrant Act, 5 Geo. IV. c. 83, s. 11,) yet after a commitment by one justice, it is not competent for others to discharge the defendant upon his appealing to the next sessions, and giving bail to prosecute that appeal. (*R.* v. *Brooke*, 2 *T. R.* 190.)

It is said in *Dalt.* c. 170, p. 410, that upon the defendant's finding sureties for payment of the fine, he ought to be discharged; but this seems very questionable.

Under stat. 17 Geo. III. c. 56, ss. 1, 2, 20, 22, two justices may convict and sentence to imprisonment; and the party convicted may appeal to sessions, giving notice to the justices at the time of conviction, and at the same time entering into recognizance with sufficient sureties to try the appeal and abide the judgment at sessions: but if he do not at such time enter into such recognizance, the convicting justices are to commit him till the sessions, unless such recognizance be sooner entered into, and are to transmit the conviction to the sessions; and the sessions, on proof of notice of appeal, and on receiving the conviction, are to hear the appeal; and if the conviction be affirmed, the party is to suffer the punishment originally adjudged, the time of imprisonment, if inflicted, being computed from the time of affirmance, unless the party has been imprisoned under the original conviction, in which case the time for which he has been so confined is to be included in the order of confirmation. A party convicted by two justices, and sentenced to eleven weeks' imprisonment, gave notice of appeal, and was committed for not entering into recognizance. By the practice of sessions, the appeal is to be entered, and the order for hearing it obtained, by the party disputing the conviction. The party not having entered the appeal, the sessions discharged him. The Court of Queen's Bench held, that the convicting magistrates had no longer power to commit in execution of the conviction; or that, at any rate, no *mandamus* should be granted to compel them to do so. (*Rex* v. *Twyford*, 5 *Ad. & Ell.* 430.)

If the commitment be until payment of a certain fine or penalty, it follows as of course that the party is to be set at liberty immediately on payment or tender thereof. (1 *Paley on Conv.* 265.) A payment or tender to the gaoler or officer entrusted with the execution of the commitment would, it should seem, be sufficient. Where an officer, after a tender of the penalty, persisted in conveying a person to gaol, insisting also upon payment of a further sum, indorsed by the justice on the warrant of commitment, under the name of costs, he was held liable to an action for false imprisonment. (*Smith* v. *Sibson*, 1 *Wils.* 153.) Payment of penalty, &c.

The commitment remains in force until it be executed, so long as the magistrate who made it is living. ("*Warrant*," Vol. VI.) How long warrant in force.

If the commitment be void, the party may obtain his discharge on habeas corpus. (See "*Habeas Corpus*," Vol. III.) Habeas corpus.

VI. Forms.

(1.) Commitment where the punishment is by imprisonment, &c.

—— } *To the constable of , in the said county, and to the keeper of the [house of correction] at , in the said county.*

WHEREAS C. D., late of , in the said county, [labourer,] was on this day duly convicted before me, J. P., one of her Majesty's justices of the peace in and for the said county, for that he the said C. D. [here state the offence as in the conviction,] *against the form of the statute in that case made and provided; and I the said J. P. thereupon adjudged the said C. D., for his said offence, to be imprisoned in the [house of correction] at , in the said county, [and there kept to hard labour,* if ordered,] *for the space of : these are therefore to command you the said constable of aforesaid, to take the said C. D., and him safely to convey to the [house of correction] at aforesaid, and there to deliver him to the said keeper thereof, together with this precept: and I do hereby command you the said keeper of the [house of correction] to receive the said C. D. into the said [house of correction,] there to imprison him [and keep him to hard labour,* if ordered,] *for the space of ; and for your so doing, this shall be your sufficient warrant. Given under my hand and seal, at , in the county aforesaid, this day of , in the year of our Lord* 18—. *J. P.*

(2.) Commitment in default of immediate payment of a penalty.

—— } *To the constable of , in the said county, and to the keeper of the [house of correction] at , in the said county.*

WHEREAS C. D., late of , in the said county, [labourer,] was on this day duly convicted before me, J. P., one of her Majesty's justices of the peace for the said county, for that he the said C. D. &c [here state the offence as in the conviction,] *against the form of the statute in that case made and provided; and I the said J. P. thereupon adjudged the said C. D., for his said offence, to, &c.* [as in the conviction, to the word "*months,*"] *unless the said sums shall be sooner paid: and whereas the said C. D. being so convicted as aforesaid, and being now required to pay the said sums, hath not paid the same or any part thereof, but herein hath made default: these are therefore to command you the said constable of aforesaid, to take the said C. D., and him safely to convey to the [house of correction] at aforesaid, and there to deliver him to the said keeper thereof, together with this precept; and I do hereby command you the said keeper of the said [house of correction] to receive the said C. D. into the said [house of correction], there to imprison him [and keep him to hard labour,* if ordered,] *for the space of calendar months, unless the said sums shall be sooner paid; and for your so doing, this shall be your sufficient warrant. Given under my hand and seal, at , in the county aforesaid, this day of , in the year of our Lord* 18—. *J. P.*

(3.) Commitment in default of payment of a penalty within a limited time.

—— } *To the constable of , in the said county, and to the keeper of the [house of correction] at , in the said county.*

WHEREAS C. D., late of in the said county, [labourer,] was on the day of last past, duly convicted before [me] J. P. one of her Majesty's justices of the peace in and for the said county, for that he the said C. D. &c. [here state the offence as in the conviction]; *against the form of the statute in that case made and provided; and [I] the said J. P. thereupon adjudged the said C. D., for his said offence, to, &c.* [as in the conviction, to the end of the adjudication]; *and [I] the said J. P. then and there ordered that the said sums should be paid by the said C. D. on or before the day of then next; and whereas the said C. D. hath not, on or before the said day of , paid the several sums or any part thereof, nor hath he yet paid the said several sums or any part thereof, but therein hath made default; these are therefore to command you the said constable of aforesaid, to take the said C. D., and him safely to convey to the [house of correction] at aforesaid, and there to deliver him to the said keeper thereof, together with this precept; and I do hereby command you the said keeper of the said [house of correction] to receive the said C. D. into the said house of correction, there to imprison him [and keep him to hard labour,* if ordered,] *for the space of calendar months, unless the said sums shall be sooner paid; and for your so doing, this shall be your sufficient warrant. Given under my hand and seal, at , in the county aforesaid, this day of , in the year of our Lord* 18—. *J. P.*

Commons.

As to when a commoner may be a witness, see "*Evidence*," Vol II. p. 436, &c.

I. *Exchange of Lands in Common Fields*, 797.
[4 & 5 Will. IV. c. 30; 6 & 7 Will. IV. c. 115, s. 35.]

II. *Inclosure of Commons*, 803 *to* 859.
[41 Geo. III. c. 109; 1 & 2 Geo. IV. c. 23; 3 & 4 Will. IV. c. 35; 6 & 7 Will. IV. c. 115; 3 & 4 Vict. c. 31.]

III. *Putting Stoned and Scabbed Horses and Sheep upon*, 859.
[32 Hen. VIII. c. 13; 38 Geo. III. c. 65.]

I. Exchange of Lands in Common Fields.

By the common law an exchange is a *mutual* grant of *equal interest*, the one in consideration of the other: as fee simple for fee simple; estate for life for estate for life, &c., and though no livery of seisin was required, an entry by each of the parties was absolutely necessary to effectuate it; but in the case of exchanges under Inclosure Acts, and the act about to be treated of, these rules as well as the others which affected the subject at common law, are considerably modified, if not wholly inapplicable.

By stat. 4 & 5 Will. IV. c. 30, intituled "*An Act to facilitate the Exchange of Lands lying in Common Fields*," [25th July, 1834,] reciting, "Whereas it is expedient to facilitate the exchange of pieces of land lying intermixed and dispersed in common fields, meadows or pastures, for other pieces of land either lying therein or being part of the enclosed lands in the same or any adjoining parish:" it is enacted, "That from and after the passing of this act it shall be lawful for any person who shall be seised or possessed of, or entitled in possession to any land in any common field, as tenant in fee simple, or in fee tail, general or special, or for life or lives, or by the curtesy of England, or for any other estate of freehold, or for years determinable on any life or lives, or for any term of years whereof one hundred years shall be unexpired, and for the guardian, trustee, feoffee for charitable or other uses, husband, or committee of such person who, at the time of making any exchange authorised by this act, shall be an infant, idiot, lunatic, or feme covert, or under any other disability, by such deed and with such consent as hereinafter mentioned, to grant and convey such land or any part thereof to any other person, in lieu of and in exchange for any other land, whether lying in the same or any other common field, or for any inclosed land lying within the same or any adjoining parish, and to accept and take from such other person any land in lieu of and in exchange for the land in such common field."

4 & 5 Will. 4, c. 30.

Proprietors of land in common fields may exchange same.

Sect. 2. "It shall be lawful for any person who shall be seised or possessed of or entitled in possession to any land which it may be desirable to exchange for the land in such common field, whether such person shall be tenant in fee simple, or in fee tail, general or special, or for life or lives, or by the curtesy of England, or for any other estate of freehold, or for years determinable on any life or lives, or for any term of years whereof one hundred years shall be unexpired, and for the guardian, trustee, feoffee for charitable or other uses, husband, or committee of such person who shall be an infant, idiot, lunatic, or feme covert, or under any other disability, to consent and agree to such exchange, and to grant and convey such land to the person proposing to make such exchange, in lieu of and in exchange for the land lying in such common field, subject to the provisions hereinafter contained."

All persons enabled to give land in exchange for such common field land.

1. *Exchange of Lands in Common Fields.*

4 & 5 Will. 4, c. 30.

Land given in exchange by persons having limited interests, to be of equal value with land taken.

If exchange made by any person having only a limited interest, or under disability, consent of person next in remainder to be obtained.

In case person next in remainder should be an infant, &c.

Consent of patron and bishop necessary for exchange of land held in right of a church.

Sect. 3. "Provided always, that when any such exchange shall be made by any person having a less estate or interest than in fee simple in the land to be by him granted or conveyed in exchange, or shall be made by any person under any disability, the land to be so taken in exchange shall, at the time of making such exchange, be, or shall by the payment of a sufficient sum for equality of exchange be made, of equal value with, or not of less value than the land to be granted or conveyed in exchange."

Sect. 4. "Whenever any exchange shall be proposed to be made under the authority of this act, and either of the parties thereto shall have a less estate or interest in the land to be by him granted or conveyed in exchange than a fee simple, or shall be under any disability, such exchange shall not be completed unless the person to whom the next immediate vested estate of freehold in remainder or reversion shall have been limited (provided such person shall be of the full age of twenty-one years, and being a female shall be unmarried), shall consent thereto, and shall testify such consent by signing the draft deed of exchange hereinafter mentioned, and such consent shall be sufficient for the purpose of authorising such exchange, notwithstanding the person giving the same may have an equitable estate only in the land intended to be conveyed in exchange, or may have previously disposed of, or charged or incumbered his reversionary estate therein: Provided always, that if the person to whom such next immediate vested estate in remainder or reversion may have been limited shall, at the time of such exchange, happen to be an infant or feme covert, or an idiot or lunatic, then and in such case it shall be lawful for the guardian or husband, or committee of such infant, feme covert, idiot, or lunatic, (such guardian, husband, or committee not being himself the person by whom such exchange is proposed to be made), to consent to such exchange, and to sign the draft deed of exchange in his or her stead: Provided further, that whenever the guardian or husband, or committee of such infant, feme covert, idiot, or lunatic, shall himself be the person by whom such exchange is proposed to be made, then and in such case it shall be lawful for the Court of Chancery, upon petition, to be preferred to the said court in a summary way, to appoint a person to act as protector to such infant, feme covert, idiot or lunatic, for the purposes of this act; and if he shall think fit so to do, to consent to such exchange, and to sign the draft deed of exchange in the stead of such infant, feme covert, idiot or lunatic, or of his or her guardian, husband, or committee."

Sect. 5. "Provided always, that no exchange shall be made of any land held in right of any benefice, without the consent of the patron thereof, and of the archbishop or bishop to whose ordinary or peculiar jurisdiction the said benefice may be subject, such consent to be signified by the patron and archbishop or bishop respectively signing the draft deed of exchange hereinafter mentioned; and such consent, when so given and signified, shall be a sufficient authority for such exchange, any law or statute to the contrary notwithstanding: Provided always, that if the patronage of such benefice shall happen to be in the crown, and the benefice shall exceed the yearly value of twenty pounds in the king's books, it shall be lawful for the lord high treasurer or the first lord commissioner of the treasury for the time being, but if it shall not exceed the yearly value of twenty pounds in the king's books, then for the lord high chancellor, lord keeper, or lords commissioners of the great seal for the time being, to consent to such exchange, and to sign the draft deed of exchange on behalf of the crown; and if the patronage of such benefice shall happen to be in the crown in right of the duchy of Lancaster, it shall be lawful for the chancellor for the time being of the said duchy to consent to such exchange, and to sign the draft deed of exchange on behalf of the crown; and if the patronage of such benefice shall be part of the possessions of the duchy of Cornwall, it shall be lawful for the Duke of Cornwall for the time being, if of full age, but if not of full age, or in case such benefice shall be within the patronage of the crown in right of the duchy of Cornwall, then for the same person who is hereinbefore authorised to consent on behalf of the crown, in respect of a benefice in the patronage of the crown, to consent to such exchange, and to sign the draft deed of

exchange on behalf either of the Duke of Cornwall, or, as the case may be, on behalf of the crown in right of the duchy of Cornwall; and if the patron of such benefice shall happen to be a minor, idiot, lunatic or feme covert, it shall and may be lawful for the guardian, committee or husband of such patron to consent to such exchange, and to sign the draft deed of exchange in the stead of such patron, and on his or her behalf."

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Sect. 6. Provided always, "that no exchange shall be made under the authority of this act by any bishop, dean, or other head of a chapter, archdeacon, prebendary, or other ecclesiastical corporation sole, unless, in the case of a bishop, with the consent of the archbishop of the province, to be signified by such archbishop signing the draft deed of exchange hereinafter mentioned, or unless, in the case of a dean or other head of a chapter, with the consent of the chapter, to be signified by their affixing their common seal to the said draft deed of exchange, or unless, in the case of an archdeacon, prebendary, or other ecclesiastical corporation sole, with the consent of the archbishop or bishop of the diocese, to be signified by such archbishop or bishop signing the said draft deed of exchange."

Draft deed of exchange to be signed or sealed by ecclesiastical person, or corporation consenting.

Sect. 7. "Every exchange under the authority of this act shall be made according to the form in the schedule to this act annexed, or as near thereto as the number of parties and the circumstances of the case will admit, and shall, when executed by the respective parties, be valid and effectual in the law to all intents and purposes, without livery of seisin made or taken, or any other act done, by any person or party to perfect or complete the same."

Exchange to be made in the form given in the schedule.

Sect. 8. Provided always, "that whenever any land held by copy of court-roll shall be exchanged under the authority of this act, the deed of exchange, when executed by the respective parties, shall be produced to the lord of the manor of which the land may be parcel, or to his steward, or to the deputy of such steward, who shall cause the same to be entered on the court-rolls of the manor."

In case of copyholds, the deed of exchange to be entered on the court-rolls.

Sect. 9. "The fees and charges to be demanded by and paid to any steward of a manor for entering on the court-rolls of such manor any deed of exchange or other instrument required by this act to be entered thereon shall not exceed the sum of sixpence for every law folio of seventy-two words contained in such deed or other instrument."

Fees to stewards.

Sect. 10. "Whenever any exchange shall be made under the authority of this act by any archbishop, bishop, dean or other head of a chapter, dean or other head of a chapter and chapter, archdeacon, prebendary or other ecclesiastical corporation, or by the incumbent of any benefice, the deed of exchange, when executed by the respective parties, shall, in the case of the exchange being made by an archbishop or bishop, be entered in his own registry, and in the case of the exchange being made by a dean or other head of a chapter, or by a dean or other head of a chapter and chapter, be entered in the registry of such chapter, and in the case of the exchange being made by an archdeacon, prebendary or other ecclesiastical corporation, or by the incumbent of a benefice, be entered in the registry of the bishop of the diocese."

In case of church lands, deed to be entered in proper ecclesiastical registry.

Sect. 11. "An office copy of any deed of exchange or other instrument which under the provisions of this act shall be entered on any such registry as aforesaid (such office copy being certified by the registrar or his deputy) shall be allowed as evidence thereof in all courts and places, and every person shall be entitled to require any such office copy, and shall also be allowed at all usual and proper times to search for and inspect any deed of exchange or other instrument which shall be so entered; and the registrar shall be entitled to charge for the entry of every such deed of exchange or other instrument after the rate of sixpence for every law folio of seventy-two words contained therein, and the sum of one shilling, and no more, for allowing any such search or inspection as aforesaid, and after the rate of sixpence for every law folio of seventy-two words in any office copy to be made and certified as aforesaid."

Office copies of instruments deposited in registry to be evidence.

Sect. 12. "Before any exchange shall be made under the authority of this act a draft of the intended deed of exchange, containing a correct description of the several lands proposed to be exchanged, and signed by the respective

Draft of intended exchange to be deposited with clerk of the peace,

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and notice inserted in some newspaper circulating in the county.

parties, and also by the several persons whose consent to such exchange is herein-before required to be given, and accompanied by an estimate of the value as well of the land proposed to be given as of the land proposed to be taken in exchange, and whenever the exchange shall be proposed to be made by or with any person under disability, then accompanied also by a copy of the several limitations contained in the deed or will under which such person may be entitled, shall be deposited with the clerk of the peace of the county in which the greater part of the land may be situated; and a notice of such draft and estimate having been so deposited (such notice containing a description of the land intended to be exchanged) shall be published in some newspaper usually circulated in the county wherein such land is situated at three several times in three successive months after such draft and estimate shall have been so deposited: provided always, that whenever a corporation aggregate shall be one of the parties to such proposed exchange, or the consent of a corporation aggregate shall be necessary thereto, the affixing of the common seal of such corporation to such draft deed of exchange shall be deemed a sufficient compliance with the provisions of this act."

Proviso as to certain corporations.

Persons having objections to deposit them with clerk of the peace within a certain time.

Sect. 13. "If any person claiming to have an interest in the land proposed to be exchanged shall object to such exchange, it shall be lawful for him to state such objection in writing, and to deposit the same with the clerk of the peace at any time not less than fourteen days before the holding of the assizes at which such proposed exchange shall be taken into consideration as hereinafter mentioned; and such draft deed of exchange, and estimate, and copy of limitations, and the said statement of objection, shall be open to the inspection of any person."

Fees to be taken by clerks of the peace.

Sect. 14. "The justices of the peace for the several counties, ridings, divisions, cities, towns, liberties and precincts within England and Wales, shall in the manner directed by an act passed in the fifty-seventh year of the reign of King George the Third, intituled '*An Act to enable Justices of the Peace to settle the Fees to be taken by the Clerks of the Peace of the respective Counties and other Divisions of England and Wales*,' ascertain, make and settle a table of fees and allowances to be taken by the clerks of the peace for such counties, ridings, divisions, cities, towns, liberties and precincts, for their trouble in the execution of the duties imposed upon them by this act, and such fees shall be subject to alteration and regulation in the manner by the said act directed."

Clerk of the peace to cause draft deed, &c. to be laid before a judge of assize, who shall appoint a barrister to consider same.

Sect. 15. "The clerk of the peace shall cause the said draft deed of exchange, estimate and statement of objection (if any), and all other papers relating thereto, to be laid before the senior judge of nisi prius at the assizes to be holden next after the expiration of three months from the time of the deposit of such draft deed of exchange with the clerk of the peace as aforesaid; and such judge shall appoint a barrister, of not less than five years standing, for taking into consideration the said draft deed and statement, who shall forthwith appoint a time for that purpose."

Barrister may summon witnesses.
False swearing perjury.

Sect. 16. "Such barrister shall be empowered to summon and to compel the attendance of witnesses, and to administer an oath; and that any person wilfully swearing falsely before such barrister shall be liable to all the penalties of wilful perjury."

Barristers to examine witnesses, and determine objections.

Sect. 17. "Such barrister shall satisfy himself, by the production of deeds, the examination of witnesses, or by such other evidence as he shall think fit to require, of the value of the lands proposed to be exchanged, and that the person proposing to make such exchange is not under any disability, or if he is, that the person stated to have the next immediate vested estate of freehold in reversion or remainder has such estate, and that the notices and the consents required by this act have been duly given; and such barrister shall hear and determine all objections (if any) which may have been made by any person claiming to have an interest in the land proposed to be exchanged."

After inquiry barrister to certify as case may be.

Sect. 18. "After such inquiry shall have been had before such barrister he shall grant a certificate under his hand, in which he shall state that the parties proposing to make such exchange are not under any disability, or if they are, or either of them is under disability, that the persons or person having the

next immediate vested estate of freehold in remainder or reversion have concurred therein, that the persons whose consents are required under this act have consented to the exchange, and that the equality and the fairness of the proposed exchange have been proved, or otherwise, as the case may be; and he shall suggest in such certificate such alterations as to him may seem expedient for the better protecting the rights of parties having an interest in the lands proposed to be exchanged."

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Sect. 19. "In any case of an exchange to be made under this act in which there shall be a difference of not more than one-fifth in the value of the lands proposed to be exchanged, it shall be lawful for the said barrister to allow or insert a provision in such exchange for the payment in money of such difference in value: provided always, that no exchange shall be made under the authority of this act in which there shall be a difference of more than one-fifth part in the value of the lands proposed to be exchanged."

In case of exchange in which there shall be a difference in value of not more than one-fifth.

Sect. 20. "The said certificate, together with the said draft deed of exchange, and estimate, and such statement of objections, if any, and all other papers relating thereto, shall be laid before the said judge of assize, who shall thereupon make such order therein, either for confirming the said exchange, or for annulling the same, or for altering the same, as to him may seem expedient; and the said draft deed of exchange, when so confirmed or altered by the said order, shall be immediately engrossed and executed by the necessary parties, and shall, when so executed, be binding upon the owners or proprietors of the pieces of land so exchanged, and all other parties interested therein: provided always, that before making such final order it shall be lawful for such judge to institute or cause to be instituted such further inquiry, by the means aforesaid, into the several matters relating to any such agreement, as he may think necessary.

Certificate with draft deed, &c. to be laid before the judge, who shall make order thereupon.

Judge may institute further inquiry.

Sect. 21. Provided also, "that such barrister shall further certify to the said judge by whom and in what proportions the costs and charges of such proceedings relative to such agreement ought to be borne, and thereupon the said judge shall make such order for payment of such costs and charges as he may think right: provided always, that in the case of any disagreement respecting the amount of such costs, such costs shall be taxed by the master or secondary of the Court of King's Bench."

Costs and charges of proceedings.

Sect. 22. "Every barrister before whom any inquiry shall be had under the authority of this act shall be entitled to be paid at the rate of five guineas for every day that he shall be employed in making such inquiry, over and above his travelling and all other expenses; and every such barrister shall after the termination of such inquiry transmit a statement of the number of days during which he shall have been so employed, and an account of the travelling and all other expenses incurred by him in respect of such employment, to the judge by whom he shall have been appointed, or in case of the death or illness or retirement of such judge, to any other judge of the superior courts of record at Westminster, who shall examine and allow the same, or so much or such parts thereof as he shall see fit; and the same when so allowed shall be paid in the same manner as the other costs and charges incident to such exchange are hereinbefore directed to be paid: provided always, that if more than one case of exchange shall be referred to the same barrister, the remuneration to such barrister shall not be cumulative, but shall be considered as fixed for the day and not for the case."

Remuneration to barrister.

Sect. 23. "In case any money shall be directed to be paid by either party to the other of them for equality of exchange, and the party to whom such money shall be directed to be paid* shall (in case it shall exceed the sum of twenty pounds) be paid with all convenient speed into the Bank of England in the name and with the privity of the accountant general of the Court of Chancery, to be placed to his account there ex parte the person entitled to the rents and profits of the land for or in respect of which such money shall be payable, to the intent that such money shall be applied, under the direction of the court, to be signified by an order made in a summary way upon a petition to be preferred by or on behalf of the person who would have been entitled to the rents and profits of the said land, either in the purchase or

Application of money paid for equality of exchange when party entitled to same under disability.

*Sic in act.

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redemption of the land tax, or in discharging any debt or incumbrance affecting the said land, or affecting any other lands standing settled therewith to the same or the like uses, or in the purchase of other lands, which shall be conveyed to the same or the like uses, or such of them as shall be then subsisting and capable of taking effect; and in the meantime and until such purchase shall be made, the said money shall, by order of the said court, upon application thereto, be invested by the said accountant general in his name in some of the public funds, and the dividends thereof shall from time to time be paid to the person who would have been entitled to the rents of the land so to be purchased and settled; but in case such money shall not exceed the sum of twenty pounds, then the same shall be paid to the person entitled to the rents and profits of the land for or in respect of which the same may be payable, or in case of infancy, lunacy, idiotcy, or coverture, to his or her guardian, committee, or husband, as the case may be."

Lands given in exchange to be exonerated from the uses affecting them at the time, and to become subject to such uses as affected the lands taken.

Sect. 24. "From and immediately after such deed of exchange as hereinbefore is mentioned shall have been duly executed by the necessary parties, the land by which such deed is given in exchange shall be exonerated and discharged from the uses, trusts, powers, conditions, limitations and restrictions, charges and incumbrances then affecting the same, and shall be and become subject to such and the same uses, trusts, powers, conditions, limitations and restrictions, charges and incumbrances, as affected the land taken in exchange at the same date; and the land so taken in exchange shall be exonerated and discharged from all uses, trusts, powers, conditions, limitations and restrictions, charges and incumbrances then affecting the same, and shall be and become subject to such and the same uses, trusts, powers, conditions, limitations and restrictions, charges and incumbrances as affected the lands given in exchange at the same time."

After exchange party not to be evicted.

Sect. 25. "No person to whom any land shall have been granted or conveyed in exchange according to the provisions of this act shall at any time thereafter be evicted from the peaceable and quiet possession of such land by reason or in consequence of any person claiming right thereto through any title prior to that of, or through any defect of title in, the person by whom such land may have been granted or conveyed; but nevertheless it shall be lawful for the person claiming such right, and he is hereby authorised and empowered to use, exercise, and enjoy all such and the same powers and remedies in trying his right to and in obtaining and recovering possession of the land which shall have been granted or conveyed in exchange as the person so claiming would in case this act had not been made, have been enabled to use, exercise, or enjoy in trying the right to and recovering the possession of the land in exchange for which the same shall have been so granted or conveyed under the authority of this act."

General saving.

Sect. 26. "Saving always to the king's most excellent majesty, his heirs and successors, and to all and every other person, bodies politic, corporate and collegiate, his and their heirs, successors, executors, and administrators, (other than and except the several owners and proprietors of the said exchanged lands, and the several persons and parties who shall have consented to such exchange, and all other persons claiming under them, or under the same will or deed or other conveyance as the said owners and proprietors, any right, title, estate, or interest to or in the said exchanged lands,) all such estate, right, title, interest, claim, and demand whatsoever, as they, every or any of them had before the making and confirming of any such exchange, or could or might have had or enjoyed in case such exchange had not been made."

Meaning of words in the act.

Sect. 27. "The words and expressions herein-after mentioned, which in their ordinary signification have a more confined or different meaning, shall, in the construction of this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; that is to say, the word 'person' shall extend as well to an individual as to a body politic, corporate, or collegiate, and to a corporation as well aggregate as sole, whether such corporation be eleemosynary or civil, ecclesiastical or lay; the word 'benefice' shall extend to and be taken to comprehend rectories, vicarages, donatives, perpetual curacies, parochial and consolidated chapelries,

district parishes and district chapelries, and churches and chapels having a district assigned thereto; the word 'land' shall extend to every species of land, whether arable, meadow, or pasture, and whether freehold, copyhold, or customary, or held by any other tenure, and as well to one piece or parcel as to any number of pieces or parcels of land; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male."

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2 & 3 Will. 4, c. 30.

Sect. 28. "This act shall extend only to that part of the United Kingdom called England and Wales."

To extend to England and Wales.

The Schedule to which the foregoing Act refers.

THIS indenture, made the day of , in the year , between A. B. of of the one part, and C. D. of of the other part, witnesseth, that in pursuance and under the authority of an act passed in the year of the reign of his Majesty King William the Fourth, intituled [here set forth the title of this act], *the said A. B. doth grant and convey all the lands comprised in the first schedule hereunder written, marked with the letter* A., *unto the said C. D., in lieu of and in exchange for the land comprised in the second schedule hereunder written, marked with the letter* B., *to the end and intent that the land comprised in the first schedule may be held and enjoyed by the said C. D. and the person or persons who for the time being shall be entitled thereto, and be and become subject to such and the same uses, trusts, powers, conditions, limitations, restrictions, charges, and incumbrances, as the land comprised in the second schedule now is or may be subject or liable to; and this indenture further witnesseth, that in pursuance of the said act the said C. D. doth grant and convey all the land comprised in the second schedule hereunder written, marked with the letter* B., *unto the said A. B., in lieu of and in exchange for the land comprised in the first schedule hereunder written, marked with the letter* A., *to the end and intent that the land comprised in the second schedule may be held and enjoyed by the said A. B. and the person or persons who for the time being shall be entitled thereto, and be and become subject to such and the same uses, trusts, powers, conditions, limitations, restrictions, charges, and incumbrances as the land comprised in the first schedule now is or may be subject or liable to. In witness, &c.*

Schedule A. containing the land conveyed by A. B. to C. D.

Schedule B. containing the land conveyed by C. D. to A. B.

Witness,

E. F. *A. B.* (L. S.)
G. H. *C. D.* (L. S.)

In the general Inclosure Act, 6 & 7 Will. IV. c. 115, s. 35, powers are incidentally given to proprietors of lands proposed to be allotted to effect exchanges; the subject will be more appropriately treated of under that particular section, *post*, p. 848.

II. Inclosure of Commons. (*a*)

Previous to the passing of the stat. 6 & 7 Will. IV. c. 115, inclosures of commons and wastes were usually regulated by local statutes, subject to and adopting the provisions of certain general statutes; that enactment enables a certain majority of the proprietors of open and common lands to inclose and allot them without special application to the legislature; but as that statute is only an extension of the previously existing general statutes, it will be necessary to give the reader a view of their provisions.

(*a*) A bill is at present before parliament on the subject of inclosures; should it pass into a law before the publication of this work, it will be found in the *Addenda*.

2. *Inclosure of.*

Inclosure bills are not to be considered merely as private acts. (1 *Atk.* 281.)

Freeholds.

Inclosures make the allotments freehold, unless the Inclosure Act otherwise directs. (*Nevell* v. *Jodrell*, 2 *T. R.* 415.)

Commons.

As, where the waste of a manor is inclosed and allotted to commoners, they hold the allotments as freehold tenures, because they were freehold before the inclosure, namely, the freehold of the lord. (*Doe* d. *Lowes* v. *Danuen*, 2 *M. & Sel.* 175.)

But the legal freehold does not vest in the allottee until the execution and proclamation of the award. (*Farrer* v. *Billing*, 2 *B. & Ald.* 171; *post*, 818, n. (*a*).)

Unless by the wording of the particular act an intention appear on the part of the legislature to give the seisin upon the allotment only, and before the execution of the award. (*Kingsley* v. *Young*, 17 *Ves.* 468; 18 *Ves.* 207; *Doe* d. *Harris* v. *Saunder*, 5 *A. & E.* 664.) Nor is the legal title to purchase-money or compensation-money to be ascertained by the award of a commissioner under an inclosure act complete till the award is made. (*Cator* v. *The Croyden Canal Company*, 4 *You. & C.* 405.)

No technical form is necessary in the award. (*Pick* v. *Clarkson*, 2 *Bl. Rep.* 1318.)

Allotment to lord.

An inclosure act directed allotments to be made to A., as a full compensation for his right to the soil of the waste as lord of the manor, for his right to the tithes as rector, and for his right of common. Part of the waste had been used by the lord as a rabbit-warren, but no mention of it as such was made in the inclosure act, nor did it appear that the lord had any right of warren in the waste. The commissioners made an allotment to A. as a full compensation for his right and interest in the warren, and also three other allotments as a full compensation for his rights above-mentioned. Held, that A.'s title to the allotment in respect of the warren could not be objected to, as that allotment was a portion of the lord's compensation for his right of soil. (*Casamajor* v. *Strode*, 5 *Sim.* 87; 2 *M. & K.* 706.)

A lord of the manor was held entitled to an allotment under an inclosure act in respect of his demesnes of the manor, over and above the allotment awarded to him by the act in respect of his right as lord of the manor. (*Arundell* v. *Falmouth* (*Viscount*), 2 *M. & S.* 440.)

An owner of the soil sufficiently answers the description of lord of the manor to take an allotment under an inclosure act, although the manor be to other purposes extinct. (*Smith* v. *Smith*, 2 *Price*, 101.)

Under a local inclosure act the commissioners allotted to the lord of the manor one full eighteenth part in value of the moor or common lands in compensation for his right to the soil of the said moor, reserving to him, as by the act directed, the right "from time to time, and at all times thereafter, to have, hold, and enjoy all courts, &c., fairs, markets, tolls, stallages, rights, royalties, with free warren, and liberty of hunting, hawking, fishing, and fowling, &c., to the said manor, or to the lord thereof for the time being, incident, belonging or appertaining, in as full, ample, and beneficial a manner, to all intents and purposes, as he could or might have enjoyed the same if the act had not been made:" Held, that the right of hunting or fowling over the allotments of the moor or common was not reserved to the lord of the manor by the saving clause; such right not being a mere licence or liberty incident to him as lord, but a mode of direct enjoyment of his own property. (*Greathead* v. *Morley*, 3 *Scott, N. R.* 538.)

Where commissioners under an inclosure act awarded that certain persons intitled to a right of common in certain commonable lands, "should for ever thereafter use and enjoy the said commonable place as a common pasture, exclusive of all others whatsoever:" Held, that the right of the commoners was still subservient to the right of the lord to take stone, it appearing that both before and since the award the lord had exercised that right; and that an action was not maintainable against his lessee, although the soil had latterly been subverted to an unusual extent. (*Place* v. *Jackson*, 4 *D. & R.* 318.)

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By an act for inclosing common lands in G., after reciting that the corporation of G. claimed the right of soil as lords of the manor, and that certain individuals were proprietors of the common lands intended to be inclosed, it was enacted that the commissioners might set out and allot plots of ground out of the *East and West Commons in* G., as a compensation for the rights of common of *all the owners and proprietors of commonable messuages or cottages*, for such messuages or cottages only, as well on the said commons as on certain other lands named; such plots of ground to be used and enjoyed as the commissioners should by their award direct. Parties dissatisfied with the award might bring an action against the persons in whose favour the determination should be, within three months, or might appeal within six months to the justices in quarter sessions, who were to determine the matter, and award costs and damages. In default of such action or appeal, the determination of the commissioners was to be final. The commissioners by their award allotted a plot of land on the *West Common*, as common pasture, *to the owners and proprietors of commonable messuages or cottages*, and their respective tenants or occupiers of the said messuages and cottages only having right of common on the said *West Common*; and they limited the use of the pastures as the act empowered them. Before the passing of the act, the rights attaching to the commonable messuages could only be exercised by such occupiers as were freemen of the borough of G. Subsequently to the act, one of the messuages on *West Common* being in the hands of a person not a freeman, the corporation brought trespass against him for turning his cattle on the above-mentioned allotment. Held, that the act, though general in its words, did not authorise the commissioners to extend the benefits of their allotments in lieu of common to occupiers who were not freemen; and that the award itself did not purport to do so; nor could it have done so unless the act had given power to the commissioners to ascertain who should be intitled to the newly granted rights; and consequently, that the present action was maintainable, though brought more than six months after the award. (*The Bailiff's Assistants and Commonalty of Gumecester otherwise Godmanchester* v. *Phillips*, 5 *B. & Adol.* 198; 2 *Nev. & M.* 713, S. C.)

Tithes.

Tithes.]—An inclosure act empowered commissioners to allot to the rector of the parish of W. cum S., such lands within the township of S., and of the titheable parts of the township of W. as should (quantity, quality, and situation considered) be equal in value to two fifteenth parts of the titheable places of the last-mentioned lands and grounds, in lieu of tithes belonging to the rector, and arising within those lands and grounds. Another clause saved to all persons, their heirs, &c. (except the persons to whom any allotment should be made by virtue of the act, in respect of the interest or property for which such allotment should be made), all such estate and interest as they had in respect of the waste lands before the passing of the act. The commissioners allotted to the rector lands in W., lands in S., and lands in A.; such lands were more than two-fifteenths of the lands inclosed in S. and A., but less than two fifteenths of the lands inclosed in W., S., and A. No one of the allotments was expressed in the award to be in lieu of the rector's tithes in W. Held, that the commissioners had not made the rector any allotment in lieu of his tithes in W., and that his right to tithes in kind there was reserved to him by the saving clause. (*Cooper* v. *Walker*, 6 *D. & R.* 31; 4 *B. & C.* 36, S. C.; and see *Chatfield* v. *Ruston*, 5 *D. & R.* 675; 4 *B. & C.* 863, S. C.)

Where, under an inclosure act, the tithes payable in respect of certain old inclosures were extinguished, and in lieu thereof a corn-rent substituted, which was directed to be paid for ever afterwards to the impropriator and vicar, by the person who for the time being should be in the possession or occupation of the land out of which the rent should be issuing; and a power of distress was given for the recovery thereof, the same as for rent service or other rent in arrear; and for several years part of such land remained uncultivated, untenanted, and wholly unprofitable to the owner, who during that time resided on another estate; and he afterwards devised the land to another tenant, who entered and occupied, and brought it into cultivation: Held, that

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during the time the land was unoccupied and uncultivated, the landlord was in the legal possession thereof within the meaning of the act, so as to subject him to the payment of the corn-rent in arrear; and the tenant coming in under him was liable to be distrained upon for such payment. (*Newling* v. *Pearce*, 2 *D. & R.* 607; 1 *B. & C.* 437, S. C.)

By an inclosure act, referees were appointed to ascertain the average price of corn for fourteen years preceding the week after the close of Easter next after the division and allotments under the inclosure acts were finished, and the exact amount of a yearly corn-rent in lieu of tithes was to be declared by an order of quarter sessions. The referees delivered their report in the court of quarter sessions, who ordered it to be filed: Held, that this was not an order as required by the statute, declaring the exact amount of the yearly corn-rent in the manner therein directed. (*Bendshyse* v. *Pearse*, 4 *Moore*, 99; 1 *B. & B.* 460, S. C.)

A modus of 10*s.* a year was payable to an impropriate rector, in lieu of all the tithes of a farm, to which farm were appurtenant rights of common in two several townships, B. and C. Under an inclosure act, to which the impropriator was a party, the common lands in the township of B. were inclosed, and allotments made to the impropriator in lieu of tithes, moduses, prescriptions, and customary payments. The act directed, that when the allotment should be made to the impropriator, all tithes, moduses, prescriptions, and customary payments should cease and be for every extinguished. By a contemporaneous act, to which the impropriator was not a party, the common lands in the township of C. were also inclosed: Held, that the impropriator being only entitled to a modus in respect of the farms and commons appurtenant, and the modus having been extinguished under the provisions of the first-mentioned act, he was not entitled to tithes of the allotments made in respect of the farm under the other act. (*Jackson* v. *Douglas*, 1 *Younge*, 391.)

An inclosure act directed that the commissioners should set out, allot, and award certain portions of lands out of the commons to be inclosed, to the impropriate rectors and curate, in lieu of all great and vicarial tithes; and the commissioners were then required to distinguish, by their award, the several allotments to such rectors and curate respectively; and the same allotments were thereby declared to be in full satisfaction and discharge of all tithes: Held, that the tithes were not extinguished until the commissioners had made their award. (*Ellis* v. *Arnison*, 5 *B. & Ald.* 47; 1 *B. & C.* 70; 2 *D. & R.* 161, S. C.)

Where therefore to an action of covenant for not setting out tithes of certain garden ground, the defendant pleaded the above act, by which the plaintiff received an allotment of waste lands in the parish, in lieu of tithe, but omitted to allege that the commissioners under the act had made their award in pursuance thereof; after a finding for the defendant by the jury, upon an issue of fact, the Court entered judgment for the plaintiff *non obstante veredicto.* (*Ellis* v. *Arnison*, 3 *D. & R.* 27; 1 *B. & C.* 78, S. C.)

Where commissioners under an inclosure act of 1769 were to make allotments to persons possessing interests in the contiguous townships of A., B., and C., and they made allotments to a rector in B. and C. in respect of tithes and glebe to which he was entitled in those townships, and in A. in respect of glebe, to which he was entitled in A., but omitted to make any specific allotment in A. in respect of tithes to which he was there entitled: Held, as the act contained a saving clause for all persons other than those to whom the allotments or compensations should be made in respect of their several interests, that the rector was not barred from suing for his tithes in 1825, although the award was to be final, unless appealed against in six months. (*Thorpe* v. *Cooper* (*in error*), 5 *Bing.* 116; 2 *M. & P.* 245, S. C.)

Mines.

Mines.]—Where, by the terms of an inclosure act, for inclosing the wastes of a manor, a certain portion was to be made to the lord in lieu of his right and interest in the soil, and the residue was to be allotted to the several tenants in fee, discharged from all customary tenures, &c., a saving clause, reserving to the lord all seigniories incident to the manor, and all rents,

fines, services, &c., and all other royalties and manorial jurisdictions whatever, will not reserve mines under those allotments to the tenants, though it appear that there was a subsisting lease of such mines at the time the act passed, granted by the lord of the manor. (*Townley* v. *Gibson*, 2 *T. R.* 701; see *R.* v. *Pitt*, 5 *B. & Adol.* 565; 2 *Nev. & M.* 363, S.C.)

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Evidence.]—To make a title to an allotment, under an inclosure act, of a sixteenth, to be set out for the person claiming to be lord of a certain manor, it is sufficient on the trial of an issue under the act to show that he is owner of the soil, and it need not be proved that there is such a manor existing in law, or that the claimant is lord, properly so called. (*Smith* v. *Smith*, 2 *Price*, 101.)

Evidence.

But the award would not be vitiated by error in the allotment. (*Id.*)

An inclosure act empowered the commissioners to sell such portions of the waste lands as should be necessary to defray the expenses of the act, before award made: in ejectment, it appeared that the lessor of the plaintiff, who claimed under a conveyance from the commissioner in pursuance of such power, had never taken possession of the land; it did not appear that any award had been made under the inclosure act: Held, that plaintiff was not bound, in order to recover in ejectment, to prove that the commissioner had duly qualified and given notice, &c. required in this section, before the execution of the conveyance. (*Doe* d. *Nanney* v. *Gore*, 2 *M. & W.* 320.)

Commissioners under an inclosure act are liable to suits at law and in equity for acts which are done not according to their authority. (*Speer* v. *Crawter*, 17 *Ves. jun.* 216.)

The commissioners' allotment must be produced. (*Bendshyse* v. *Pearse*, 4 *Moore*, 99; 1 *B. & B.* 460, S. C.)

An inhabitant of the parish is a competent witness. (*Meredith* v. *Gilpin*, 6 *Price*, 146.)

It has been considered that the provisions of this section, that the commissioners' oath, and the appointment of any new commissioner, shall be annexed to and inrolled with the award, are merely directory. (*Casamajor* v. *Strode*, 2 *M. & K.* 706; 5 *Sim. C. C.* 87, S. C.)

Where *three* commissioners and their successors were appointed to transact the business under an inclosure act, and the act of any *two* of them was to be valid, an assessment executed by *two*, after the death of one of the three, and before the appointment of a successor, was holden invalid, there not being three commissioners in existence at the time. (*Doe* v. *Middleton*, *H.* 2 & 3 *Geo. IV.*; 6 *Moore*, 532; 3 *B. & B.* 214, S. C.)

By a local inclosure act, it was provided, that, whenever the office of a commissioner should become vacant, the lord of the manor, with the major part in value of the proprietors of lands and common rights in the parish (such value to be ascertained according to their respective assessments in the last rates made for the relief of the poor in the said parish) present at a public meeting, should elect another. The office of commissioner having become vacant, a new one was elected by the lord of the manor, and the major part in value of the proprietors of lands at a public meeting. No one there disputed that he had such majority, but no reference was made to the poor rates: held, that, nevertheless, the appointment was valid. (*Doe* d. *Harris* v. *Bodenham*, 9 *B. & C.* 495.)

Provisions of sect. 1 merely directory.

Commissioners, vacancy of.

The commissioners' power is not determined absolutely by their award. (*Haggerston* v. *Dugmore*, 1 *B. & Ald.* 82; *post*, 816.)

Commissioners' power not determined by award.

By stat. 41 Geo. III. (*U. K.*) c. 109, s. 1, after reciting, "That in order to diminish the expense attending the passing of acts of inclosure, it is expedient that certain clauses usually contained in such acts should be comprised in one law, and certain regulations adopted for facilitating the mode of proving the several facts usually required by parliament on the passing of such acts;" it is enacted, "That no person shall be capable of acting as a commissioner in the execution of any of the powers to be given by any act hereafter to be passed for dividing, allotting, or inclosing any lands or grounds, except the power of signing and giving notice of the first meeting of the commissioner or commissioners for executing any such act, and of adminis-

41 Geo. 3, c. 109.

No person to act as a commissioner under any future act of inclosure, except signing notice of first meeting, and adminis-

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41 Geo. 3, c. 100.

tering the oath or affirmation hereinafter directed, until he shall have taken or subscribed the oath or affirmation following:—

tering an oath, until he shall have taken the oath herein mentioned.

"*I, A. B., do swear,* [or, being one of the people called Quakers, *do solemnly affirm*], *that I will faithfully, impartially, and honestly, according to the best of my skill and ability, execute and perform the several trusts, powers, and authorities vested and reposed in me as a commissioner, by virtue of an act for* [here insert the title of the act], *according to equity and good conscience, and without favour or affection, prejudice or partiality, to any person or persons whomsoever.*

So help me God."

Oaths and appointment of new commissioners to be inrolled with the award, and a copy admitted as evidence.

Which oath or affirmation it shall be lawful for any one of the commissioners, where more than one shall be appointed by any such act, or any one justice of the peace for the county within which the said lands or grounds shall be situated, where only one commissioner shall be so appointed, to administer, and they are hereby respectively required to administer the same; and the said oath or affirmation, so to be taken and subscribed by each commissioner, and also the appointment of every new commissioner, shall be annexed to and inrolled with the award of any commissioner or commissioners, and a copy of the inrolment thereof shall be admitted as legal evidence."

Commissioners declining to act, to give notice of such intention to the other commissioners; and none to purchase lands within any parish in which the inclosures are to be made, for a limited time.

Sect. 2. "Every person appointed a commissioner in or by virtue of any such act, who shall refuse or decline to act as such, shall forthwith give notice in writing to the other commissioner or commissioners of his intention to refuse or decline acting as a commissioner: provided always, that no such commissioner shall be capable of being a purchaser of any part or parts of the lands, tenements, or hereditaments within any parish in which the lands and grounds intended to be inclosed are situate, either in his own name, or in the name or names of any person or persons, until five years after the date and execution of the award to be made by any such commissioner or commissioners."

Commissioners to inquire into the boundaries of parishes, and if not sufficiently ascertained, fix them, giving notice of their intention so to do.

Sect. 3. "And whereas disputes or doubts may arise concerning the boundaries of parishes, manors, hamlets, or districts to be divided and inclosed, and of parishes, manors, hamlets, or districts adjoining thereto;" it is therefore enacted, "That the commissioner or commissioners appointed in or by virtue of any such act shall, and he or they is and are hereby authorised and required, by examination of witnesses upon oath or affirmation, (which oath or affirmation any one of such commissioners is hereby empowered to administer), and by such other legal ways and means as he or they shall think proper, to inquire into the boundaries of such several parishes, manors, hamlets, or districts; and in case it shall appear to such commissioner or commissioners that the boundaries of the same respectively are not then sufficiently ascertained and distinguished, such commissioner or commissioners shall, and he or they is and are hereby authorised and required, to ascertain, set out, determine, and fix the same respectively; and after the said boundaries shall be so ascertained, set out, determined and fixed, the same shall and are hereby declared to be the boundaries of such parishes, manors, hamlets or districts; (*a*) provided always, that such commissioner or

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Boundaries fixed by commissioners.

(*a*) The determination of the commissioners under an inclosure act, as to the boundaries of a parish to be inclosed, is not conclusive of the fact as to what were the boundaries *antecedently* to such determination. (*R.* v. *St. Mary, in Bury St. Edmunds*, 4 *B. & Ald.* 462.) Order of removal from Rougham, in Suffolk, to St. Mary, in Bury St. Edmunds. Confirmed by sessions, subject to the opinion of K. B., on the following case:—The pauper, in 1783, gained a settlement by hiring and service, in a house called Eldo Farm, which lay partly in Rougham and partly in St. Mary, Bury. He had at different times afterwards, in the course of thirty years and upwards, and up to the time of the removal, been relieved by Rougham, while living in another parish. In the years 1813 and 1814, separate inclosures took place of lands in Rougham and Bury. Under the Rougham Inclosure Act, in 1813, the commissioners in their award, ascertained and fixed the boundary line between Rougham and St. Mary, in Bury, and thereby included within the latter the apartment in which the pauper slept during his service at the Eldo Farm; and the commissioner under the Bury Inclosure Act, in 1814, also ascertained and fixed the boundaries of Bury by his

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41 Geo. 3, c. 109.

commissioners (before he or they proceed to ascertain and set out the boundaries of such parishes, manors, hamlets, or districts) shall, and he or they is and are hereby required to give public notice, by writing under his or their hands, to be affixed on the most public doors of the churches of such parishes, and also by advertisement to be inserted in some newspaper to be named in such act, and also by writing to be delivered to or left at the last or usual places of the abode of the respective lords, or stewards of the lords, of the manors in which the lands and grounds to be inclosed shall be situate, and of such adjoining manor or manors, ten days at least before the time of setting out such boundaries, or his or their intention to ascertain, set out, determine and fix the same respectively; and such commissioner or commissioners shall, within one month after his or their ascertaining and setting out the same boundaries, cause a description thereof in writing to be delivered to, or left at the places of abode of one of the churchwardens or overseers of the poor of the respective parishes, (*b*) and also of such respective lords or stewards: provided

Commissioners to cause a description of boundaries to be delivered to churchwardens, &c. and lords of manors, &c.

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award, and thereby found and declared, that the boundary of the parish of St. Mary, in Bury, proceeded along the boundary of Rougham parish, through the Eldo Farm House, as the same had been ascertained and fixed under the Rougham inclosure. In a perambulation also made subsequently to these acts, the parishioners of Bury included the apartment in which the pauper slept within the parish of St. Mary, in Bury. These facts being proved by the respondents, the appellants contended, that the boundary line set out by the commissioners was not conclusive as to the actual boundary before the award, and tendered to the court evidence to prove, that, before the inclosure acts, the spot in question was in Rougham. This evidence was objected to; and the sessions, considering the award of the commissioners as retrospective and conclusive, rejected the evidence, and confirmed the order of removal.—After argument, *Abbott*, C. J., said, "It seems to me, that great mischief might follow, if the court were to hold, that the decision of the commissioners in this case, as to the boundaries of the parish, was conclusive, and at the same time retrospective; for many cases may be put, both of fines of lands and wills, in which such a decision might materially affect the rights of third persons. The best and safest course, therefore, will be, to hold such determination not to be conclusive evidence of what the boundaries were previously to the period when it was made. In that case the sessions ought to have received the evidence which they have rejected; and I think, therefore, that the order of sessions should be quashed, and the case sent back to be re-heard." The other judges concurring—Case sent back to the sessions.

By a private inclosure act, commissioners were directed to fix and settle the boundaries of a parish in a certain manner therein specified, and to advertise in a provincial newspaper, a description of the boundaries so fixed and settled. The boundaries so fixed and settled were also to be inserted in the award of the commissioners, and to be final, binding, and conclusive. The commissioners having fixed and settled the boundaries in the mode specified, duly advertised a description of them; but the boundaries mentioned in the award varied from those which had been advertised:—held, that the commissioners had not pursued the authority given by that act, and that their award was not binding as to the boundaries of the parish. (*R.* v. *Washbrook*, 4 *B. & C.* 732; 7 *D. & R.* 221, S. C.)

(*b*) A parish was divided into four tithings, A., B., C., and D.; A. containing the parish church. Each tithing maintained its own poor, and each had a churchwarden, elected at a vestry of the parish in general, but from and by its own inhabitants. The minute of appointment included all the four, and stated them to have been nominated to serve the office of churchwardens for the tithings for the year ensuing. All were sworn in together at the archdeacon's visitation, the oath being administered to them and each of them "truly to execute the office of churchwarden within your parish." None ever acted out of his own tithing, unless in signing the annual presentments to the archdeacon of the state of the church, &c. Each of the tithings (except A., which was exempt) raised its own church-rate, and paid it to the vestry-clerk; and he kept a separate account for each churchwarden, who accounted with the inhabitants of his own tithing. A commissioner of inclosure under the local act and the General Act, 41 Geo. III. c. 109, s. 3, made an order settling the boundaries between the above parish and another parish adjacent, and adjudging certain lands to be in the latter; and he within a month, served a description of the

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41 Geo. 3, c. 109.

Appeal.

always, that if any person or persons interested in the determination of the said commissioner or commissioners respecting the said boundaries shall be dissatisfied with such determination, such person or persons may appeal to the justices of the peace acting in and for the county in which such lands or grounds shall be situate, at any general quarter sessions of the peace to be holden within four calendar months next after the aforesaid publication of the said boundaries, by delivering or leaving such description as aforesaid; the party or parties making such appeal (*a*) giving eight days' notice of such appeal and of the matter thereof in writing to the commissioners; and the decision of the said justices therein shall be final and conclusive, and shall not be removed or removable by certiorari or any other writ or process whatsoever, into any of his majesty's courts of record at Westminster or elsewhere." (*b*)

Decision at sessions final.

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boundaries on a party then acting as churchwarden of tithing A. Until the order, the lands in question had been rated to tithing B. On appeal against a poor-rate made upon the above lands, as situate in tithing B., notwithstanding the commissioner's order:—held, that the description of boundaries had been sufficiently served, according to the proviso of stat. 41 Geo. III. c. 109, s. 3, requiring such description to be served upon "one of the churchwardens or overseers of the poor of the respective parishes," although the party served had finished his year of office, but continued to do the duties, because his successor had not been sworn in or acted: held, also, that the sessions had acted rightly in rejecting evidence offered to show that the commissioner, in his inquiry into the boundaries, had not conducted his examination in the manner required by stat. 41 Geo. III. c. 109, s. 3. (*Rex* v. *Marsh*, 6 *Ad. & Ell.* 468.)

(*a*) Where a clause in a private inclosure act, in which the above general inclosure act was recited, gave an appeal to any person aggrieved by any thing done in pursuance of that act, in all cases "except as to such acts, determinations, or proceedings of the commissioners, as by the general inclosure act were directed to be final, binding, and conclusive;" and an order was made by a commissioner and a magistrate jointly, for stopping up a private road set out under the local act:—held, that an appeal lay to the sessions against such order, because it was not an order of the commissioner alone, but of him and a magistrate together, and there being no words contained in the general inclosure act which rendered the decision of the commissioner and justice final and conclusive, or that an order of a commissioner should be final, as far as regarded private roads. (*R.* v. *West Riding of Yorkshire Justices*, 3 *D. & R.* 306; 2 *B. & C.* 228, S. C.)

A clause in a private inclosure act, declaring that no item or charge in the accounts of the commissioners shall be binding to the parties concerned, or valid in law, unless the same shall have been duly allowed by a justice of the peace in the manner therein pointed out, does not take away an appeal given by a subsequent clause "to the party grieved by any thing done in pursuance of that or the general inclosure act, (other than and except such determinations as were by that or the general inclosure act declared to be binding, final, and conclusive)," the allowance of the accounts by a justice not falling within this exception. (*R.* v. *Justices of Cumberland*, 1 *B. & C.* 64.)

See *R.* v. *Townshend*, (5 *B. & Ald.* 420, *post*, 814, *n.*), as to appeal.

(*b*) By an inclosure act, an appeal was given to the next sessions within six calendar months after the cause of complaint, at which said sessions the justices were authorised and required to hear and determine the matter of such appeal, and make such order as to them should seem reasonable; the appellant moved the Court of Sessions (in due time) to receive and respite his appeal to the next sessions, which was refused, because the following sessions would not happen before the expiration of six months after the cause of complaint. The Court of Queen's Bench had no doubt but that the clause was compulsory on the justices to *receive* the appeal, but not to *respite* it, and therefore refused to grant a mandamus to the justices to receive it. (*R.* v. *Justices of Derbyshire*, 4 *T. R.* 488.)

Though a statute, giving an appeal to the sessions within four months after the cause of complaint shall arise, direct the justices at the *said* sessions, to hear and determine the matter of such appeal, &c. yet it seems they have an incidental power of adjourning it to another sessions upon lawful cause, such as the absence of a material witness, of the sufficiency of which they are to judge; but where the appeal was against the suffi-

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A survey, admeasurement, &c. of lands, &c., to be inclosed, to be made and kept by commissioners, and verified by persons making the same.

Sect. 4. "A true, exact, and particular survey, admeasurement, plan, and valuation, of all the lands and grounds to be divided, allotted, and inclosed by any such act, and also of all the messuages, cottages, orchards, gardens, homesteads, ancient inclosed lands and grounds, within any such parish or manor, shall be made and reduced into writing by such commissioner or commissioners, or by such other person or persons as he or they shall nominate and appoint, as soon as conveniently may be, for the purposes of such act; and the number of acres and decimal parts of an acre, in statute measure, contained in all the lands and grounds directed or authorised to be divided, allotted, and inclosed, and also in all the ancient inclosed lands, grounds, and homesteads aforesaid, and of each and every proprietor's distinct property in the same respectively, at the time of making such survey and admeasurement, shall be therein set forth and specified; and that the said survey, admeasurement, plan, and valuation, shall be kept by such commissioner or commissioners; and the person or persons who shall make such survey, admeasurement, plan, and valuation, shall verify the same upon oath or affirmation, at any meeting to be held after the making thereof; (which oath or affirmation the commissioners, or any one of them, are and is hereby empowered and required to administer); and the proprietors and their respective agents, and all persons interested therein, shall at all seasonable times have liberty to peruse and inspect such admeasurement and plan only, and to take copies thereof and extracts therefrom respectively."

Proprietors may inspect admeasurements and plans, and take copies.

Until division completed, lands may be entered by commissioners, or persons they may appoint, to make surveys, &c.

Sect. 5. "For surveying, admeasuring, and valuing all the said lands and grounds, and for other the purposes of such act, it shall be lawful for such commissioner or commissioners, every or any of them, or the person or persons to be appointed by him or them, to make such survey, admeasurement, plan, and valuation, together with their and every of their assistants and servants, at any time or times whatsoever, until such division shall be completed, to enter, view, and examine, survey, and admeasure, all and every part of the lands and grounds intended to be divided and allotted, and also all the ancient inclosed lands, grounds, and homesteads directed to be surveyed, and to do, or cause to be done, any act or thing necessary for putting such act into execution: provided always, that any map or survey made at the time of passing any such act, which shall be tendered to such commissioner or commissioners, and which shall be, in his or their judgment, and to his or their satisfaction, a just and true map or survey, proper for the purpose of carrying such act into execution, may be used for that purpose, if the said commissioner or commissioners shall think fit, without any new map or survey being made of such part of the lands and grounds as shall be comprised in any such approved map or survey as aforesaid."

Maps made at the time of passing acts, may be used, without making new ones, if commissioners think fit.

Claimants of rights in lands to be inclosed, to deliver to commissioners schedules of particulars, or be excluded; which claims may be inspected, and copies taken. (*a*)

Sect. 6. "All persons, and bodies corporate or politic, who shall have or claim any common or other right to or in any such lands so to be inclosed, shall deliver or cause to be delivered to such commissioner or commissioners, or one of them, at some one of such meetings as the said commissioner or commissioners shall appoint for the purpose, (or within such further time, if any, as the said commissioner or commissioners shall for some special reason think proper to allow for that purpose), an account or schedule in writing, signed by them, or their respective husbands, guardians, trustees, committees, or agents, of such their respective rights or claims, and therein describe the lands and grounds, and the respective messuages, lands, tenements, and here-

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ciency of an allotment under an inclosure act, and it appeared that the ground was staked out in March, when the appellant took possession of and cropped it, though no final award of it was made by the commissioners till long afterwards, yet an appeal lodged at the October sessions was held to be out of time, and this, though a small part of the allotment was, with the appellant's consent, exchanged so late as July. (*R.* v. *Justices of Wiltshire*, 13 *East*, 352.)

See further, *ante*, "*Appeal*;" *R.* v. *Justices of Middlesex*, 1 *Chit. Rep.* 366; *R.* v. *Justices of Lancashire*, 1 *B. & Ald.* 630.

(*a*) This clause extends to tithes. (*Doe* d. *Watson* v. *Jefferson*, 9 *Moore*, 260; 2 *Bing.* 118, S. C.)

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ditaments, in respect whereof they shall respectively claim to be entitled to any and which of such rights in and upon the same or any part thereof, with the name or names of the person or persons then in the actual possession thereof, and the particular computed quantities of the same respectively, and of what nature and extent such right is, and also in what rights, and for what estates and interests they claim the same respectively, distinguishing the freehold from the copyhold or leasehold; or, on non-compliance therewith, every of them making default therein shall, as far only as respects any claim so neglected to be delivered, be totally barred and excluded of and from all right and title in or upon such lands so to be divided respectively, and of and from all benefit and advantage in or to any share or allotment thereof; all which said claims or accounts shall, at all seasonable times, until after the execution of the said award, be open to the inspection and perusal of all parties interested or claiming to be interested in the premises, their respective agents or attornies, who may take copies thereof, or extracts therefrom respectively; and if any person or persons, or body politic or corporate, interested or claiming to be interested in the premises, shall have any objection to offer to any such account or claim, the particulars of such objection shall be reduced into writing, and signed by them or their respective husbands, guardians, trustees, committees, or agents, and shall be delivered to the said commissioner or commissioners, at or before some other meeting of such commissioner or commissioners, to be by him or them appointed for that purpose; and no such objection shall afterwards be received, unless for some legal disability or special cause to be allowed by the said commissioner or commissioners."

Objections to claims to be delivered to commissioners at or before meeting appointed for that purpose, or shall not be received except for special cause.

Sect. 7. "Nothing herein contained shall authorise such commissioner or commissioners to hear and determine any difference or dispute which may arise, touching the right or title to any lands, tenements, or hereditaments, but such commissioner or commissioners shall assign and set out the several allotments directed to be made unto the person or persons, who, at the time of the division and inclosure, shall have the actual seisin or possession of the lands, tenements, or hereditaments, in lieu or in right whereof such allotment shall be respectively made: provided also, that no difference or suit, touching the title to any lands, tenements, or hereditaments, shall impede or delay the commissioner or commissioners in the execution of the powers vested in him or them, by virtue of any such act; but the division or inclosure directed to be made shall be proceeded in, notwithstanding such difference or suit."

Commissioners not hereby authorised to determine disputes touching rights; but they shall assign the allotments to the persons in actual possession of the lands in lieu whereof made.

Sect. 8. "Such commissioner or commissioners shall, and he or they is and are hereby authorised and required, in the first place, before he or they proceed to make any of the divisions and allotments directed in and by any such act, to set out and appoint the public carriage roads and highways, through and over the lands and grounds intended to be divided, allotted, and inclosed, and to divert, turn, and stop up, any of the roads and tracts, upon and over all or any part of the said lands and grounds, as he or they shall judge necessary, so as such roads and highways shall be and remain thirty feet wide at the least, and so as the same shall be set out in such directions as shall, upon the whole, appear to him or them most commodious to the public; and he or they are hereby further required to ascertain the same by marks and bounds, and to prepare a map in which such intended roads shall be accurately laid down and described, and to cause the same, being signed by such commissioner, if only one, or the major part of such commissioners, to be deposited with the clerk of the said commissioner or commissioners, for the inspection of all persons concerned; and as soon as may be after such carriage roads shall have been so set out, and such map so deposited, to give notice in some newspaper to be named in such bill, and also by affixing the same upon the church door of the parish, in which any of the lands so to be inclosed shall lie, of his or their having set out such roads, and deposited such map, and also of the general lines of such intended carriage roads, and to appoint, in and by the same notice, a meeting to be held by the said commissioner or commissioners, at some convenient place, in or near to the parish or township within which the said inclosure is to be made, and not sooner

Commissioners, before making any allotments, to appoint public carriage roads, and prepare map thereof, to be deposited with their clerk, and give notice thereof, and appoint a meeting; at which, if any person shall object, commissioners, with a justice of the division, shall determine the matter.

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than three weeks from the date and publication of such notice; at which meeting it shall and may be lawful for any person who may be injured or aggrieved by the setting out of such roads to attend; and if any such person shall object to the setting out of the same, then such commissioner or commissioners, together with any justice or justices of peace, acting in and for the division of the county in which such inclosure shall be made, and not being interested in the same, who may attend such meeting, shall hear and determine such objection, and the objections of any other such person, to any alteration that the said commissioner or commissioners, together with such justice or justices, may in consequence propose to make, and shall, and he or they are hereby required, according to the best of their judgment upon the whole, to order and finally direct how such carriage roads shall be set out, and either to confirm the said map, or make such alterations therein as the case may require: provided always, that in case such commissioner or commissioners shall by such bill be empowered to stop up any old or accustomed road passing or leading through any part of the old inclosures in such parish, township or place, the same shall in no case be done without the concurrence and order of two justices of the peace, acting in and for such division, and not interested in the repair of such roads, and which order shall be subject to

Old road not to be stopped up without order of two justices, and which shall be subject to appeal to quarter sessions.(*a*)

(*a*) Under this section the commissioners are authorised to stop up or divert footways as well as carriage roads; and the proviso at the end of the section is not confined to carriage roads, but extends to every species of ways. Therefore, where commissioners were empowered by the local inclosure act to stop up all ways passing over the lands to be inclosed, as well as ways passing through old inclosures in the parish; it was held, that in order effectually to stop up a public footway, passing partly over the lands to be inclosed, and partly over an old inclosure, it was necessary for them to have the concurrence and order of two justices: and no such order or concurrence having been obtained, it was held, that a footway, which the commissioners ordered to be stopped up, had not been effectually stopped, but continued a public footway. (*Logan* v. *Burton*, 5 *B. & C.* 513; 8 *D. & R.* 299, S. C.)

Where an inclosure act authorised the commissioners to stop up old roads in the parish, besides those over the lands to be inclosed, provided it were not done without the concurrence of two justices, it was, it seems, considered, that under this clause, the concurrence of two justices was necessary to warrant the stopping up of any part of a public footway which passed through an old inclosure. (*Id.*)

A local inclosure act empowered the commissioners, *with the concurrence and order of two justices* of the peace, to *stop up* and discontinue any of the roads or ways *in, through, over, or on the sides of* the inclosed lands. The General Inclosure Act, 41 Geo. III. c. 109, s. 8, *supra*, requires the commissioners, first to appoint and set out the *public carriage roads and highways*, and to describe them by metes and bounds in a map; of all which notice is to be given in a public newspaper, and a meeting is to be advertised, whereat any person aggrieved *by the setting out* of such carriage roads, may attend and complain, and a commissioner, or the commissioners and two magistrates, are to determine such complaints, and to alter and finally confirm the map. It is then provided (in the same section), that no *old* or *accustomed road*, passing or leading *through* the old inclosures, which the commissioner or commissioners may be by any bill authorised to stop up, *shall be stopped up* in any case *without the concurrence and order of two justices of the peace* acting, &c., and *such order shall be subject to an appeal* to the quarter sessions. By the 10th section, *post*, 816, the commissioners are empowered to *set out* and appoint such *private roads*, &c., *in, over, upon, and through, or by the sides of* allotments, as they shall think fit, giving such notice. By the 11th section, *post*, 817, it is provided, *that all roads, ways and paths, over, through and upon such lands and grounds*, which shall not be set out as aforesaid, *shall be for ever* stopped up and extinguished, and shall be deemed and taken as part of the lands and grounds to be divided, allotted and inclosed. The commissioners published in the newspapers the roads set out, and advertised the required meeting also in the newspaper, announcing therein, that any person *injured* or *aggrieved* by the setting out such roads, or *by the omission of any other*, might attend, and they would be heard. After that meeting, the commissioners and two magistrates made

Stopping up ways and setting out new.

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an appeal to the quarter sessions, in like manner and under the same forms and restrictions as if the same had been originally made by such justice as aforesaid."

Notices of stopping up.

and signed an order *confirming* the map, and the roads and footways therein described, excepting three which were specified, and such map was annexed to the award.—A proprietor of one of the new inclosures brought an action of trespass for breaking his close, &c.; the defendant justified under an alleged right of way, and proved an ancient footpath over the locus in quo. On a special case, stating that such old footpath *had been omitted by the commissioners in preparing the map* of roads, &c. to be set out, the Court of Exchequer decided, that the old way *was not stopped up* and extinguished, according to a true construction of the acts of parliament, by what had been done by the commissioners and magistrates for that purpose, and with that intention: the *positive* concurrence and order of two magistrates being indispensably necessary to the stopping up of the roads, whether they be public carriage roads, *or private or bridle and foot roads.* Nothing short of *an order* of two magistrates *expressly stopping up the road* will satisfy the statute; merely *not setting it out* is *not sufficient to extinguish it*, even in the case of *a private road, bridle or footway.* (*Harber* v. *Rand*, 9 *Price*, 58.)

Mandamus to set out way, &c.

Way, how to be formed.

An old footway passed from a public highway over wastes to *old inclosures*, into another public highway. By an award of the commissioners under a local act for inclosing the wastes, the part of the waste over which the footway ran was allotted; but the footway was not mentioned in the award, nor was any new way set out therein. No power to stop up ways over *old* inclosures was given by the particular inclosure act:—Held, that the old footway was not extinguished by the allotment. (*Thackrah* v. *Seymour*, 1 *C. & M.* 18; 8 *Tyr.* 87.)

Who to repair.

The plaintiff, having an allotment made to him by a commissioner under an inclosure act, of land, over which the defendants had a *private* right of way before the passing of the act, but which way was not noticed or described amongst those set out by the commissioner appointed for executing that act, (the operation of which, as to the powers of setting out or stopping up roads, was left to the General Inclosure Act, 41 Geo. III. c. 109), may, under the 11th section of the latter statute, justify the stopping up of such way, without any directions from the commissioners for that purpose in the award, or any other road being set out or appointed in lieu of it. (*White* v. *Reeves*, 2 *Moore*, 23.)

Commissioners' authority to direct repairs of ways.

The commissioners have, in general, no authority to allot an ancient towing-path. (*Simpson* v. *Scales*, 2 *B. & P.* 496.)

Before the repeal of the 55 Geo. III. c. 60, (see "*Highways in general*," Vol. III.) it was made a question, but not decided, whether it was necessary for a commissioner to give such notices as were required by that general act, where roads were stopped up under the provisions of a private or local inclosure act. (*R.* v. *Townshend*, 5 *B. & Ald.* 420.)

Allotments were set out under an inclosure act to a party claiming them, and possession given in or about 1817. There was no road to them, nor any access but through allotments made, or land sold, under the act, to other persons. On motion in 1829, for a mandamus to the commissioners (who had not yet published their award) to set out an occupation road to the first mentioned allotments, the Court held that the application came too late. (*R.* v. *Commissioners under Cockermouth Inclosure Act*, 1 *B. & Adol.* 378.)

The way over inclosures must be formed, as a man would make it over his own land. Where a private act reserved to the lord all mines, &c., and the liberty of laying waggon ways, &c., as might be necessary for the full and complete enjoyment thereof; trespass for laying a waggon way over one of the allotments in an improper manner:—Held, that the real question for the jury was, whether such waggon way had been laid in such a manner as a person of reasonable or ordinary skill would have laid it, and such as a prudent person would have adopted if he had been making the road over his own land, and not over that of another. (*Absen* v. *Fenton*, 1 *B. & C.* 195.)

Where an inclosure act declared, that the roads set out shall be repaired by "such person and persons," it means those only interested in the inclosure. (*R.* v. *Collingham*, 6 *T. R.* 20.)

On an indictment for encroaching on a public highway, it appeared, that in 1771, commissioners, under an inclosure act, had been empowered to set out public and private roads, the former to be repaired by the township, the latter by such persons as the commissioners should direct. The public roads were to be sixty feet wide between the fences. The commissioners, in their award, described a road as private; but, in setting it out, a space of sixty feet was left between the fences,

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The carriage roads to be fenced on both sides by such land owners as commissioners shall direct, and no person shall erect a gate across a road, or plant trees on sides, at less than 50 yards distance.

Commissioners to appoint surveyors, and if with salary, such salary and expense of making the road, over and above the statute duty, to be raised as other expenses, and paid on or before execution of award.

Sect. 9. "Such carriage roads, so to be set out as aforesaid, shall be well and sufficiently fenced on both sides, by such of the owners and proprietors of the lands and grounds intended to be divided, allotted, and inclosed, and within such time as such commissioner or commissioners shall, by any writing under his or their hands, direct or appoint, and that it shall not be lawful for any person or persons to set up or erect any gate across any such carriage road, or to plant any trees in or near to the edges on the sides thereof, at a less distance from each other than fifty yards; and such commissioner or commissioners shall, and he or they is and are hereby empowered and required, by writing under his or their hands, to nominate and appoint one or more surveyor or surveyors, with or without a salary, for the first forming and completing such parts of the said carriage roads as shall be newly made, and for putting into complete repair such part of the same as shall have been previously made; which salary (if any), and also the expense of forming, completing, and repairing such roads respectively, over and above a proportion of the statute duty on the roads so to be repaired, shall be raised in like manner as the charges and expenses of obtaining and passing any such act, and of carrying the same into execution, shall be thereby directed to be raised, and shall be paid to such surveyor or surveyors on or before the execution of the award of such commissioner or commissioners; and in case the same shall be thereby provided to be raised by sale of any part of the lands so to be divided and inclosed, that then such commissioner or commissioners shall make a conditional rate upon the owners and proprietors of the same, in case the produce of such sale should prove insufficient for the purposes aforesaid;

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and they directed both the public and private roads to be repaired by the township. The centre only of the sixty feet was ordinarily used as a carriage road, and the township repaired it. The space said to be encroached upon was at the side of this road, and there was a diversity of evidence as to the use made of this space by the public, and its condition since the time of the award: — Held, that the commissioners had exceeded their authority in awarding that private roads should be repaired by the township; but that, on the whole of this evidence, it was a proper question for the jury, whether or not the road in question, though originally intended to be private, had been dedicated to, and adopted by the public. (*R.* v. *Wright*, 3 *B. & Adol.* 681.)

And semble, per Lord *Tenterden*, C. J., that when a road runs through a space of fifty or sixty feet between inclosures set out by the act of parliament, it is *primâ facie* to be presumed, that the whole of that space is public, though it may not all be used or kept in repair as a road. (*Id.*)

Where a public footway over crown land is extinguished under an inclosure act, but the public continue for twenty years afterwards to use the way, such use is not evidence of a dedication of the way to the public, unless it appears to have had the consent of the crown. (*Harper* v. *Charlesworth*, 6 *D. & R.* 572; 4 *B. & C.* 574, S. C.)

By a clause in an inclosure act, a commissioner was empowered to stop up any way, provided it was done by the order and with the concurrence of two justices, and such order was to be subject to an appeal to the quarter sessions, in like manner, and under such form and restrictions, as if the same had been originally made by such justices; and, by a subsequent clause, any party aggrieved might appeal at any time within six months next after the cause of complaint had arisen under this act. The commissioner, with the concurrence and order of two justices, stopped up a road, without giving the public notices required by 55 Geo. III. c. 68, s. 2: — Held, that a party aggrieved might, under these circumstances, appeal at any time within six months. (*R.* v. *Townshend*, 5 *B. & Ald.* 420, *ante*, 814, n. See further as to appeals, *ante*, "*Appeal.*")

Plaintiff having pleaded a right of common under an award of commissioners appointed by an inclosure act, which authorised them to award such rights in respect of certain messuages in G., and gave an appeal in three months after the award, by feigned issue, and to the quarter sessions: it was held, that, the limited time having elapsed, it was not necessary for him to show the original right, in respect of which the commissioners had given him the right in the award. (*Phillips* v. *Maile*, 7 *Bing.* 133; 4 *M. & P.* 70, S. C.)

See further as to appeals, "*Appeals,*" *ante.*

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and such surveyor or surveyors shall, and he or they is and are hereby directed to be in all respects subject to the jurisdiction and control of the justices of the peace acting in and for the county in which such roads shall respectively lie, and shall account to such justices in like manner for all monies so to be by him or them received and expended, and for the repayment of any surplus which may remain in his or their hands to such persons as shall have been made liable to contribute thereto, according to the proportion so as above ascertained by such commissioner or commissioners; and such justices shall have the like powers of levying any such rate as may by them be thought necessary for the purposes aforesaid, according to the proportions previously ascertained by such commissioner or commissioners, as if such surveyor or surveyors had been appointed under or by virtue of the General Highway Act passed in the thirteenth year of the reign of his present majesty; and in case such surveyor or surveyors shall neglect to complete and repair such roads respectively within the space of two years after such award, unless a further time, not exceeding one year, shall for that purpose be allowed by such justices, and then within such further time, he or they shall forfeit the sum of 20*l.*, and the inhabitants at large of the parish, township or place wherein such roads shall be respectively situate, shall be in no wise charged or chargeable towards forming or repairing the said roads respectively, except such proportion of such statute duty as aforesaid, till such time as the same shall, by such justices in their special sessions, be declared to be fully and sufficiently formed, completed and repaired; from which time, and for ever thereafter, the same shall be supported and kept in repair by such persons, and in like manner as the other public roads within such parish, township or place are by law to be amended and kept in repair." (*a*)

Surveyors to be subject to control of justices, and to account to them for monies received.

Justices may levy rates.

Surveyors neglecting to complete roads in a limited time, to forfeit 20*l.*, and inhabitants not to be chargeable to them (except statute duty) till declared to be completed at a special sessions.

Commissioners shall appoint private roads, &c.

Sect. 10. "Such commissioner or commissioners shall, and he or they is and are hereby empowered and required to set out and appoint such private roads, bridleways, footways, ditches, drains, water-courses, watering-places, quarries, bridges, gates, stiles, mounds, fences, banks, bounds, and landmarks, in, over, upon, and through or by the sides of the allotments to be made and set out in pursuance of such act, as he or they shall think requisite, giving such notice, and subject to such examination, as to any private roads or paths, as are above required in the case of public roads; and the same shall be made, and at all times for ever thereafter be supported and kept in repair, by and at the expense (*b*) of the owners and proprietors for

Expenses.

(*a*) A road continued, as well as a road newly made, under the award of commissioners of inclosure, must be declared by justices in special sessions to be fully completed and repaired before the inhabitants of the district can be indicted for not repairing it. (*R.* v. *Inhabitants of Hatfield*, 4 *A.* & *E.* 156.)

(*b*) Under this section it has been held, that commissioners who had made private roads under the authority of that and a private inclosure act (which said nothing about private roads), had no power to make a rate for reimbursing themselves the expenses incurred. (*Falmouth* (*Earl*) v. *Richardson*, 5 *D.* & *R.* 664; 3 *B.* & *C.* 837, S. C.; and see *R.* v. *St. Benedict*, 4 *B.* & *Ald.* 447.) It will be seen that this 10th section does not give to commissioners any power to *make* private *roads*, but only to set them out, and say in what proportions they shall be made by owners of allotments.

An ancient towing-path is not within the jurisdiction of the commissioners, and therefore cannot be allotted under this section. (*Simpson* v. *Scoles*, 2 *B.* & *P.* 496.)

The commissioners appointed by a local act, which enacts that the private roads set out by them should be repaired by such person or persons as they should award, have no power to impose on the parish at large the burden of repairing. (*R.* v. *Cottingham*, 6 *T. R.* 20.)

In another case, where commissioners, by an inclosure act, were empowered (*inter alia*) to make roads and to defray the expense by a rate on the several proprietors, and they executed their award as to the allotments before the roads were completed, or sufficient funds were raised for that purpose: Held, that they might afterwards make a rate to defray the expense of completing the roads. (*Haggerston* v. *Dugmore*, 1 *B.* & *Ald.* 82.)

As to the effect of a clause that commissioners shall lay these accounts before a justice of the peace, and other law points as to these accounts, *see post*, 827, and notes there.

the time being of the lands and grounds directed to be divided and inclosed, in such shares and proportions as the commissioner or commissioners shall, in and by his or their award, order and direct."

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Sect. 11. "After such public and private roads and ways shall have been set out and made, the grass and herbage arising thereon shall for ever belong to and be the sole right of the proprietors of the lands and grounds which shall next adjoin the said roads and ways on either side thereof, as far as the crown of the road; (a) and all roads, ways, and paths, over, through, and upon such lands and grounds which shall not be set out as aforesaid, shall be for ever stopped up and extinguished, and shall be deemed and taken as part of the lands and grounds to be divided, allotted, and inclosed, and shall be divided, allotted, and inclosed accordingly [*see ante*, 813, 814, *&c.*]: provided, that nothing herein contained shall extend, or be construed to extend, to give such commissioner or commissioners any power or authority to divert, change, or alter any turnpike road that shall or may lead over any such lands and grounds, unless the consent of the majority of the trustees of such turnpike road, assembled at some public meeting called for that purpose, on ten days' notice, be first had and obtained."

Grass and herbage on roads shall belong to proprietors of lands adjoining; all roads not set out shall be allotted and inclosed. (a)

No turnpike road shall be altered without consent of trustees.

Sect. 12. "Such commissioner or commissioners, in making the several allotments directed by any such act, shall have due regard, as well to the situation of the respective houses or homesteads of the proprietors, as to the quantity and quality of the lands and grounds to be allotted to them respectively, so far as may be consistent with the general convenience of the said proprietors; and that such commissioner or commissioners, in making the said allotments, shall have particular regard to the convenience of the owners or proprietors of the smallest estates in the lands and grounds directed to be allotted and exchanged."

Commissioners to have regard to situation of houses as well as to quantity and quality of land, as far as consistent with general convenience.

Sect. 13. "And whereas the proprietors and persons interested in open common fields, meadows, pastures, commons, and waste lands, directed to be divided and allotted, whose allotments thereof will be small, and expensive to inclose, may be desirous of stocking and depasturing their allotments in common, and of sharing such produce as may grow thereon, under proper regulations; it is therefore further enacted, that such commissioner or commissioners shall be, and he or they is and are hereby fully authorised and empowered, on application of the parties interested, at their first or second meeting for receiving claims, and on an attentive view and full consideration of the premises, to award, order, and direct any such allotments to be laid together and ring-fenced, and to be stocked and depastured in common, and to make such orders and regulations for the equitable enjoyment thereof, and for the participation of any produce growing or to grow thereon, as such commissioner or commissioners may think beneficial and proper for the said several parties interested therein."

Commissioners may direct small allotments to be laid together and ring-fenced, and stocked and depastured in common by the proprietors.

Sect. 14. "The several shares of and in any lands or grounds which shall, upon any such division, be assigned, set out, allotted, and applied, unto and for the several persons who shall be entitled to the same, shall, when so

Allotments to be in full compensation for all rights in the lands, which

(a) An inclosure act authorising commissioners to make roads through inclosed lands, and declaring that the persons having common rights of such lands should be entitled to the herbage of the roads, in such manner as the commissioners should award, does not authorise them to sell the herbage by auction, or otherwise, to one individual commissioner. (*Raimes* v. *Robinson*, 2 *Chit.* 501.)

If an award under an inclosure act allot herbage to the surveyors of the highway for the time being, the lord of the manor is a trustee for the surveyors for the time being. (*Johnson* v. *Hodgson*, 8 *East*, 38.)

Where the herbage of a road becomes vested by the General Inclosure Act, s. 11, in the proprietors of allotments on each side, no presumption arises that the soil itself belongs to such proprietors. (*Per* Lord *Denman*, *R.* v. *Inhabitants of Hatfield*, 4 *Ad. & E.* 156.)

In *R.* v. *Edmonton* (2 *M. & Malk.* 32) Lord *Tenterden* expressed a doubt whether the ordinary presumption of law, that the soil of roads is the property of the owners of the adjoining lands, prevails, in cases where the road is made under an inclosure act.

Right to soil of lands set out.

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41 Geo. 3, c. 109. shall cease on notice from the commissioners being affixed on door of parish church. (a)

allotted, be and be taken to be in full bar of and satisfaction and compensation for their several and respective lands, grounds, rights of common, and all other rights and properties whatsoever, which they respectively had or were entitled to, in and over the said lands and grounds immediately before the passing of any such act [*see sect.* 40, *post*, 829]; and that, from and immediately after the making of the said division and allotments, and the execution of the award (a) of such commissioner and commissioners, or at any other time as such commissioner or commissioners shall, by writing under his or their hands, to be affixed on the principal door of the church of the parish in which the lands and grounds shall be situate, direct, or appoint, all rights of common, and all rights whatsoever, by such act intended to be extinguished, (b) belonging to or claimed by any person or persons whomsoever, bodies politic or corporate, in, over, or upon such lands or grounds, shall cease, determine, and be for ever extinguished."

Commissioners may exchange by allotments, messuages, lands, &c., with the consent

Sect. 15. "Such commissioner or commissioners shall, and he or they is and are hereby authorised to set out, allot, and award any messuages, buildings, lands, tenements, hereditaments, new allotments, or old inclosures within such parish or manors, in lieu of or in exchange for any other messuages, (c)

Title to allotment not acquired until execution of award, &c.

(a) By this act the legal title to an allotment is not acquired until the execution and proclamation of the commissioners' award; and where a local act directed that the commissioners, by notice, might cause all rights of common to be extinguished, and might then allot the waste land amongst the proprietors, and that the owners might fence their allotments after they had been marked, staked out, and confirmed, and *before the assigning the award*, and might also within three months *before the execution of the award*, sell and convey their interests in the allotments; the commissioners being thereby authorised to allot to the purchasers, and the latter, *after the execution of the award*, to hold the allotted lands in such manner as the vendor would have done if there had been no sale; provided that where the allotments were copyhold, the deed should be inrolled in the court-rolls of the manor, and that the purchaser should be admitted tenant thereto at the same time as the other allottees of copyhold lands, *viz. after the execution of the award*: Held, that this authority to inclose, and so to enjoy in severalty, and the power to sell and convey, might well (considering the language in which that power was given) be enjoyed and exercised without the legal seisin of the land; and that therefore these provisions not sufficiently countervailing those of the General Inclosure Act, the legal freehold did not pass to the allottee till after the execution and proclamation of the award. (*Farrer* v. *Billing*, 2 *B. & Ald.* 271. *Vide post*, 847, 6 & 7 W. IV. c. 115, s. 33, *and notes.*)

The preparation of plans and maps, for the purpose of carrying an inclosure act into effect, is no evidence of an allotment under an act, which requires an appeal against an allotment to be made within six months after the cause of complaint has arisen; and it suffices to appeal in six months from the making the conclusive allotment. (*R.* v. *Justices of Middlesex*, 1 *Chit. Rep.* 366.)

No technical form is necessary in the award of commissioners of inclosure: but if they substantially pursue their powers in shutting up old roads, those roads effectually cease. (*Pick* v. *Clarke*, 2 *W. Bla.* 1318.)

(b) See *Thackrah* v. *Seymour* (1 *C. & M.* 18; 3 *Tyrw.* 87; S. C. *ante*, 814, n.)

(c) An inclosure act authorised the commissioners to award lands in exchange for other lands: Held, that they were authorised in awarding lands given in exchange, partly for other lands and partly for money. (*Doe* d. *Suffield* (*Lord*) v. *Preston*, 7 *B. & C.* 392; 1 *M. & R.* 713, S. C.) But where the commissioners under an inclosure act were required to allot the lands directed to be inclosed unto the several proprietors thereof, in such shares, quantities, &c. as they should adjudge to be a just compensation for their several respective lands, rights of common, &c. therein, and were empowered also to set out, allot, and award any lands, &c. within the parish of A. "in lieu of or in exchange for any other lands, &c. within the said parish, provided that all such exchanges should be ascertained, specified, and declared in and by the award to be made by the consent of the owners of the lands exchanged:" the commissioners awarded a certain allotment to A. B. "as a compensation for his open fields, lands, and rights of common, *and* an old inclosure given up by A. B. to be allotted by the commissioners in exchange:" Held, that the commissioners had not pursued the powers vested in them by the act, and that A. B. could not make a good title to the allotment. (*Wingfield* v. *Tharp*, 10 *B. & C.* 785.)

buildings, lands, tenements, hereditaments, new allotments, or old inclosures within the said parish or manors, or within any adjoining parish or place; so as that all such exchanges be made with the consent of the respective owners, proprietors, or other persons seised of the lands, hereditaments, and premises which shall respectively be so exchanged as aforesaid, (*a*) or of the husbands, guardians, trustees, committees, or attorneys acting for or on behalf of such owners, proprietors, or other persons respectively, who are under coverture, minors, lunatics, or beyond the seas, or under any other disability or incapacity of acting for themselves (such consent to be testified by writing under their respective hands); and so that all such exchanges be ascertained, specified, and set forth in the award of such commissioner or commissioners; and so that all such exchanges of any lands, tenements, or hereditaments belonging to, or held in right of any church, chapel, or ecclesiastical benefice, shall also be made with the like consent, in writing, of the bishop of the diocese, and of the patron of any church, chapel, or ecclesiastical benefice for the time being; and all such exchanges so made as aforesaid shall be for ever good, valid, and effectual in the law, to all intents and purposes whatsoever" (*b*).

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of proprietors, or, if belonging to churches, &c., with consent of bishop and of patron.

Sect. 16. "It shall be lawful for any such commissioner or commissioners, and he or they is and are hereby authorised and empowered (upon the request in writing of such joint-tenants or coparceners, or tenants in common, or any or either of them, or of the husbands, guardians, trustees, committees, or attorneys of such as are under coverture, minors, lunatics, or under any other incapacity as aforesaid, or absent beyond seas) to make partition and division of the messuages, cottages, tenements, lands, and allotment or allot-

Commissioners may make allotments in severalty to joint tenants or tenants in common.

(*a*) In 1812, S. P. conveyed two closes of land, in the parish of A., by way of mortgage, to W. P. In 1813, an inclosure act was passed for inclosing the waste lands in that parish; by which act the commissioners were empowered to allot any lands within the parish of A., in exchange for any other lands within that parish, provided that all such exchanges were ascertained, specified, and declared in the award of the commissioners, and were made with the consent of the proprietors of the lands exchanged; such consent to be in writing under their hands, &c. By the consent of S. P., the mortgagor, the above two closes of land were exchanged, under the act, for two other closes; and the commissioners stated in their award, that the exchange was made with the consent of S. P., the mortgagor, in writing, under his hand, but it was not stated to have been the consent of the mortgagee. Held, that it was not necessary to say whether the consent of the mortgagee was necessary to give validity to the exchange, and that the Court had no right to presume that it was not given; for that the commissioners were not bound to state in the award all the authorities they had; and that the presumption was, that they had acted according to their jurisdiction, as the contrary did not appear. (*Goodtitle* d. *Baker* v. *Milburn*, 2 *Mee. & Wels.* 853.)

(*b*) Commissioners under an inclosure act were empowered to allot common lands among the proprietors of common lands in the parish, and to assign any messuages, &c., new allotments, and old inclosures in exchange for other messuages, &c., new allotments, and old inclosures, so that such exchanges should be ascertained in the commissioners' award, or in some deed executed by them, and be made with the consent in writing of the respective proprietors. Power of appeal was given to the quarter sessions in six months after the cause of complaint. The commissioners, among other things, awarded to Sir H. M. in respect of an estate of his in the parish rented by A. M. and W. C., furze close of five acres, and hill close of four acres, late W. P.'s land, and to W. P., a proprietor of meadow and arable land in the parish, in respect of his freehold estate, two acres arable called "Shortlands," late a common field, and sixteen acres of old inclosure called "Stearts," late Sir H. M.'s, without saying that the several closes had been given in exchange for each other, but concluding the award with an approbation of the exchanges made between Sir H. M. and W. P.; there was no consent in writing by Sir H. M. or W. P.: Held, that in 1813, W. P. could make no title to Stearts or Shortlands, notwithstanding they had been in his possession ever since the execution of the award in 1798. (*Cox* v. *King*, 3 *Bing. N. C.* 795; 4 *Scott*, 553; 3 *Hodges*, 119.)

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ments, to such of the said owners or proprietors who shall be entitled to the same as joint-tenants, coparceners, or tenant in common, and to allot the same accordingly to such owners and proprietors in severalty; and from and immediately after the said allotments shall be so made and declared, the same shall be holden and enjoyed by the person or persons to whom the same shall be allotted in severalty, in such and the same manner, and subject to such and the same uses, as the undivided parts or shares of such estates would have been held in case such partition and division had not been made."

Persons to accept their allotments in a limited time, or forfeit their right.

Sect. 17. "All and every person or persons to whom any allotment or allotments shall be made by virtue of any such act, shall, and he, she or they is and are hereby required to accept his, her, and their respective allotments within the space of two calendar months next after the execution of the award directed to be made in and by any such act; and in case any person or persons shall neglect or refuse to accept of his, her, or their share or allotment within the time before mentioned, such person or persons so neglecting or refusing shall be totally excluded from having or receiving any estate or interest, or right of common whatsoever, in any part of the lands and grounds to be divided and inclosed by virtue of any such act."

Guardians, &c. may accept for incapacitated persons, and tenants for life shall accept of allotments.

Sect. 18. "It shall and may be lawful for the respective guardians, husbands, trustees, committees, or attorneys, of any person or persons being minors, femes covert, lunatics, beyond the seas, or otherwise incapable by law, to accept any such allotments as shall be made by virtue of any such act, to and for the use of such person or persons so incapacitated as aforesaid; and also, that any person or persons entitled to any allotment or allotments as tenant or tenants for life or lives, shall be, and he, she and they is and are hereby respectively enabled and required to accept of and take such allotment or allotments respectively; and every such acceptance respectively shall be and is hereby declared to be valid and effectual to all intents and purposes whatsoever: provided further, that the non-claim or non-acceptance of any such guardian, husband, trustee, committee, or attorney, shall not exclude or in any way prejudice the right of any infant, feme covert, lunatic, or other person or persons being under any disability or incapacity as aforesaid, or absent beyond the seas, who shall claim or accept such share or allotment within twelve calendar months next after such disability or incapacity shall be removed, or of any person entitled as heir in remainder after the death of any person dying during such incapacity or disability, who shall claim or accept the same within one year next after his, her, or their right, title, or interest shall have accrued, descended, or vested, or be known so to be."

Non-acceptance of guardians, &c., shall not prejudice rights of incapacitated persons, who shall accept in a limited time after enabled so to do.

Before execution of award, allotments may be ditched and inclosed, with consent of commissioners.

Sect. 19. "After the allotments shall be set out by such commissioner or commissioners, and at any time before the execution of his or their award, it shall be lawful for any person or persons to whom any allotment or allotments shall be so made, and staked, or marked out, by and with the consent of such commissioner or commissioners in writing, under his or their hands, to ditch, fence off, and inclose their respective allotments, in such manner as such commissioner or commissioners shall so direct and appoint."

Trees, &c. to be allotted with lands whereon they stand, the parties paying to owners such sums as commissioners shall direct; but in case of neglect, owners may cut them down and take them away.

Sect. 20. "The timber trees and other trees, thorns, and bushes, standing and growing upon any waste lands or other lands to be allotted by such act, shall be allotted and go along with the lands whereon they respectively stand, and shall be deemed the property of the several persons to whom the same lands shall be respectively allotted, such persons paying to the owner or respective owners of the said trees such sums of money for the same, and at such time or times, and place or places, as the said commissioner or commissioners shall by writing under his or their hand or hands direct; but if the said parties who are to make such respective payments shall neglect or refuse to make the same accordingly, then it shall be lawful to and for the respective parties who shall be entitled to have and receive such payments, to enter on the said lands, and cut down, take, and carry away, to their own use, the said trees, thorns or bushes, in respect of which the said payments were respectively to be made to them, at any seasonable time or times within one year next after such neglect or default, they doing as little damage on the said lands as may be."

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Where money is to be paid for lands, &c., and which ought to be laid out in other purchases to be settled to the same uses, commissioners may thereout defray a proportion of expenses of passing the act, &c.; and if the surplus amount to 200*l.*, it shall, as soon as may be, be laid out out in other purchases, and in mean time be paid into the bank, and applied under the direction of the Court of Chancery.

Sect. 21. "Whenever any sum of money is, under the provision of this act, or any such bill, to be paid for the purchase or exchange of any lands, tenements, or hereditaments, or of any timber or wood growing thereon, and which sum of money ought to be laid out in the purchase of other lands, tenements, or hereditaments, to be settled to the same uses, it shall and may be lawful, to and for such commissioner or commissioners, out of such sum to defray such proportion of the expense of passing such act, and of carrying the same into execution, as shall, if any, be charged upon any of the lands, tenements, or hereditaments, of the person or persons, body politic or corporate, trustees or feoffees, in possession of the lands, tenements, or hereditaments so sold or exchanged, or on which such timber or wood actually grew; and also the expense of any permanent improvement, such as building, sub-dividing, draining, or planting, and the like, which shall in the judgment of such commissioner or commissioners be proper to be made, and shall be made under his or their direction, upon any lands to be by virtue of such act allotted to such person or persons, body politic or corporate, trustees or feoffees respectively; and in case the surplus of such money shall amount to the sum of 200*l.*, then the same shall, with all convenient speed, be invested in the purchase of any lands or hereditaments, which shall be conveyed and settled upon, and subject to the like uses, trusts, and limitations, as such land so sold or exchanged, or the lands on which such timber grew, were settled, limited, or assured; and in the mean time, and until such purchase can be made, such money shall be paid into the Bank of England, in the name and with the privity of the Accountant-General of the High Court of Chancery, to be placed to his account there ex parte the said commissioner or commissioners, without fee or reward, to the intent that such money shall be applied, under the direction and with the approbation of the said Court, to be signified by an order made upon petition, to be preferred in a summary way by the person or persons who would have been entitled to such lands, tenements, and hereditaments, or timber respectively, either in or towards the redemption or purchase of land-tax, or towards the discharge of any debts or incumbrances affecting the lands or hereditaments so purchased or exchanged, or on which such timber grew, or until the same shall, upon the like application, in a summary way, be laid out by order of the said Court in the purchase of other lands or hereditaments to be settled to the like uses; and in the mean time, and until order can be made, such money may, by order of the said Court, be laid out in some of the public funds, or on government or real securities, and the dividends or interest arising therefrom shall, by order of the said Court, be paid to such person or persons, as would for the time being be entitled to the rents and profits of such lands, tenements and hereditaments so to be purchased, conveyed and settled."

If such money be less than 200l. and exceed 20l., it shall, at option of the person entitled to the rents of the lands, be paid into the bank, or to two trustees to be approved of by commissioners, to be applied as before directed;

Sect. 22. "If any such money shall be less than the sum of 200*l.*, and shall exceed the sum of 20*l.*, then and in such case the same shall, at the option of the person or persons for the time being entitled to the rents and profits of the lands or hereditaments so purchased, or of his, her, or their guardian or guardians, committee or committees, in case of infancy or lunacy, to be signified in writing under their respective hands, be paid into the bank in the name and with the privity of the said Accountant-General of the High Court of Chancery, and be placed to his account as aforesaid, in order to be applied in the manner before directed; or otherwise the same shall be paid at the like option to two trustees to be nominated by the person or persons making such option, and approved of by the commissioner or commissioners (such nomination and approbation to be signified in writing under the hands of the nominating and approving parties), in order that such principal money, and the dividends arising thereon, may be applied in manner hereinbefore directed, so far as the case be applicable, without obtaining or being required to obtain the direction or approbation of the said Court of Chancery."

and if less than 20l., it shall be applied to the use of

Sect. 23. "Where such money shall be less than 20*l.*, then and in such case the same shall be applied to the use of the person or persons who would

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the person entitled to the rents of the lands, as the commissioners shall think fit.

for the time being have been entitled to the rents and profits of the lands or hereditaments so purchased, in such manner as the said commissioner or commissioners shall think fit; or, in case of infancy or lunacy, then to his, her, or their guardian or guardians, committee or committees, to and for the use and benefit of such person or persons so entitled respectively."

If any person does not accept, inclose, and fence his allotment as commissioners direct, they may inclose, fence, and let it, and receive the rents until the expenses are satisfied, or they may charge them upon the proprietor.

Sect. 24. "If any person to whom any allotment or allotments shall be made, or any guardian, husband, trustees, feoffees, committees, or attorney of any infant, feme covert, charity or charities, lunatic, idiot, person or persons beyond the seas, or otherwise incapable of acting respectively, or any tenant in tail or for life, or trustee or trustees for any settlement, or any mortgagee or mortgagees, or other creditor in possession, shall neglect or refuse to accept, inclose, and fence his, her, or their allotment or allotments, within such time or times as such commissioner or commissioners, by any writing as aforesaid, or by his or their award, shall order or direct, it shall be lawful for such commissioner or commissioners to cause such allotment or allotments to be inclosed and fenced, and to let the same to any person or persons he or they may think proper, and to receive the rents and profits thereof, until the expenses attending the inclosure and fencing thereof are paid and satisfied, or to charge such expenses upon the proprietor or proprietors of the same allotment or allotments; and by any such writing as aforesaid, or by his or their said award, to appoint to whom, and at what time or times the same shall be paid, subject to the same mode, and with the like powers of recovery thereof, as may be provided respecting the other expenses of passing any such act, and carrying the same into execution, or otherwise directed by any such act."

In seven years after fencing of allotments, fences may be erected on outside of ditches, and materials carried away by proprietors.

Sect. 25. "It shall be lawful for the several proprietors of the allotments to be made in pursuance of any such act, their agents or workmen, at any seasonable time or times, within the space of seven years next after the fencing of any allotment or allotments, to set up and erect posts and rails, or other dead fences, on the outside of the ditches bounding their respective allotments, not exceeding three feet from such ditches, for the preservation of their quickset hedges, and at any seasonable time or times before the expiration of the said term, to take and carry away the materials of such outside fences when they shall think proper."

No fences, &c. standing when any act is passed, shall be destroyed till execution of award, without consent of commissioners, and if assigned by them as boundary, &c. fences, they shall be left uncut, the persons to whom the allotments belong making compensation to former owners.

Sect. 26. "No fences (*a*) or hedges, which at the time of the passing of any such act shall be standing or growing in or upon any of the lands directed to be divided and inclosed, shall be cut down or destroyed by the owners and proprietors thereof, after the passing of such act, until the execution of the award, without the consent of such commissioner or commissioners first had and obtained in writing for that purpose; and if any such fences or hedges shall be assigned or approved by such commissioner or commissioners as and for a boundary fence, or as and for a subdivision fence to and for any of the allotments to be made in pursuance of such act, all such fences and hedges shall be left uncut for the benefit of the person or persons to whom such allotment or allotments shall belong; and he, she, or they shall make such compensation in money to the former owners and proprietors thereof, as such commissioner or commissioners shall, by writing under his or their hand or hands in that behalf order and appoint, subject to the same mode, and with the like powers of recovery thereof, as may in such act be provided respect-

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(*a*) A ditch which, from time immemorial, has been the only boundary between a common and adjoining township, is a defence within the meaning of the General Inclosure Act, 41 Geo. III. c. 109. Therefore, where the issue was whether a certain allotment was bounded by a sufficient fence within the meaning of a local inclosure act, which required "that the allotments in lieu of tithes should be inclosed and fenced on all such parts and sides as should not be directed to be fenced by any other proprietor, or as should not adjoin to any inclosed land, or be bounded by any river or other sufficient fence;" and the proof was, that part of the *locus in quo* was bounded by an old deep ditch:—Held, that this was a sufficient fence within the meaning of the statute. (*Ellis* v. *Arnison*, 2 *D. & R.* 161; 1 *B. & C.* 79, S. C.)

ing the other expenses of passing any such act, and carrying the same into execution."

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Where boundary of common fields or inclosed grounds shall be fenced by any mound, &c. proprietors of adjoining allotments shall not be compelled to fence them next such common fields, &c. but such boundaries shall be maintained by the respective proprietors; expenses of which commissioners may apportion.

Sect. 27. "No proprietors whose allotments or shares shall, upon any such inclosure, lie and be situate next and adjoining to any common fields or inclosed grounds, the boundary of which shall be fenced by any mound, fence, (*a*) brook, or rivulet, shall be compelled to make or erect any hedges, ditches, or fences, next adjoining to any such common fields or inclosed grounds, for inclosing such their allotments or shares; but that the whole mound, fence, brook, or rivulet, or other sufficient fences which divide any such common fields or inclosed grounds from such allotments, shall for ever be and remain a boundary fence for the purpose of such division, and shall from time to time be maintained, kept, cleansed, scoured, and repaired by the respective proprietors thereof in the same manner as before the passing of this act, or in such other manner as such commissioner or commissioners shall order and direct: provided nevertheless, that in case it shall happen that some of the proprietors shall have a greater proportion of fences to make and maintain upon any of the lands directed to be divided and inclosed, than in the judgment of such commissioner or commissioners the allotments of such proprietors ought to be charged with, it shall be lawful for such commissioner or commissioners, where he or they shall judge it proper, to ascertain and appoint such sum of money to be paid to every such proprietor towards making and maintaining such fences, by such other of the proprietors who may have a less proportion of fencing, according to the value and quantity of the lands to be allotted to them, and to grant such other relief in respect thereof, out of the money to be raised for defraying the expenses of carrying such act into execution, as he or they shall think reasonable, and in case any such money shall be so directed to be raised, in order that the said boundary fences may be brought as near as may be to a just and equal proportion."

Persons destroying or damaging fence, &c. shall forfeit 5*l.*, and proprietor of lands, &c. may give evidence. (*b*)

Sect. 28. "In case any person or persons shall wilfully and unlawfully break down, destroy, carry away, or damage any fence, stile, post, rail, gate, bridge or tunnel, which may be put up or placed under the authority and for the purposes of any such act, every person so offending, and being thereof convicted before any justice of the peace for the county in which the lands or grounds to be inclosed shall be situate, on confession or on proof of the offence, by oath of one or more credible witness or witnesses (which oath the said justice is hereby authorised to administer) shall, for every such offence, forfeit and pay any sum not exceeding 5*l.*; and every person shall be allowed to give evidence of such offence notwithstanding he may be a proprietor or occupier of lands within or an inhabitant of such parish, and notwithstanding he may be the owner of any such fence, stile, post, rail, gate, bridge or tunnel; to be recovered as hereinafter provided."

If provided by any act, that the expenses of obtaining and carrying it into execution shall be paid by the proprietors, and they neglect so to do, same may be levied by distress.

Sect. 29. "And whereas it may often be provided by such act that the expenses of obtaining the same, and also the expenses of carrying the same into execution, shall be paid in proportion by the proprietors of lands or grounds to whom any allotments shall be made," it is enacted, "That in such case, when and so often as any such person or persons, except the person or persons thereby exempted from payment of any such charges and expenses, shall refuse or neglect to pay his, her, or their proportion of the charges and expenses, or shall refuse or neglect to pay the expenses attending the inclosing and fencing of any such allotments as upon the neglect or refusal of the proprietors shall be inclosed and fenced by such commissioner or commissioners as hereinafter mentioned, at the respective days and times to be appointed for payment of such charges and expenses, it shall be lawful for such commissioner or commissioners, by any warrant or warrants under his or their hands and seals, directed to any person or persons whomsoever, to cause the said costs, charges and expenses, and sum or sums of

(*a*) *Vide ante*, note (*a*), *supra*.

(*b*) The 6 & 7 Will. IV. c. 115, s. 53, *post*, gives a right of appeal; see title "*Malicious Injuries to Property*," Vol. V.

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money respectively, to be levied by distress and sale of the goods and chattels of the person or persons so making default in payment as aforesaid, his, her, or their husbands, guardians, trustees, committees or attornies, wheresoever the same shall be found, rendering the overplus (if any) on demand, to the owner or owners of such goods and chattels, the reasonable charges of such warrant, distress and sale being first deducted, together with the interest after the rate of 5*l. per cent. per annum*, to be computed on such share or shares, proportion or proportions, from the time the same shall be directed to be paid by such commissioner or commissioners as aforesaid; or otherwise it shall be lawful for such commissioner or commissioners, or any person or persons authorised by him or them, to enter upon and take possession of the premises so to be allotted to such person or persons refusing or neglecting to pay as aforesaid, and to receive and take the rents and profits thereof, (*a*) until thereby, therewith, or otherwise, the share or shares, proportion or proportions, and the said costs and charges so ordered and directed by such commissioner or commissioners to be paid by such person or persons as aforesaid, and all interest on such share or shares, proportion or proportions, to be computed from the time the same shall by such commissioner or commissioners be directed to be paid as aforesaid, and also all costs, charges and expenses occasioned by or attending such entry upon and perception of the rents and profits of the said premises, shall be fully paid and satisfied." [See further the provisions of the 3 & 4 Will. IV. c. 35, *post*, 831, as to the recovery of rates made by commissioners for defraying expenses of Inclosure Acts.]

or commissioner may take possession of allotments, and receive the rents, till satisfied. (*a*)

Husbands, &c. may charge allotments with such sums as commissioners shall adjudge necessary to defray the aforesaid expenses; and if persons in possession, liable to a share thereof, or enabled to charge the lands with the same, advance the money, commissioners may mortgage the lands to them for reimbursement.

Sect. 30. "In such case as last aforesaid, it shall be lawful for the husbands, guardians, trustees, committees or attornies of any of the owners or proprietors of such allotment or exchanged lands, being under coverture, minors, lunatics, beyond the seas, or under any other disability, and for any of the said owners or proprietors, being tenants in tail, or for life or lives, or years determinable on a life or lives, or on any other contingency, or otherwise interested as aforesaid, (except the rector or vicar of such parish), to charge such allotments, or exchanged lands and premises, with such sum or sums of money as such commissioner or commissioners shall, by his or their award, or by writing under his or their hands, either before or after the execution of such award, adjudge necessary, to pay and defray the said respective shares of the charges and expenses incident to and attending the obtaining such act, and carrying the same into execution, and of charging the said lands as aforesaid, so that the same shall not exceed 5*l.* for every acre of such allotments or exchanged lands; and to grant, mortgage, surrender, lease, or demise, or otherwise subject the lands, tenements and hereditaments so to be charged, unto such person or persons who shall advance and lend the same respectively, his, her or their executors, administrators and assigns, for any term or number of years; or in case any person in possession, who shall or may be liable to and charged with a share of the expenses as aforesaid, or enabled by this or any such act to charge such lands and grounds with the same, shall choose to advance, pay and discharge such sum or sums of money, then it shall be lawful for the said commissioner or commissioners, by any deed or writing under his or their hands and seals, to be attested by two or more credible witnesses, in like manner to grant, mort-

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Ejectment.

(*a*) By an inclosure act it was enacted, that, out of the lands to be allotted, the commissioners should allot a part, in their judgment sufficient, when sold, to defray the expenses of carrying the act into effect; and if it should prove insufficient, the deficiency should be made up by the persons interested in the lands to be inclosed, and should be paid in such proportions, and at such times as the commissioners should direct. The commissioners having set apart and sold a portion of the lands to be allotted, in order to defray expenses, found that there was a deficiency, and made a rate upon the parties interested, in order to provide for that deficiency; one of those parties having refused to pay: it was held, that the commissioners might bring an ejectment under the above 29th section, to recover the land allotted to him in respect of which the rate was imposed. (*Doe* d. *Harris* v. *Bodenham*, 9 *B. & C.* 495; *post*, 827.)

gage, surrender, lease, demise, or otherwise subject the said lands, tenements and hereditaments to such person or persons respectively paying and discharging the same, his, her or their executors, administrators and assigns, for any term or number of years, to and for the payment of such sum and sums of money so advanced, paid and discharged by him or them, with interest for the same, to commence on the termination of his, her or their right in the premises; so that every such grant, mortgage, surrender, lease or demise be made with a proviso or condition to cease and be void, or with an express trust to be surrendered or re-assigned, when such sum or sums of money thereby to be secured shall be fully paid and satisfied; and also with a covenant to pay and keep down the interest, so that no person or persons afterwards becoming possessed or entitled to any such lands, tenements or hereditaments shall be liable to pay any further or larger arrear of interest than for six calendar months preceding the time when the title to such possession shall have commenced; and that every such charge, grant, mortgage, surrender, lease or demise shall be good, vaid and effectual in the law for the purposes therein intended."

2. *Inclosure of.*

41 Geo. 3, c. 109.

Sect. 31. "And whereas in such cases as aforesaid, where provision may be made in any such act for charging the expenses of passing such act, or of executing the powers therein contained, or of fencing the respective allotments, on the several proprietors thereof, it may be more convenient for the feoffees or trustees of any charity lands or school lands, to have lands deducted from the respective allotments to be made for such charity lands or school lands, for paying the proportionable share in respect of such allotments of such expenses respectively, than to raise money on mortgage for those purposes;" it is therefore enacted, "That it shall be lawful for any such commissioner or commissioners, if he or they shall judge it right or expedient, to deduct from the respective allotments to be made to such feoffees or trustees as aforesaid, so much land as shall, in the judgment of such commissioner or commissioners, be equal in value to their respective proportions of the said expenses, and to allot, assign, and award the same to such person or persons as such commissioner or commissioners shall think proper, and who will undertake to pay and defray, and shall pay and defray, all such expenses."

Commissioners may deduct from allotments for charity or school lands, what shall be deemed equal to proportionable share of expenses of passing and executing any act, and allot same to such persons as will undertake to pay it.

Sect. 32. "And in case it shall be provided by any such act, that the expenses attending the same shall be paid by sale of any part of the land so to be enclosed, the said commissioner or commissioners shall mark and set out such part or parts of the said waste or commonable lands, as in his or their opinion will, by sale thereof, raise a sum of money sufficient to pay and discharge all such charges and expenses as may by any such act be directed to be paid and discharged out of the same; and the said commissioner or commissioners shall sell such part or parts of the said lands to any person or persons for the best price or prices that can be gotten for the same, by private contract, or by public auction or auctions to be holden for that purpose, of which six weeks' previous notice shall be given, in such manner as shall by any such act be directed with respect to the other notices thereby required; and the person or persons so purchasing the same, shall immediately pay (by way of deposit) into the hands of the said commissioner or commissioners, or such person or persons as he or they shall direct and appoint, one-tenth part of his, her or their purchase-money, and pay the remainder thereof within three calendar months next after, or at such other time as the said commissioner or commissioners shall appoint, and in default thereof, the money so deposited shall be forfeited, and shall be applied in carrying such act into execution; and the said allotment or allotments for which the whole of such purchase-money shall not have been so paid, or for which there shall be no bidding at such auction, shall be again put up to sale, and sold in manner aforesaid, for the best price or prices that can be gotten for the same, or be sold by the said commissioner or commissioners by private contract, for any sum or sums not less than the remaining nine-tenths of the price or respective prices for which the same was or were respectively before sold, or the amount of one bidding above the sum or respective sums at which the same

If provided by any act that the expenses of obtaining and carrying it into execution shall be paid by sale of part of the lands, commissioners shall set out and sell such part as they think will raise a sufficient sum, and the purchasers shall immediately deposit a part of purchase money, which shall be forfeited if remainder be not duly paid.

2. *Inclosure of.*

41 Geo 3. c. 109.

was or were respectively put up in the said former auction; and every allotment for which the full purchase-money shall be paid, shall immediately thereupon be absolutely discharged of and from all common and other right thereon or therein, and be vested in fee simple in, and be inclosed, and thenceforth held in severalty by such purchaser or purchasers thereof respectively, as his, her or their private and absolute property, and shall be allotted accordingly by the said commissioner or commissioners, and the said purchase-money shall be applied in defraying such charges and expenses as may be in any such act directed to be paid and discharged by the sale of such land."

Commissioners may summon witnesses, who shall be subject to penalty for neglect.

Sect. 33. "It shall be lawful to and for the said commissioner or commissioners from time or time, as he or they shall see occasion, by any writing or writings under his or their hand or hands, to summon and require any person or persons to appear before them, at any time and place in such writing to be appointed, to testify the truth touching the matter in dispute between any proprietors or interested persons, or otherwise relating to the execution of the powers given by this or any such act, and to cause a copy of such writing to be served on such person or persons required to give evidence, or to be left at his, her or their usual or last place of abode; and every person or persons so summoned who shall not appear before the said commissioner or commissioners pursuant to such summons, (without assigning some reasonable excuse for not appearing), or appearing shall refuse to be sworn or examined on oath or affirmation, which oath or affirmation the said commissioner or commissioners is and are hereby empowered and required to administer, (such person or persons having been paid* or tendered to him, her or them, the reasonable charges of his, her or their attendance), and being thereof convicted before one of his majesty's justices of the peace of the county or district in which such lands are situated, upon information thereof upon oath made before any such justice, shall, for every such neglect or refusal, forfeit and pay such sum of money, not exceeding 10*l.*, nor less than 5*l.*, as such justice or justices shall think fit and order."

* So in act.

No witness obliged to travel beyond eight miles.

Sect. 34. "No witness summoned to attend such commissioner or commissioners, shall be obliged to travel above eight miles from the boundary of the parish, manor, or district, by any such act intended to be inclosed."

Commissioners shall draw up an award containing sundry particulars, which shall be read and executed at a meeting of the proprietors, and proclaimed the next Sunday in the parish church, and then considered as complete.(*a*)

Sect. 35. "As soon as conveniently may be after the division and allotment of the said lands and grounds shall be finished, pursuant to the purport and directions of this or any such act, the said commissioner or commissioners shall form and draw up, or cause to be formed and drawn up, an award in writing, which shall express the quantity of acres, roods, and perches, in statute measure, contained in the said lands and grounds, and the quantity of each and every part and parcel thereof, which shall be so allotted, assigned, or exchanged, and the situations and descriptions of the same respectively, and shall also contain a description of the roads, ways, footpaths, watercourses, watering places, quarries, bridges, fences, and land marks, set out and appointed by the said commissioner or commissioners respectively as aforesaid, and all such other rules, orders, agreements, regulations, directions, and determinations, as the said commissioner or commissioners shall think necessary, proper, or beneficial to the parties, which said award shall be fairly engrossed or written on parchment, and shall be read and executed by the commissioner or commissioners, in the presence of the proprietors who may attend at a special general meeting called for that purpose, of which ten days' notice at least shall be given in some paper to be named in such act, and circulating in the county, which execution of such award shall be proclaimed the next Sunday in the church of the parish in which such lands shall be, from the time of which proclamation only, and not before, such award shall be considered as complete; and shall, within twelve calendar months after the same shall be so signed and sealed, or so

Award to be enrolled in a court of record at West-

(*a*) As to the necessity of proclamation to vest right in allotment, see *ante*, 818, and note (*a*).

2. *Inclosure of.*

41 Geo. 3. c. 109.

soon as conveniently may be, be inrolled in one of his majesty's courts of record at Westminster, or with the clerk of the peace for the county in which such lands shall be situated, to the end that recourse may be had thereto by any person or persons interested therein, for the inspection and perusal whereof no more than 1*s.* shall be paid; and a copy of the said award, or any part thereof, signed by the proper officer of the court wherein the same shall be inrolled, or by the clerk of the peace for such county, or his deputy, purporting the same to be a true copy, shall from time to time be made and delivered by such officer or clerk of the peace for the time being as aforesaid, to any person requesting the same, for which no more shall be paid than 2*d.* for every sheet of seventy-two words; and the said award, and each copy of the same, or of any part thereof signed as aforesaid, shall at all times be admitted and allowed in all courts whatever as legal evidence; and the said award or instrument, and the several allotments, partitions, regulations, agreements, exchanges, orders, directions, determinations, and all other matters and things therein mentioned and contained, shall, to all intents and purposes, be binding and conclusive, except where some provision to the contrary is herein or shall be by any such act contained, unto and upon the said proprietors, and all parties and persons concerned or interested in the same, or in any of the lands, grounds, or premises aforesaid; and also, that the said respective commissioners, if they think it necessary, shall form or draw, or cause to be formed and drawn, on parchment or vellum, such maps or plans of the said lands and grounds, the better to describe the several new allotments or divisions to be made, and premises that shall be exchanged by virtue of this act, and which shall express the quantity of each allotment in acres, roods, and perches, together with the names of the respective proprietors at the time of such division and allotment; which said maps and plans shall be annexed to and inrolled with the said respective award, and shall be deemed and construed in every respect as and for part of the said award."

minster, or with clerk of peace of county, and may be inspected, and copies obtained for a certain sum. (*a*)

Award and copies to be legal evidence, and award to be binding on all parties interested.

Commissioners may form maps of grounds, which shall be annexed to award, and deemed part thereof.

Sect. 36. "Such commissioner or commissioners shall, and he or they is and are hereby required to enter in a book to be provided for that purpose, a particular account (*a*) of all sums of money whatever received from the pro-

Commissioners shall keep an account (*b*) of all monies received

Commissioners' accounts.

(*a*) The 3 & 4 Will. IV. c. 87, *post*, 834, remedies defects in titles in consequence of the award not having been enrolled pursuant to this section.

(*b*) By an Inclosure Act, it was enacted, That the commissioners should, once a year, lay their accounts before a justice of the peace, and get them allowed by him, and that no charge or item in such account shall be binding on the parties concerned, or valid in law, unless the same shall have been duly allowed by such justice; and an appeal was given against the accounts or rates to be made by the commissioners. The commissioners, instead of laying their accounts before a justice annually, had done so only twice in fourteen years, and had not done so for several years before the rate was made, but there never was any appeal against the accounts or the rate, it was held, that the commissioners had power to make such rate, notwithstanding their neglect in passing their accounts. (*Doe* d. *Harris* v. *Bodenham*, 9 *B. & C.* 495, *ante*, 807, 824.) So, where by a local inclosure act, it was directed that the costs of carrying the act into effect, and all the charges of the commissioners, and the persons employed by them, should be borne by the parties interested in the lands to be allotted, &c. as the commissioners should direct, and should be levied according to the general inclosure act: and the commissioners were required, once a year at least, to lay before a justice of the county a statement of all sums by them received and expended, or due to them for their own trouble and expense and it was enacted, that no charge or item in such accounts should be binding or valid, unless the same should have been duly avowed by such justice: commissioners, under the act, levied by distress a sum of money, part of which was due for their own trouble and expense during several preceding years, and had not been accounted for annually, nor until a short time before the issuing of the distress warrant Held, that the accounting was not a condition precedent to the levy, and that the distress was legal. (*Smith* v. *Jones*, 1 *B. & Adol.* 328.)

In another case, where, by an act, the commissioners were required to make a statement or account of all monies received, expended, or due to them in the execution of such act, and to lay the

2. *Inclosure of.*

41 Geo. 3, c. 109.

and disbursed; which may be inspected at their clerk's office gratis.

Penalty for not keeping such account, or for refusing inspection.

prietors or others during the progress of the inclosure; and also of all the charges, expenses, and disbursements which shall accrue or be made by virtue of any such act, and in carrying the same into execution; which book of accounts shall be kept at the office of their clerk, open at all seasonable times during the progress of the inclosure, and till all the accounts are finally settled, for the inspection of any of the proprietors, without fee or reward; and in case any such commissioner or commissioners, or his or their clerk, shall neglect to provide and keep such book of accounts as aforesaid, or refuse the inspection thereof to any of the proprietors at seasonable times, in manner before mentioned, and shall be convicted thereof, upon the oath of one or more credible witness or witnesses not interested in the intended division and inclosure, before any justice of the peace of the county in which the lands or grounds to be inclosed shall be situate, or of such other county or place where such commissioner or clerk so offending shall be or reside, every such commissioner or clerk so causing such neglect or refusal, and convicted as aforesaid, shall forfeit and pay for every such offence any sum not exceeding 10*l.* nor less than 5*l.*, to be levied, recovered, and applied in the same manner as other penalties are by this act directed to be levied, recovered, and applied."

Monies raised under any act shall be deposited as may be approved by a majority in value of proprietors, and not issued without order from commissioners.

Sect. 37. "All monies to be raised under and by virtue of the powers contained in any such act, shall, from time to time, as often as the same shall amount to the sum of 50*l.*, be paid to and deposited in the hands of some banker, or such person or persons as shall be approved by a majority in value of the proprietors who may be present at the first meeting of such commissioner or commissioners; and in the notice of which meeting shall be expressed the intention of then appointing such banker, or such other person or persons; and no such monies deposited or paid into the hands of such banker, or other person or persons to be appointed as aforesaid, shall be issued or paid by him or them, without an order in writing under the hands of such commissioner or commissioners, specifying the person or persons to whom the same are respectively payable, and the service or consideration for which the same are due; and the balance, if any, upon the final settlement of accounts, shall be immediately repaid to the land owners in proportion to the sums respectively paid by them."

The rector or vicar, with consent of bishop of diocise, and of patron of living, may lease allotments for twenty one years, upon certain conditions.

Sect. 38. "It shall be lawful for the rector or vicar for the time being of any parish wherein the lands and grounds intended to be inclosed shall be situate, by indenture or indentures, under his hand and seal, with the consent and approbation of the bishop of the diocese, and of the patron of the said rectory or vicarage, to lease or demise all or any part or parts of the allotment or allotments to be set out and allotted to any such rector or vicar, by virtue of any such act, to any person or persons whomsoever, for any term not exceeding twenty-one years, to commence within twelve calendar months next after the executing the award; so that the rent or rents for the same shall be thereby reserved to the rector or vicar for the time being, by four equal quarterly payments in every year, and so that there be thereby also reserved and made payable to such rector or vicar, the best and most im-

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same before a magistrate, who was to examine and balance the same, and no charge or item in such account was to be binding, unless allowed by such magistrate; it was made a question, but not decided, whether the commissioners, having made an assessment for the costs of carrying the act into execution, could proceed for the recovery of such assessment before it was allowed by a magistrate. (*Doe* d. *Nicholson* v. *Middleton*, 6 *Moore*, 532; 3 *B.* & *B.* 214, S.C.; *ante*, 807.)

A clause in a private inclosure act, declaring that no item or charge in the accounts of the commissioners shall be binding on the parties concerned, or valid in law, unless the same shall have been duly allowed by a justice of peace in the manner therein pointed out, does not take away an appeal given by a subsequent clause "to the party grieved by any thing done in pursuance of that or the general inclosure act, (other than and except such determinations as were by that or the general inclosure act declared to be binding, final, and conclusive,)" the allowance of the accounts by a justice not falling within this exception. (*R.* v. *Justices of Cumberland*, 1 *B.* & *C.* 64; and see *ante*, 810, n. (*a*) as to appeal.)

proved rent or rents that can reasonably be had or gotten for the same, without taking any fine, foregift, premium, sum of money, or other consideration, for the making or granting any such lease or demise; and so that no such lessee by any such lease or demise be made disponishable for waste, by any express words to be therein contained; and so that there be inserted in every such lease, power of re-entry on nonpayment of the rent or rents to be thereby reserved, within a reasonable time to be therein limited, after the same shall become due; and so that a counterpart of such lease be duly executed by the lessee or lessees to whom such lease shall be so made as aforesaid; and every such lease shall be valid and effectual, any law or usage to the contrary notwithstanding." (See stat. 1 & 2 Geo. IV. c. 23, s. 4, *post*, 831.)

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41 Geo. 3, c. 109.

Sect. 39. "All penalties and forfeitures imposed by this or any such act, or which shall be imposed by such commissioner or commissioners, under or by virtue of the authority of this or any such act, shall be levied and recovered before any one justice of the peace for the county in which the lands or grounds to be inclosed shall be situate, and residing near any such parish, and not interested in the matter in question; for which purpose it shall be lawful for any such justice of the peace, upon complaint made to him, to summon the party accused, and the witnesses on both sides; and, upon the appearance or contempt of the party accused, to examine such witnesses upon oath, (which oath any such justice is hereby empowered to administer,) and upon such evidence to give judgment accordingly, and to condemn the party accused (proof of the accusation being made by one or more witness or witnesses as aforesaid) in such penalties and forfeitures as the offenders shall have incurred, and to levy such penalties and forfeitures by distress and sale of the offender's goods and chattels, together with reasonable costs; all which penalties and forfeitures, the application whereof is not particularly directed by any such act or this act, shall, when and so soon as the same shall be levied, be paid and applied to and for such uses, intents, or purposes, as such commissioner or commissioners, in and by any writing or writings under his or their hands, or in and by his or their award, shall order, direct, or appoint."

Recovery and application of penalties.

Sect. 40. "Nothing in such act contained shall lessen, prejudice, or defeat the right, title, or interest of any lord or lady of any manor or lordship, or reputed manor or lordship, within the jurisdiction or limits whereof the lands and grounds thereby directed to be divided and allotted are situate, lying, and being, of, in, or to the seigniories, rights, and royalties incident or belonging to such manor or lordship, or reputed manor or lordship, or to the lord or lady thereof, or to any person or persons claiming under him or her, but the same (other than and except the interest and other property as is or are meant or intended to be barred by such act) (*a*) shall remain in as full, ample and beneficial manner, to all intents and purposes, as he or she might or ought to have held or enjoyed such rights before the passing of such act, or in case the same had never been made."

Saving of rights of lords of manors.

Sect. 41. "Saving always to the king's most excellent majesty, his heirs and successors, and to all and every other person and persons, bodies politic and corporate, and his, her and their heirs, successors, executors and administrators, all such estate, right, title and interest, (other than and except such as are hereby intended to be barred, destroyed or extinguished), as they, every or any of them, had or enjoyed of, in, to or out of, or in respect of the said lands, grounds and promises so directed to be divided, allotted and inclosed, or exchanged as aforesaid, before the passing of such act, or could or might have had or enjoyed in case the same had never been made."

General saving.

Sect. 42. "It shall and may be lawful for any two or more justices of the peace to take affidavits on oath or affirmation (which oath or affirmation such justices are hereby authorised and empowered to administer) of the notices required for such bills having been given, of the consents of the parties inte-

Two justices may take affidavits of the notices required having been given &c. in forms in schedule, without stamps.

(*a*) See rights of lord, *ante*, 804, n., and 2 *T. R.* 701; 4 *D. & R.* 323; 5 *T. R.* 411.

2. *Inclosure of.*

41 Geo. 3, c. 109

rested therein, of the allegations contained in the preambles of such bills, and of the quantity of the land to be inclosed; and that such affidavits shall respectively be in the forms contained in the schedule hereunto annexed, as near as the circumstances of the case will admit; and that such affidavits shall not be subject or liable to any stamp duties whatsoever."

Persons forswearing themselves to be deemed guilty of perjury.

Sect. 43. "If any person or persons shall, in any examination, affidavit, deposition or affirmation, to be had or taken in pursuance of this act, before such justice or justices, or such commissioner or commissioners, knowingly and wilfully swear or affirm any matter or thing which shall be false or untrue, every such person so offending shall, on conviction thereof, be deemed guilty of perjury, and shall suffer the like pains and penalties as persons guilty of wilful and corrupt perjury are now subject and liable to."

Powers hereof, how far binding.

Sect. 44. "All and every the powers, authorities, directions and provisions in this act contained shall be only so far effective and binding in each particular case, as they or any of them shall not be otherwise provided and enacted in any such act hereafter to be passed as aforesaid."

See the schedule to this act, *post*.

1 & 2 Geo. 4, c. 23.

By stat. 1 & 2 Geo. IV. c. 23, intituled "*An Act to amend the Laws respecting the Inclosing of open Fields, Pastures, Moors, Commons, and Waste Lands, in England,*" Sect. 1, after reciting, "Whereas great inconveniences have arisen to landlords and other persons, owners of allotments allotted and set out to them by the commissioner or commissioners under or by virtue of several acts, already passed for dividing, allotting and inclosing of open and uninclosed fields, pastures, moors, commons, and waste lands in England, by reason that such landlords and other persons, owners of allotments as aforesaid, cannot, before the execution and perfecting of the award or awards by such acts directed to be made by such commissioner or commissioners, distrain for the rent in arrear or unpaid for or in respect of such allotment or allotments; or support an action of trespass for any damage or injury done to such allotment or allotments, or an action of ejectment to recover the possession of such allotment or allotments, in consequence of the freehold or legal seisin thereof respectively not being vested in such landlords and other persons, owners of such allotment or allotments, by the award or awards of such commissioner or commissioners as aforesaid;" for remedy whereof enacts,

Landlords admitted to possession of lands allotted in form specified in schedule, or persons acting under their orders, may enter thereon and distrain for rent, notwithstanding commissioners' award not executed.

"That, from and after the passing of this act, it shall and may be lawful to and for all and every person and persons, to whom any allotment or allotments of land has or have been set out or allotted, or which shall or may hereafter be set out or allotted, and to whom the possession of such allotment or allotments hath been already given, by virtue of any order or direction, orders or directions, or to whom the possession thereof shall hereafter be given, by virtue of any order or direction, orders or directions in writing, in the form, and specified in the schedule hereto annexed, and signed by the commissioner or commissioners acting under or by virtue of any act or acts of parliament now or hereafter to be passed for dividing, allotting and inclosing any open fields, pastures, commons, moors and waste lands in England, and who shall have demised the same, or any part thereof, to any tenant or servant, or for their, his or her bailiff or agent, bailiffs or agents, or any person or persons by them, him or her authorised and employed for that purpose, to enter into and upon any such allotment or allotments, and to seize and distrain any goods, chattels or effects which may be in or upon such allotment or allotments, or in or upon any other lands, tenements or hereditaments held, occupied or enjoyed by the tenant or occupier of such allotment or allotments, along and together with any such allotment or allotments, for any rent that may be in arrear and unpaid for all or any part of such allotment or allotments, and either alone or together with any such allotment or allotments, and any other lands, tenements and hereditaments held, occupied or enjoyed therewith, notwithstanding the award or awards of the commissioner or commissioners appointed in or named by or by virtue of any such act or acts so made and passed, or to be hereafter made and passed, shall not be executed

and perfected by such commissioner or commissioners, by virtue or in pursuance of any such act or acts of parliament."

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1 & 2 Geo. 4, c. 32.

Actions at law may also be brought.

Sect. 2. "It shall and may be lawful to and for all and every person or persons, to whom any such allotment or allotments is or are already set out or allotted, or which shall or may be hereafter set out or allotted, and to whom such possession as aforesaid hath been already given by virtue of any order or direction, orders or directions, or the possession whereof shall hereafter be given to such person or persons by virtue of any order or direction, orders or directions in writing, in the form specified in the said schedule as aforesaid, and signed by such commissioner or commissioners as aforesaid, and to his, her or their tenants, stewards, bailiffs, agents or servants, to commence, prosecute and maintain any action or suit at law for any injury or damage that may be done or committed by any person or persons whomsoever, to the ground, soil or herbage of any such allotment or allotments, or to the walls, hedges, fences, ditches, gates, posts, rails, stiles, cloughs, bridges or tunnels already erected or to be erected in or upon any such allotment or allotments, and to bring, maintain and prosecute any action or actions of ejectment for recovering the possession of any such allotment or allotments, or any part or parts thereof, from any person or persons whomsoever, notwithstanding the award or awards of the commissioner or commissioners appointed in, or named by, or by virtue of any such act or acts now made and passed, or to be hereafter made and passed, shall not be executed and perfected by such commissioner or commissioners, by virtue or in pursuance of any such act or acts of parliament; any thing in any act or acts, or any construction of, or implication from, any act or acts, or any law, usage or custom to the contrary in anywise notwithstanding."

Act not to affect right of persons to appeal against award of commissioners;

or to prevent commissioners making alteration in award as to lands so allotted.

Sect. 3. "Nothing in this act contained shall prevent, or be construed to prevent or take away the right of any person or persons, bodies politic or corporate, and his, her and their heirs, successors and assigns, to appeal against the award or awards, order or directions of any such commissioner or commissioners, when made and executed, or the right of possession to any such allotment or allotments, which may be affected by the judgment of the court on such appeal; or to prevent or obstruct, or in anywise lessen or prejudice, any alteration or alterations to be made, ordered or directed by any such commissioner or commissioners as aforesaid, for or in respect of any such allotment or allotments, in and by his or their award or awards, to be made and executed by virtue or in pursuance of any such act or acts of parliament as aforesaid."

Where leases granted under 41 Geo. 3, (U. K.), c. 109, become void, before the expiration of their term, incumbents may grant new leases.

Sect. 4. "Whenever any lease or leases to be granted by any rector, vicar, or other incumbent, under the powers or provisions of an act passed in the forty-first year of the reign of his late Majesty King George the Third, intituled '*An Act for consolidating in one Act certain Provisions usually inserted in Acts of Inclosure, and for facilitating the Mode of proving the several Facts usually required on the passing of such Acts,*' shall by any means become forfeited or void, or be surrendered before the expiration, by effluxion of time, of the term or terms thereby granted, then and in such case, and as often as the same shall so happen, it shall and may be lawful for the rector, vicar, or other incumbent for the time being of the same rectory, vicarage or parish, by and with the previous consent of the ordinary and patron, to grant a new lease of the lands so demised, for such term or terms of years as shall, at the time or times of such avoidance, be then to come and unexpired of the original term or terms granted by such original lease or leases, subject nevertheless to the provisions and conditions contained in such original lease or leases, and then remaining unperformed and capable of having effect."

Powers of this act only binding in cases where not otherwise provided.

Sect. 5. "The powers, authorities and provisions in this act contained, shall be only so far effective and binding, in each particular case, as they or any of them shall not be otherwise provided and enacted in any act hereafter to be passed, for dividing, alloting and inclosing any open fields, pastures, commons, moors, or waste lands in England."

3 & 4 W. 4, c. 35.

By the 3 & 4 Will. IV. c. 35, intituled "*An Act to remedy certain Defects*

2. *Inclosure of.*

3 & 4 Will. 4, c. 35.

as to the Recovery of Rates and Assessments made by Commissioners and other Persons under divers Inclosure and Drainage Acts after the Execution of the final Awards of the said Commissioners," [24th July, 1833], reciting "Whereas divers acts of parliament have from time to time been passed for the inclosure, drainage and improvement of divers lands, commons and waste grounds, wherein commissioners are empowered to set out and make private roads and drains, banks, bridges, sluices and other works: and whereas it hath been discovered, since the passing of the said acts, that there are no powers therein for the recovery of the rates or assessments from time to time after the making of the respective final awards of the commissioners acting in execution of the said acts, under or by virtue of the said acts or the said awards, or under or by virtue of powers, authorities or directions given or contained in the said acts or awards, for defraying the expenses of repairing, superintending or renewing the said roads, drains, banks, bridges, sluices and other works, whereby great inconvenience and losses have been sustained for want of such powers: and whereas it is expedient that a summary mode of proceeding should be granted for the purpose of recovering and enforcing the payment of such rates or assessments;" for remedy whereof, it is enacted, "That in all cases where no such remedy shall have been given, and where any such rate or assessment, rates or assessments, already made or hereafter to be made, or any part thereof, and whether made at one time or at several times, shall have been or shall be in arrear and unpaid for the space of twenty-one days after a notice in writing requiring payment thereof shall have been personally served on or left at the place of abode of the person or persons, or one of the persons, by whom the said rate or assessment, rates or assessments, ought to be paid, or at the place of abode of the tenant or occupier of the lands or grounds in respect of which the said rate or assessment, rates or assessments, is or are made, it shall and may be lawful for any two or more of his majesty's justices of the peace acting for any county, riding or division, in petty sessions assembled, (not interested in the matter in question), and who are hereby required, upon complaint made to them by the person or persons, or any one of the persons, to whom for the time being the said rate or assessment or rates or assessments ought to be paid, or by the person or persons, or any one of the persons, who for the time being shall be duly appointed to make or collect such rate or assessment or rates or assessments, to summon the person or persons from whom any rate or assessment, rates or assessments, shall be due, and the witnesses on both sides, and upon the appearance or contempt of the party or parties accused, or any of them, to examine such party or parties and witness or witnesses as may be then present, upon oath, (which oath such justices are hereby authorised and empowered to administer), and to give judgment accordingly upon the matters and things brought before them, and by warrant or warrants under the hands and seals of such justices to levy the amount of all and every such rate or assessment, rates or assessments, so in arrear and unpaid, by distress and sale of the goods and chattels of the person or persons so making default in payment of such rate or assessment, rates or assessments, wheresoever the same can or may be found, or of the occupier or occupiers of any lands or grounds belonging to such person or persons in respect of which such rate or assessment, rates or assessments, is or are made, which may be found on such lands or grounds, together with the reasonable costs and charges of such proceeding, rendering the overplus arising by such sale (if any), after deducting the sum or sums to be levied by such distress and sale, and the charges of taking, keeping, appraising and selling the said distress, to the owner thereof (on demand); and the respective tenants of all the lands on which such distress shall be taken are hereby authorised and required to pay any sum of money for which such distress shall be made, and to deduct the same out of his, her or their rent; and every tenant making such payment shall be acquitted, exonerated and discharged for so much money as shall be by him or her so paid: provided always, that no such levy by distress and sale shall be made in respect of any such rate or assessment when more than six years shall have elapsed from the time when such rate or assessment first became due, unless a promise in writing to pay the said rate

Mode of proceeding for recovery of rates or assessments in arrear where no remedy already given.

Limiting the recovery to six years from period of rate becoming due.

or assessment shall have been given by the person or persons liable to the payment thereof to some person duly authorised to receive the same; and when such promise has been given no such levy by distress or sale shall take place when more than six years shall have elapsed from the time that such promise was given: provided also, that no such levy by distress and sale shall in any case exceed the amount of the rent due."

2. *Inclosure of.*

3 & 4 Will. 4, c. 33.

Sect. 2. "The justices by whom any such warrant of distress shall be issued, may cause such warrant to be drawn up in the following form of words, or in any other form to the same effect; (that is to say),

Form of warrant of distress.

"*To the Constable of the , in the County of .*

"*WHEREAS in and by a certain rate or assessment, dated the , and made for* [here in substance describe the purposes of the rate] *A. B. of , in the parish of , in the county of , was duly rated and assessed in the sum of* , [if more than one rate or assessment, recite the others in the same manner]: *and whereas it appeareth unto us, two* [or more] *of his majesty's justices of the peace for the said* [*county, riding* or *division*, as the case may be], *upon the complaint of C. D. of , the person to whom the said rate or assessment ought to be paid* [or otherwise, as the case may be], *that a notice in writing, requiring payment of the said sum* [or *said several sums*] *was personally served on the said A. B.* [or *left at the place of abode of the said A. B.*, or *of the tenant or occupier of the lands or grounds*], *to wit, on the day of last, and that default has been made in payment thereof for the space of twenty-one days next after such notice so served* [or *left*], *and that the same sum* [or *several sums*, or *a certain part of such sum or sums*, as the case may be] *is* [or *are*] *still due and unpaid: and whereas it having been duly proved to us, upon oath, that the said A. B. hath been duly summoned to appear before us, the said justices, to show cause why the said rate or assessment* [*rates or assessments*] *should not be paid; and he the said A. B. having appeared before us* [or *and he the said A. B. having neglected to appear accordingly before us*, as the case may be], *according to such summons, and not having shown to us any sufficient cause why the said sum so as aforesaid due and unpaid should not be paid: these are therefore to require you forthwith to make distress of the goods and chattels of him the said A. B. wheresoever they may be found, or of the occupier or occupiers of the lands or grounds or some part thereof belonging to the said A. B. in respect of which the said rate or assessment* [*rates or assessments*] *is* [or *are*] *made, which may be found in and upon such lands or grounds; and if within the space of five days next after such distress by you taken, the sum of , and also the further sum of , being the costs already incurred in the premises, making together the sum of , together with the reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and out of the money arising by such sale, that you detain the said sum of and also your reasonable charges of taking, keeping, appraising and selling the said distress, rendering to him the said A. B. the overplus, on demand. Given under our hands and seals, this day of , 18 .*"

Appeal.

Sect. 3. "If any person or persons shall think himself, herself or themselves aggrieved by any thing done in pursuance of this act, then and in every such case he, she or they may appeal to the next Court of General Quarter Sessions of the peace which shall be holden not less than ten days after the cause of such complaint for the county, riding, division or place wherein the cause of complaint shall have arisen; provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within eight days after such cause of complaint, and six clear days at the least before such sessions, and shall also enter into a recognizance within such six days, with sufficient surety, before a justice of the peace for the same county, riding, division or place, conditioned to appear at the said sessions, and to try such appeal, and to abide the judgment of the Court thereupon, and to pay such costs as shall be awarded by the Court; and the Court at such sessions shall hear and determine the matter of such appeal, and shall make such order therein, with or without costs to either party, as to the Court shall seem meet."

Warrant not to be quashed for want of form.

Sect. 4. "No such warrant of distress or adjudication made on appeal therefrom shall be quashed for want of form."

Rated persons not to be disqualified

Sect. 5. "At the hearing of the said complaint and appeal, or either of them, no person shall be an incompetent witness by reason of his or her

2. *Inclosure of.*

from giving evidence.

being rated or liable to be rated to the said rate or assessment, rates or assessments."

4 & 5 Will. 4, c. 87.

By 3 & 4 Will. IV. c. 87, intituled "*An Act for remedying a Defect in Titles to Messuages, Lands, Tenements and Hereditaments allotted, sold, divided or exchanged under Acts of Inclosure, in consequence of the Award not having been inrolled, or not having been inrolled within the time limited by the several Acts; and for authorising the appointment of new Commissioners in certain cases where the same shall have been omitted,*" [28th August, 1833,] reciting, "Whereas by divers acts of inclosure the awards or instruments in writing, thereby directed to be formed and drawn up or made by the commissioner or commissioners appointed by or by virtue of such acts for executing the powers and authorities thereof respectively, are directed or required to be inrolled by or with the clerk of the peace of the county, riding, division, soke or place in which the lands to which such acts respectively relate are situated, or in one of his majesty's Courts of record at Westminster, or in some other Court, and, in certain of the said acts, within certain times mentioned in such acts next after the execution of such awards or instruments in writing respectively; and in certain of the said acts new commissioners are directed to be appointed within certain times thereby respectively limited: and whereas, in a great number of instances such awards or instruments in writing have not been inrolled, or have not been inrolled within the time directed or required by the several acts; and by reason of such omission the title to the messuages, lands, tenements and hereditaments allotted, sold, divided or exchanged under such acts respectively may be considered defective; and in many instances new commissioners have not been appointed within the time directed by the several acts: and whereas, it is expedient that provision should be made for remedying such defects: it is enacted,

All awards already made but not inrolled shall, from the execution thereof, be as valid as if inrolled within the time limited by the act.

'That every award already made and executed under or in pursuance of any act of inclosure, and which has not been inrolled, or which has not been inrolled within the time limited by the act under or in pursuance of which such award shall have been made, shall from the time of the execution of such award be as good and valid and of the same effect in all respects as if such award had been inrolled in the manner, and within the time, if any, appointed and limited for that purpose in the act under or in pursuance of which the same has been made.'"

Proprietors of lands may cause awards to be inrolled.

Sect. 2. "Where any award already made and executed under or in pursuance of any act of inclosure has not been inrolled, it shall be lawful for any person or persons having or deriving title to any messuages, lands, tenements and hereditaments under such award, at his, her or their expense, to require and cause such award, with any maps or plans annexed or relating thereto, to be inrolled in any one of his majesty's Courts of record at Westminster, or by the clerk of the peace of the county, riding, division, soke or place in which the lands to which such award shall relate are situated, to the end that recourse may be had thereto by any person or persons interested therein, for the inspection and perusal whereof no more than 1s. shall be paid; and a copy of such award when so inrolled, or of any part thereof, signed by the proper officer of the Court wherein the same shall be inrolled, or by the clerk of the peace for such county, riding, division, soke or place, or his deputy, purporting the same to be a true copy, shall from time to time be made and delivered by such officer or clerk of the peace for the time being, or his deputy, to any person or persons requesting the same, for which no more shall be paid than threepence for every sheet of seventy-two words; and every award already made, whether inrolled or not, and every copy of such award when inrolled as aforesaid, or of any part thereof, signed as aforesaid, shall at all times be admitted and allowed in all Courts whatsoever as legal evidence."

Copy of any award so inrolled and signed by the proper officer to be delivered to any person requiring the same.

As to practice requiring acknowledgment of deeds.

Sect. 3. "If any commissioner shall be dead or incapable of acknowledging his award before such award shall be inrolled, the same award may be inrolled without the acknowledgment of such commissioner, on due proof being given that such award is the deed or instrument of such commissioner."

2. *Inclosure of.*

4 & 5 Will. 4, c. 87.

As to the possession of awards when deposited.

Sect. 4. "Where any award already made and executed under or in pursuance of any act of inclosure shall be deposited in any parish church it shall be considered as in the custody of the officiating minister and churchwardens for the time being of such parish church; and where any such award shall be in the possession of the lord of any manor to or for whom, or to or for any preceding lord of which manor, any allotment shall have been made under such award, or in the possession of the steward of such manor, it shall be considered as in the custody of the lord of such manor for the time being; and the steward shall, when required, deliver up the same accordingly; and the said minister and churchwardens, or lord, as the case may be, shall from time to time, upon the request of any person or persons interested in any allotment or allotments, or otherwise, under such award, cause the same to be produced for the inspection of such person or persons, on being paid by him, her or them a just and reasonable compensation for such production, and shall also cause the same to be produced for the purpose of being inrolled, or in any Court of law or equity, or on any other occasion, for the purpose of being given in evidence, on being paid all just expenses."

Proprietors may require awards to be deposited in the church or with the lord of manor.

Sect. 5. "Where any such award as aforesaid shall not be deposited in the parish church of the parish in which the lands to which such award shall relate are situated, and shall not be in the possession of the lord or steward of any manor to or for the present or any preceding lord of which manor an allotment shall have been made under such award, but shall be in the possession of any other person, it shall be lawful for any person or persons interested in any allotment or allotments, or otherwise, under such award, to require the same to be deposited in the parish church of the parish in which the lands to which such award shall relate are situated, and the person in whose possession the same shall be shall, on such request, deliver up the same to the minister and churchwardens for the time being of such parish church, for the purpose of being so deposited."

Providing for appointment of commissioners in cases where they have been neglected or omitted to be made.

Sect. 6. "In all cases where, in or by virtue of any act or acts of inclosure heretofore passed, provision hath been made for the election, nomination or appointment, within a time therein limited or directed, of a new commissioner or commissioners in the event of the death, refusal or neglect to act of the commissioner or commissioners appointed by or by virtue of such act or acts, or of his or their becoming, by reason of absence beyond the seas or otherwise, incapable of acting in the execution of the powers, authorities and trusts in such commissioner or commissioners vested and reposed, before the same and every of them shall have been fully executed and performed, and where any such election, nomination or appointment as aforesaid, or any of them, shall have been neglected or omitted to have been made, pursuant to such act or acts, within the time or times thereby limited or directed, then and in every such case it shall and may be lawful to and for the person or persons by any such act or acts of inclosure authorised or empowered for that purpose, and on such notice or notices, and at such meeting or meetings (if any) as required or directed by any such act or acts of inclosure, to proceed at any time after the passing of this act to the election, nomination and appointment of, and to elect, nominate and appoint in such manner as by such act or acts of inclosure is or are directed, one or more fit and proper person or persons (as the case may require) not interested in the division, allotment or inclosure by such act or acts of inclosure directed or authorised to be made, and not otherwise disqualified by such act or acts respectively, as a commissioner or commissioners in the room, place or stead of the commissioner or commissioners so dying, refusing or neglecting, or becoming incapable of acting as aforesaid, and to do all other acts, matters and things which shall be requisite or necessary for effecting the purposes aforesaid, notwithstanding the time so limited or appointed as aforesaid for doing or performing the same shall then have elapsed, and so from time to time as often as any commissioner so to be elected, nominated or appointed as aforesaid shall die, refuse, neglect or become incapable of acting as aforesaid; and the several writings appointing such new commissioner or commissioners, and all other documents (if any) relative thereto, shall be deposited or dis-

2. *Inclosure of.*

3 & 4 Will. 4, c. 87.

posed of as by such act or acts of inclosure is or are directed; and every commissioner to be elected, nominated or appointed by virtue of this act to execute the powers, authorities and trusts of any act or acts of inclosure as aforesaid, having first taken the oath or oaths, and complied with the other terms or conditions (if any) prescribed in and by such act or acts of inclosure, shall have the same powers and authorities, and no others, for putting or carrying into execution such act or acts, as if he had been duly elected, nominated and appointed for those purposes, within the time limited or directed by such act or acts of inclosure."

Act not to give greater validity to awards than as respects the defects.

Sect. 7. "Nothing herein contained shall extend to affect any public right, or otherwise to give any greater force or validity to any award already made and executed under or in pursuance of any act of inclosure, than such award would have had if this act had not been made, except so far as respects the several defects hereinbefore respectively specified and provided for."

4 & 5 Will. 4, c. 30. Exchange of lands in common fields.

The 4 & 5 Will. IV. c. 30, contains provisions for facilitating the exchange of lands in common fields. (See the enactments, *ante*, 799.)

6 & 7 Will. 4, c. 115. (*a*)

By 6 & 7 Will. IV. c. 115, intituled "*An Act for facilitating the Inclosure of open and arable Fields in England and Wales,*" [20th August, 1836,] reciting "Whereas there are in many parishes, townships, and places in England and Wales, divers open and common arable, meadow and pasture lands and fields, and the lands of the several proprietors of the same are frequently very much intermixed and dispersed, and it would tend to the improved cultivation and occupation of all the aforesaid lands within such parishes, townships, and places, and be otherwise advantageous to the proprietors thereof and persons interested therein, if they were enabled by a general law to divide and inclose the same; and whereas an act was passed in the forty-first year of the reign of his late Majesty King George the Third, intituled '*An Act for consolidating in one Act certain Provisions usually inserted in Acts of Inclosure, and for facilitating the Mode of proving the several Facts usually required on the passing of such Acts:*' and whereas another act was passed in the first year of his late Majesty King George the Fourth, intituled '*An Act to amend the Law respecting the Inclosing of open Fields, Pastures, Moors, Commons, and Waste Lands in England:*' it is enacted, That from and after the passing of this act, it shall be lawful for two-third parts in number and value (such value to be ascertained as hereinafter mentioned) of the several persons who shall be seised or possessed of or entitled in possession to or interested in possession in any rights of common or other rights in any open and common arable fields, (including any untilled slips or balks therein,) or any open and common meadow or pasture lands or fields, (*b*) in any parish, township, or place in England or Wales, known by metes and bounds, or occupied according to known and legal rights, (except as hereinafter provided,) as tenant in fee simple or in fee tail, general or special, or for life or lives, or by the courtesy of England, or for any other estate of or as of freehold, or for years determinable on any life or lives, or for any term of years whereof one hundred years shall be un-

41 Geo. 3, c. 100.

1 Geo. 4, c. 23.

Open and common lands may be inclosed with the consent of two-third parts in number and value of the parties interested therein. (*c*)

(*a*) The 3 & 4 Vict. c. 31, *post*, 858, is to be construed as one act with this; vide sect. 5.

(*b*) Now extended to lands commonable only during *part* of the year; 3 & 4 Vict. c. 31, s. 4.

(*c*) Under the General Inclosure Act, 6 & 7 Will. 4, c. 115, authorising exchanges of old inclosures with the written consent of the proprietors, a party, who has given his consent to an exchange of lands, has no equity to restrain the commissioner appointed under the provisions of the act from proceeding to make his award upon the authority of such consent, on the ground that it is not a valid consent within the meaning of the act; and, upon a bill filed by the proprietor, to whom the land has been allotted in exchange for other land, and possession given, with the concurrence of such consenting party, the Court will restrain the latter from taking any proceedings at law to recover the land. (*Neeld* v. *Duke of Beaufort*, 3 *Scott*, *N. R.* 618; 5 *Jur.* 1123; but see *post*, 847, sect. 33, and note.)

expired, or as a holder of lands or rights of copyhold, customary, tenant right, or other tenure, of an estate or interest equal in quantity to the estates hereinbefore mentioned or any of them, and for the guardian, trustee, feoffee for charitable or other uses, husband or committee of such person who at the time of any agreement for or on the making of any inclosure authorised by this act shall be an infant, idiot, lunatic, or feme covert, or under any other disability, in such manner and with such consent as is hereinafter mentioned, to inclose such open and common arable, meadow and pasture lands and fields, or any of them, and to extinguish the right of intercommonage which shall exist as well over as in respect of such land; provided that no such inclosure shall take place without the consent in writing under the hands of two-third parts in number and value of the persons so seised, possessed, entitled, or interested as aforesaid, or of the guardians, trustees, feoffees, husbands, or committees aforesaid of such of the said persons who may be under disability as aforesaid, such value to be ascertained by the assessments of the poor's rates of the respective parishes or townships for the then current year, which assessments of the poor's rates, in case they shall not be made according to the full annual amount or value of the tenements and property thereby assessed, shall be increased or diminished so as to represent the full or true annual value of the several lands, fields, and rights liable to be affected by the intended inclosure, and where the lands are extraparochial, or no poor rates shall exist in respect of any such lands, then by the full or true annual value thereof: provided also, that no such inclosure shall take place, nor shall any agreement for that purpose be binding, until a public meeting of the proprietors and persons interested in the lands intended to be inclosed shall have been previously called for the purpose of taking the expediency of such inclosure into consideration by notice under the hands of three or more of such proprietors or persons interested, such notice to be affixed on the principal outer door of the church or chapel of the parishes, townships, or places wherein the lands intended to be inclosed shall lie, or in case there be no such church or chapel, then on the door of the church or chapel of some adjoining parish, township, or place, and also advertised in some newspaper circulating in the county wherein such lands lie, at least fourteen days before the said intended meeting; provided that such inclosure may after such meeting be proceeded with by and with the consent in writing of two-third parts in number and value of the proprietors and persons interested in the lands intended to be inclosed, notwithstanding some of the parties who may approve of and consent to such inclosure may not be present at such meeting, and may signify their consent thereto after the same shall have been holden."

2. *Inclosure of.*

6 & 7 Will. 4, c. 115.

Sect. 2. "Whenever any inclosure shall be proposed to be made or consented to under the authority of this act, or any agreement for compensation in pursuance of the provisions in that respect hereinafter contained shall be entered into, by any person or persons who being necessary to make up, and without whom there shall not be consenting parties sufficient to make up, the proportion of two-third parts in number and value hereinbefore required, or other the proportion hereinafter required in the case of an inclosure without the assistance of commissioners, and who shall have a less estate or interest in the land to be inclosed, or the said rights therein, than a fee simple or an estate in tail, or be an holder of a copyhold or customaryhold tenant right or other tenure in such lands or rights for any less estate than an estate or interest in fee or in tail, or shall be under any disability, such consent shall not be available for the purposes of this act, unless the person to whom the next immediate vested estate of freehold or of copyhold or customaryhold tenant right or other tenure of inheritance, in remainder or reversion, shall have been limited, (provided such person shall be of the full age of twenty-one years, and being a female shall be unmarried,) shall consent thereto in writing; and such consent shall be sufficient for the purposes of this act, notwithstanding the person giving the same may have an equitable estate only in the land intended to be inclosed, or may have previously charged or incumbered his reversionary estate therein: provided always, that if the

The consent of the tenant in remainder necessary in certain cases.

2. *Inclosure of.*

6 & 7 Wil. 4, c. 115.

person to whom such next immediate vested estate in remainder or reversion may have been limited, shall at the time such inclosure is proposed to be made happen to be an infant, feme covert, idiot, or lunatic, it shall be lawful for the guardian, or husband or committee of such infant, feme covert, idiot, or lunatic to consent to such inclosure in his or her stead: provided always, that in respect to any land held in right of any benefice, no consent of the incumbent thereof shall alone be available for the purposes of this act, where such consent shall be necessary to make up the proportion of two-third parts in number and value hereinbefore required, or other the proportion hereinafter required in the case of an inclosure without the assistance of commissioners, without the concurrence of the patron of such benefice, and of the archbishop or bishop to whose ordinary or peculiar jurisdiction the said benefice shall be subject; and if the patron of such benefice shall happen to be a minor, idiot, lunatic or feme covert, it shall be lawful for the guardian, committee, or husband of such patron to consent to such inclosure in the stead of such patron, and on his or her behalf: provided always, that if the patronage of such benefice shall happen to be in the crown, and the benefice shall exceed the yearly value of 20*l.* in the King's books, no consent of the incumbent thereof shall be available for the purposes of this act, where such consent shall be necessary to make up either of the proportions aforesaid, without the concurrence of the lord high treasurer or the first lord commissioner of the treasury for the time being, who are respectively hereby authorised so to concur; but if such benefice shall not exceed the yearly value of 20*l.* in the King's books, then no consent of the incumbent thereof shall be available for the purposes of this act, where such consent shall be necessary to make up either of the proportions aforesaid, without the concurrence of the lord high chancellor, lord keeper or lords commissioners of the great seal for the time being, who is and are hereby authorised to give such consent on behalf of the crown.

Commissioners to be nominated by the parties consenting to the inclosure.

Sect. 3. "That whenever the persons whose consents are hereby rendered necessary to any such inclosure shall have consented thereto in manner in that behalf herein authorised and required, it shall be lawful for the major part in number and value of the proprietors of and persons interested in the lands intended to be divided and inclosed, or their known agents, who may be present at a meeting to be called for that purpose, to nominate and appoint in writing under their hands one or more person or persons (not interested in the premises) to be a commissioner or commissioners for dividing, allotting and inclosing, and he or they is and are hereby empowered to divide, allot, and inclose, all or any of the open and common arable meadow or pasture lands or fields in any such parish, township, or place, or in any parishes, townships, or places adjoining or lying within two miles of the aforesaid parish, township or place which may have been agreed to be divided, allotted, and inclosed as aforesaid; and when and as often as any such commissioner, or any commissioner to be from time to time appointed in his place, shall die, neglect, or refuse or become incapable to act, it shall be lawful for the major part in number and value of the proprietors of such open common arable fields or other lands or fields as aforesaid so agreed to be divided, allotted, and inclosed, or of their agents assembled at a public meeting to be held in manner hereinbefore mentioned in respect to the meeting for taking such inclosure into consideration, to nominate and appoint any other person not interested in the premises to be a commissioner in the stead or place of the commissioner so dying, neglecting, refusing, or becoming incapable to act as aforesaid; and in case the said proprietors or persons interested as aforesaid shall make default in appointing any new commissioner within two calendar months after any such death, neglect, refusal, or disability shall happen, and shall be known and signified to them or any two of them respectively as aforesaid, then the surviving or remaining commissioner (if any) shall and he is hereby required from time to time, by writing under his hand, within one calendar month next after the expiration of the said period allowed to the proprietors or persons interested for naming such new commissioner to be appointed as aforesaid, to appoint one other commis-

sioner, not interested in the said inclosure, in the place of such commissioner so dying, neglecting, refusing, or becoming disabled to act as aforesaid; and every such new commissioner so to be appointed shall have the like powers and authorities for carrying this act into execution in all respects whatsoever as the commissioner in whose place he shall have been so appointed and chosen as aforesaid was invested with under and by virtue of this and the said hereinbefore recited act."

2. *Inclosure of.*

6 & 7 Will. 4, c. 115.

Sect. 4. "The said commissioner or commissioners shall and they are hereby authorised and empowered to appoint a clerk to assist him or them in the execution of the said recited act and this act, and shall and may remove such clerk and appoint another in his room as to him or them shall seem meet; and in case of the death, incapacity, neglect or declining to act of any such clerk, then and in any such case the said commissioner or commissioners shall and may appoint any other person to be clerk."

Commissioners to appoint a clerk.

Sect. 5. "In all cases where two commissioners shall have been appointed for any such inclosure they shall, before they proceed upon the business of such inclosure, by writing under their hands appoint a fit and proper person (not interested in the said division and inclosure) to act as umpire between them, and from time to time afterwards renew such appointment in the event of the death, refusal, neglect, or incapacity to act of the person so appointed; and if any difference of opinion shall arise between them touching or concerning any matter or thing to be done by them by virtue or in the execution of the said recited act or of this act, the matter upon which such difference shall arise shall be settled and determined by such person so to be appointed umpire, whose determination therein shall be deemed and taken to be the determination of the said commissioners, and shall be reduced into writing, and shall be binding and conclusive upon all parties whomsoever; (so far as the acts and determinations of the commissioners are by the said recited act or this act declared to be final and conclusive;) and for the purposes aforesaid such umpire shall have and he is hereby invested with the same powers and authorities as by the said recited act and this act are given or vested in the said commissioners."

Umpire to be appointed.

In case of difference of opinion between the commissioners, the matter to be determined by the umpire.

Sect. 6. Provided always, "That no person shall be capable of acting as a commissioner or an umpire or a surveyor in the execution of this act or the said recited act until he shall have taken and subscribed an oath or made an affirmation in the form or to the effect following before one of his majesty's justices of the peace for the county, riding, division, or place in which the lands intended to be inclosed, or some part thereof, are situate; which oath or affirmation the said justice is hereby empowered to administer, (that is to say):—

Commissioners and umpire to take an oath.

"*I, A. B. do swear* [or, being one of the people called Quakers, *do solemnly affirm*], *that I will faithfully, impartially and honestly, according to the best of my skill and judgment, execute and perform the several powers and authorities vested and reposed in me as a commissioner* [or *an umpire*, or *surveyor*, as the case may be], *by virtue of an Act passed in the year of the reign of King William the Fourth, intituled* 'An Act,' &c. [here set forth the title of this act], *according to equity and good conscience, without favour or affection, prejudice or partiality, to any person or persons whomsoever. So help me God.*"

Form of oath.

[Or, being a Quaker, omit the words *So help me God.*]

Sect. 7. "The said commissioner or commissioners or umpire shall and he or they is or are hereby required to cause notice in writing to be affixed to the respective church or chapel doors of the parish, township or place wherein the lands intended to be inclosed are situate, or if there be no church or chapel, then in some conspicuous public place there, and also a like notice to be published in some newspaper circulating in the county wherein such lands lie, of the time and place of his or their attendance or meeting, and of all other subsequent attendances or meetings for executing the powers hereby or in and by the said recited act vested in him or them, ten days before any such meeting; (meetings by adjournment only excepted); and if there be two commissioners, and not more than one of them shall attend at the time and place appointed for any such meeting, it shall be lawful for the commis-

Commissioners to give notice of meetings, &c.

Adjournment of meeting in case of failure of attendance of commissioners.

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sioner who shall attend such meeting, or the clerk of the said commissioners, or if notice shall have been given of such meeting by any umpire, and both the commissioners shall not attend the same, it shall be lawful for such umpire, to adjourn such meeting to any future day not exceeding fourteen days from the day of adjournment; and such clerk shall cause notice of such adjournment to be given to the said commissioners: provided always, that all the meetings of the said commissioners, or umpire and commissioners, shall be holden in one of the parishes or townships wherein the lands to be inclosed are situate, or within seven miles of the boundaries of one of them."

Place of meeting.

Mode in which other notices are to be given.

Sect. 8. Provided always, "That all other notices necessary or requisite to be given by the said commissioner or commissioners or umpire shall be so given by affixing the same on the respective church or chapel doors of the several parishes, townships or places wherein the lands to be inclosed are situate, or if there be no church or chapel, in some conspicuous public place in such parishes, townships or places, and by advertisement in a newspaper circulating in the county wherein such lands are situate."

Allowance to commissioners, umpire and surveyors.

Sect. 9. "Out of the money that shall arise for defraying the expenses of executing this act there shall be paid to each of the commissioners (if more than one) and to the umpire who shall act in the execution thereof, as a recompence for his pains and trouble, the sum of three guineas for each and every day they shall respectively be employed in travelling to, returning from, and attending in the execution of this act, and no more; and at all meetings to be held in pursuance of this act the said commissioners and umpire shall, out of such allowance, defray their own expenses; and there shall be paid to the surveyor or surveyors to be appointed for the purposes of this act such allowances in respect of his or their services as the said commissioner or commissioners shall adjudge to be a full recompence and satisfaction for all his or their expenses and charges whatsoever in attending the said commissioners, and in surveying and admeasuring the lands and grounds to be inclosed, and in planning and staking out the several allotments intended to be made, and in making such maps and plans as may be required respectively by virtue of this act."

Major part of proprietors may agree for payment of a gross sum to commissioners, &c.

Sect. 10. Provided always, "That it shall be lawful for the major part in number and value of the proprietors and persons interested as aforesaid to make any agreement with any commissioner or commissioners or surveyor or surveyors to be appointed under this act for the payment to them respectively of one sum for the whole duty or any part thereof to be performed by them or either of them."

Four fifths of proprietors, &c. may agree to adopt any previous plan, &c.

Sect. 11. Provided further, "That it shall be lawful for four-fifths in number and value of such proprietors and persons interested as aforesaid to agree upon the adoption for the purposes of this act of any plan, map, admeasurement or valuation previously made, and such agreement shall be binding upon any commissioner or commissioners or umpire who may be appointed in pursuance of the provisions of this act."

Four fifths in number may agree upon rules for guidance of commissioners or umpire.

Sect. 12. Provided also, "That it shall be lawful for four-fifths in number and value of such proprietors and persons interested as aforesaid to agree upon the rules, conditions and principles according to which any such commissioner or commissioners or umpire shall act in allotting the lands to be inclosed to the several persons interested therein, and such agreement shall be binding upon such commissioner or commissioners or umpire as aforesaid."

Such several agreements may be appealed against to the quarter sessions.

Sect. 13. Provided nevertheless, "That it shall be lawful for any proprietor or person interested as aforesaid, who may deem himself aggrieved by any such agreement as hereinbefore mentioned for the payment of a commissioner or commissioners, surveyor or surveyors, or for the adoption of any plan, map, admeasurement or valuation, or for establishing any rules, conditions and principles for the guidance of the commissioner or commissioners or umpire in making allotments, to appeal against the same to the first general quarter sessions of the peace to be holden in and for the county, riding, or division wherein the lands, or the greater part thereof, in respect of which the matter of complaint may arise, shall be situate, or some adjournment

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thereof, or if such general quarter sessions shall be holden within one month from the making of such agreement, then to the general quarter sessions next following such first general quarter sessions, or some adjournment thereof; and notice of such appeal shall in each case be given in writing to the commissioner or commissioners seven days at the least before the day on which such sessions respectively shall be holden: provided always, that in the event of the decision upon any such appeal being in favour of the appellant it shall be lawful for any party who shall have consented to such agreement for inclosure as aforesaid to withdraw his consent from such agreement by giving notice in writing to that effect to the commissioner or commissioners at any time within twenty-one days after the day on which the decision upon such appeal as aforesaid shall have been given; and if by reason of such withdrawal of consent the proportion of two-thirds in number and value of consenting parties shall not remain, the said agreement for inclosure shall thenceforth cease and determine."

Notice of appeal. Proviso.

Sect. 14. "If any of the parties interested in the premises shall have any objection or objections to any of the accounts or claims which shall be delivered to the said commissioner or commissioners by virtue of the said recited act or of this act, such objection or objections shall be reduced into writing, and two parts thereof shall be signed by the party or parties making the same, or by some person or persons on his, her or their behalf, and one part thereof shall be delivered to the party or parties whose claim or account shall be objected to, or to his, her or their agent, or left at his, her or their last and most usual place or places of abode, at such time or times as the said commissioner or commissioners shall appoint for that purpose."

A copy of the objection to be left with the party objected to, or given to his agent.

Sect. 15. "If any dispute or difference shall arise between any of the parties interested or claiming to be interested in the said intended division, allotment and inclosure, touching or concerning the respective rights or interests which they or any of them shall claim to have in, to or out of the lands and fields hereby authorised to be divided, allotted and inclosed, or touching or concerning any other matter or thing relating to the said division, allotment and inclosure, it shall be lawful for the said commissioner or commissioners, and they are hereby authorised and required, to examine into, hear and determine the same respectively; provided that nothing in this act contained shall authorise the said commissioner or commissioners to determine the title to any manors, messuages, cottages, lands, tenements or hereditaments whatsoever."

For settling disputes between parties interested.

Sect. 16. "In case the said commissioner or commissioners shall, upon the hearing and determination of any claim or claims, objection or objections, to be delivered to them in pursuance of the said recited act or this act, see cause to award any costs, it shall be lawful for the said commissioners, and they are respectively hereby empowered, upon application being made to them for that purpose, to settle, assess and award such costs and charges as they shall think reasonable to be paid, either for the public account for or towards the expenses occasioned in or relating to the investigation, settling and determining of such claim or claims, if finally disallowed, or to the party or parties in whose favour any determination of the said commissioner or commissioners shall be made, by the person or persons whose claim or objection shall be thereby disallowed or overruled, or against whom the said commissioner or commissioners shall have determined as aforesaid; and in case the person or persons who shall be liable to pay such costs shall neglect or refuse to pay the same, upon demand, it shall be lawful for the said commissioner or commissioners, and he and they are hereby authorised and required, by warrant under their hands and seals, directed to any person or persons whomsoever, to cause such costs to be levied by distress and sale of the goods and chattels of the person or persons so neglecting or refusing to pay the same, rendering the overplus (if any) upon demand, to such person or persons whose goods and chattels shall have been so distrained and sold, after deducting the costs and charges attending such distress and sale."

Commissioners may award costs.

Sect. 17. Provided always, "That in case any person or persons interested or claiming to be interested in the said intended division and inclosure shall

Appeal allowed when parties are dissatisfied with

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decision of the commissioners.

be dissatisfied with any determination of the said commissioner or commissioners or umpire touching or concerning any claim or objection which shall be delivered to the said commissioners in pursuance of the said recited act or this act, or touching or concerning any property, right or interest intended to be affected by such determination, and shall cause notice in writing of such dissatisfaction to be delivered to or left at the usual places of abode of the commissioner or commissioners or umpire making such determination, and of the party or parties in whose favour such determination shall have been made, if there be any party or parties specially interested in the same, or his, her or their agent, within thirty days next after such determination shall have been notified in writing to the several parties or persons specially interested, if any such there be, it shall be lawful for such person or persons so dissatisfied, and giving such notice as aforesaid, to bring or cause to be brought an action or actions upon a feigned issue against the person or persons in whose favour such determination shall have been made, and to proceed to a trial at law of the matter so determined by the said commissioners or umpire at the then first or second assizes to be holden for the county wherein the lands relating to which such dispute shall arise are situate; and the defendant or defendants in such action or actions shall, and he, she and they is and are hereby required to name an attorney or attorneys, who shall appeal thereto, and file common bail, and accept one or more issue or issues, whereby such claim or claims, rights in question, and the property, right and interest thereby insisted upon, may be tried and determined; such issue or issues to be settled by the proper officer of the court in which the said action shall be commenced, in case the said parties shall differ about the same; and the verdict or verdicts which shall be given upon the trial of such action shall be binding, final and conclusive, unless the court wherein such action shall be brought shall set aside such verdict or verdicts, and order a new trial to be had thereon, which it shall be lawful for the said court to do in case the said court shall think proper; and after such verdict or verdicts shall be obtained, and not set aside, the said commissioners shall and they are hereby required to act in conformity thereto, and to allow or disallow the claim, property, right or interest thereby determined according to the event of such trial or trials; and the costs and charges payable by the said commissioner or commissioners in or relating to such action or actions shall be paid and discharged out of the monies to be raised by him or them for the purposes of this act: provided always, that if no such notice shall be given, and such action or actions at law shall not be commenced as aforesaid, or if any such action shall be commenced, and the plaintiff or plaintiffs therein shall not proceed to trial within the time hereinbefore limited for that purpose, then the determination of the said commissioner or commissioners or umpire shall be final, binding and conclusive to all intents and purposes whatsoever: provided always, that if any of the parties in any such action to be commenced as aforesaid shall die before the determination thereof, such action shall not abate by reason thereof, but shall be proceeded in as if no such event had happened; and that no difference, suit or proceeding as aforesaid, nor any difference or dispute touching the title to any lands, tenements or hereditaments shall impede or delay the said commissioner or commissioners in the execution of the powers of this act, but the division, allotment and inclosure hereby authorised to be made shall be proceeded in notwithstanding any such difference or proceeding."

Death of parties not to abate actions.

Sect. 18. Provided always, "That if any person or persons in whose favour such determination as aforesaid shall have been made, and against whom any such action or actions might have been brought if living, shall die before any such action or actions shall have been brought, and before the expiration of the time hereinbefore limited for bringing such action or actions, it shall be lawful for the person or persons who might have brought such action or actions against the person or persons so dying to bring the same within the time so limited as aforesaid, against such person or persons as aforesaid as if actually living, and to serve the clerk of the said commissioner or commissioners with process for commencing such action or actions in the

same manner as the party or parties so dying might have been served therewith if living; and it shall thereupon be incumbent upon the heir or heirs or other person or persons who shall claim the benefit of such determination as aforesaid to appear and defend such action or actions in the name or names of the person or persons so dead; and proceedings shall be had therein in the same manner as if such person had been actually living, and the rights of all parties shall be equally bound and concluded by the event of such action or actions."

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Sect. 19. Provided also, "That nothing in this act contained shall extend to enable the said commissioner or commissioners to determine any right between any parties contrary to the possession of any such parties, except in cases of encroachments made within the period of twenty years next preceding the passing of this act; but in case the said commissioner or commissioners shall be of opinion against the right of the person or persons so in possession they shall forbear to make any determination thereupon until the possession shall have been given up by or taken from such person or persons by ejectment or other due course of law."

Commissioners not to determine rights between parties except in cases of encroachments within twenty years.

Sect. 20. "All encroachments or intakes which at any time within twenty years next preceding the date of the agreement for any such inclosure have been made upon the said lands and fields hereby authorised to be divided and inclosed shall be deemed and considered part and parcel of the lands and fields to be allotted and inclosed by virtue of this act as if the same were actually lying open and uninclosed, and shall be divided and allotted accordingly; and in case any dispute or difference shall arise touching any such encroachments or intakes, or as to the extent thereof, such dispute or difference shall be determined by the said commissioner or commissioners."

Encroachments made within twenty years to be deemed part of the land to be allotted.

Sect. 21. Provided also, "That in case any such lands shall have been taken or used at any time before the passing of this act for the erection of a school-house or school-houses, or the appurtenances thereto, or for other charitable purposes, such land so taken, or the erections made thereon, shall not be taken or deemed to be of the nature of an encroachment within the meaning of this act."

Lands used for charitable purposes not to be deemed an encroachment.

Sect. 22. Provided always nevertheless, "That all lands which shall have been inclosed from the open fields, or any of them, for more than twenty years next preceding the date of the agreement for such inclosure, shall for the purpose of this act be deemed and taken to be ancient inclosures."

Lands inclosed more than twenty years deemed to be ancient inclosures.

Sect. 23. Provided always, "That it shall not be lawful for the said commissioner or commissioners, or umpire, to allot to any other person than the proprietor thereof any land which may be cultivated as orchard or garden, or on which any building may have been erected, or which may have been inclosed by virtue of any voluntary agreement between the proprietor thereof and the persons having right of common over the same, without the consent in writing of such actual proprietor."

Cultivated ground to be allotted to proprietors only.

Sect. 24. "The said commissioner or commissioners shall, by some writing or writings under their hands, ascertain, order and appoint what recompence and satisfaction in money shall be made to the owner or owners of any crops growing at the time of the said intended division and allotment, for the said crops, by the person or persons to whom the lands on which such crops are growing shall be allotted, and also what recompence and satisfaction in money shall be paid, and by whom, to any tenant or tenants, occupier or occupiers of lands to be inclosed as aforesaid, as well for the ploughing, tilling and manuring of any lands or fields which shall be allotted to some other person or persons, and for the profit or advantage which any such person or persons to whom the said lands and fields shall be allotted will obtain thereby, as for any loss or disadvantage which any such tenant or tenants, occupier or occupiers, shall or may sustain by the loss of any following or way-going crop in any of the open and common lands or fields by this act authorised to be divided, allotted and inclosed, or by means of the said division, allotment and inclosure; and if in any or either of the said cases last mentioned such recompence and satisfaction shall not be made at the time and in the manner to be appointed by the said commissioner or commissioners, then the

Compensation to be made for standing crops.

2. *Inclosure of.*

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said commissioner or commissioners shall and may, by any warrant or warrants under his or their hands and seals, directed to any person or persons whomsoever, (which warrant or warrants he or they are hereby authorised and empowered to grant accordingly,) cause the same to be levied by distress and sale of the goods and chattels of the person or persons required to make such recompence and satisfaction as aforesaid, together with the costs and charges of such distress and sale, rendering the overplus, if any, to the owner or owners of such goods and chattels."

Commissioners to direct the course of husbandry to be followed.

Sect. 25. "The said commissioner or commissioners shall, as soon after his or their appointment as conveniently may be, by some writing or writings under his or their hands to be affixed on the principal outer doors of the several and respective churches or chapels of the parishes or townships in which the lands to be inclosed are situate, or if there be no church or chapel, then in some conspicuous place in the parish, township or place where such lands shall be, order and direct the course of husbandry that shall be used in, over and upon the open arable, meadow or pasture lands or fields to be divided, allotted and inclosed by virtue of this act, until the time when he or they shall have made and completed the intended division and allotment thereof, as well with respect to breaking up and laying down, as the ploughing, sowing, fallowing and tilling the same lands and fields; and by the same or any other writing or writings under his or their hands, to be affixed as aforesaid, shall and may make such orders and regulations touching the conduct of the owners and occupiers of the same lands and fields, for the preventing the committing of waste or destruction by any person or persons whomsoever upon any of the lands and fields to be divided and allotted by virtue of this act, in the meantime and until the allotments and divisions thereof shall be effected, as to the said commissioner or commissioners shall seem expedient; all which orders and regulations of the said commissioners shall be binding and conclusive upon all parties interested therein, their farmers and tenants; and that the said commissioners shall set and impose such pecuniary penalties and forfeitures upon every person not conforming to such orders and regulations as they shall think necessary, not exceeding 5*l.* per acre; all which penalties and forfeitures shall be paid to such person or persons and for such uses and purposes as the said commissioner or commissioners shall by any such writing or writings as aforesaid, or any other writing or writings, direct or appoint; and the said commissioner or commissioners are hereby authorised and required to raise and levy the same, for the use of the person or persons he or they may consider entitled thereto, by such ways and means as the costs, charges and expenses of carrying this act and the said recited act of the forty-first year of the reign of his late majesty King George the Third into execution may be raised and levied."

Commissioners to allot the lands to be inclosed.

Sect. 26. "The said commissioner or commissioners shall apportion, divide, set out and allot the said open or common arable, meadow and pasture lands or fields authorised by this act to be divided, allotted and inclosed, unto and amongst the several proprietors thereof and persons interested therein, in proportion to their respective shares, rights of common, and all other rights, property and interest, and in proportion to the true and real value of their several shares, rights of common, and all other rights, property and interests, and the same, when so apportioned, divided, set out and allotted, shall be taken to be in lieu and full satisfaction of and for such their said several shares, rights of common, and all other rights, property and interests, to be ascertained and adjusted by such ways and means and in such manner as to the said commissioners shall seem just and expedient, but subject to the rules, orders and regulations herein contained or referred to and authorised to be established concerning the same."

At the desire of the parties several allotments may be set out together, distinguished by metes and bounds, but not fenced from each other.

Sect. 27. "In case any number of the proprietors or persons interested in the lands and fields agreed to be inclosed under the authority of this act shall deem it expedient and desire to have their allotments thrown together and distinguished by metes and bounds, but not fenced from each other, and of such their desire shall give notice in writing to the said commissioner or commissioners, such commissioner or commissioners shall and he and

they is and are hereby required to set out the several allotments of the said persons so giving notice as aforesaid in one plot or parcel of land, distinguishing the portion of such plot or parcel of land allotted to each of such proprietors by metes and bounds, but not requiring them to make any subdivision fences or other fences, save such ring or outer fences as may be necessary and may be ordered by the said commissioner or commissioners to be made for dividing the said plot or parcel of land from the residue of the lands so to be inclosed."

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Sect. 28. "For the purposes of shortening or rendering straight or otherwise improving any boundary fence or fences between the lands and fields hereby authorised to be divided, allotted and inclosed, and the old or other lands thereunto adjoining, or between such allotments and inclosed or other lands, or any of them, and any adjoining lands and grounds, it shall be lawful for the said commissioner or commissioners (with the consent of the lord of any manor in which the lands are respectively situate, and of the owners of any such adjoining lands, testified by writing under their respective hands, or under the common seal of any of them being a corporation aggregate) to set out, ascertain and determine the boundaries between the lands hereby authorised to be divided, allotted and inclosed, and any adjoining lands or grounds lying in the same or in any adjoining manor, parish or place, as the said commissioner or commissioners shall judge proper for the purposes aforesaid; and after such boundaries shall be so set out, ascertained and determined as aforesaid, the same shall be made, fenced, ditched or mounded by such person, in such manner and at such times as the said commissioner or commissioners shall direct, and shall for ever thereafter be deemed the boundaries between the said allotted and inclosed lands respectively. or (as the case may be) between the said allotments or inclosed or other lands and such adjoining manor, parish or place; any law, usage or custom to the contrary notwithstanding."

For ascertaining boundaries.

Sect. 29. "The said commissioner or commissioners shall in and by his or their award order and appoint the grass and herbage growing and renewing upon all and every the private roads to be set out by him or them within the said lands and fields hereby authorised to be divided, allotted and inclosed, to be and for ever hereafter remain to and for the use and benefit of such persons as the said commissioner or commissioners shall in his or their judgment think best entitled to the same."

Right of herbage in private roads to be set out.

Sect. 30. "And whereas the allotments made to any rector or vicar who may be entitled to any glebe lands in such open and common arable, meadow or pasture lands or fields, or some of such allotments, may probably require some additional buildings, by reason whereof, and in order to render the same of greater value to the said rectors and vicars respectively, and their respective successors, it may be necessary that some buildings should be erected thereon, and some necessary division as well as interior or subdivision fences may be necessary to be made, planted and raised in and upon the said allotments or some of them: And whereas the erecting of such further buildings, and the making, planting and raising such fences, will be attended with considerable expense, and as the same will probably be more beneficial to the successors of such rectors and vicars respectively than to the rector and vicar in whose incumbency such allotment and inclosure may take place; be it therefore further enacted, that it shall and may be lawful to and for the said rectors and vicars respectively, and their respective successors, by and with the consent in writing of the respective patrons of the said rectories and vicarages, and of the ordinary of the diocese for the time being, to erect or cause to be erected for agricultural purposes such further buildings upon the allotment or allotments, (which buildings the said rectors and vicars respectively, and their respective successors, are hereby required to cause to be insured equal to the value thereof annually in some of the offices in London established for insurance against fire), so as aforesaid to be set out unto the said rectors and vicars and their respective successors as aforesaid, and also to make, plant and raise such outer division as well as interior or subdivision fences in and upon the said allotment or allotments as the said commissioner

Empowering rectors to erect buildings on lands allotted in right of glebe, and charge expenses thereon.

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or commissioners shall judge necessary and proper for the occupation of the lands so to be allotted to the said rectors and vicars respectively, and their respective successors, and by any deed or deeds, writing or writings, under the respective hand and seal of such rectors or vicars respectively, and their respective successors, and attested by two or more credible witnesses, by and with the consent in writing of the bishop of the diocese for the time being, to charge such allotment or allotments so as aforesaid to be set out for the said rectors and vicars respectively, and their respective successors as aforesaid, and the buildings so to be erected thereon, with such sum or sums of money, not exceeding in the whole two years' annual value of the respective allotments so to be set out to the said rectors and vicars respectively, as the said commissioners shall think necessary for the purposes of and in order to be applied to paying and defraying the charges and expenses of erecting the said further buildings, and of making, planting or raising such division or subdivision fences, or for either of the said purposes, and in applying for and obtaining the consent of the said bishop, and in exercise of the powers given to and vested in the said rectors and vicars respectively by virtue of this act and the said recited act; which sum or sums of money shall be paid to such person or persons as the said commissioners shall nominate and appoint, in order to be applied or disposed of accordingly; and for securing the repayment of such sum or sums of money, with interest for the same, to grant, mortgage, lease or demise the allotments so as aforesaid to be set out unto and for the said rectors and vicars respectively, and their respective successors, as aforesaid, and the buildings so to be erected thereon, unto such person or persons who shall advance and lend the same, his, her and their executors, administrators and assigns, for any term or number of years, so that every such grant, mortgage, lease or demise be made with a proviso to cease and be void, or with an express trust to be surrendered, when the sum or sums of money thereby to be secured, with the interest thereof, shall be respectively fully paid and satisfied; and such mortgagee or mortgagees advancing and lending the money so to be borrowed shall not be obliged to see to the application or be in anywise answerable for the misapplication of such monies or any part thereof; and the said rectors and vicars respectively, and their respective successors for the time being, shall be and are hereby required and made liable, at the end of every year after the date of such mortgage, to pay to the person or persons to whom such grant, mortgage, lease or demise shall be made, his, her or their executors, administrators or assigns, one thirtieth part of the respective principal monies so to be borrowed, until the whole thereof shall by such annual payments be paid off and discharged, and also to pay and keep down the interest of the said respective monies so to be borrowed, so that the future rectors and vicars of the said respective parishes or townships becoming possessed of such respective lands and fields shall not be subject or liable (and they are hereby respectively discharged from being subject or liable) to pay any further or larger share of such monies than his or their proportion thereof according to such last-mentioned condition, or any interest for the same save only from the day of the death, resignation or cession of the preceding incumbent of the said rectories or vicarages respectively; and that it shall and may be lawful to and for the person or persons who shall advance and lend such monies, his, her or their heirs, executors, administrators and assigns, for the more easily recovering the said one thirtieth part of the said principal and the whole of the interest which is enacted annually to be paid, to have, use, exercise and take such and the same powers and remedies, by entry and distress upon the premises so to be charged, mortgaged and demised, and sale of such distress, as by the laws now in force are provided for and given to landlords, or as they can use and take for the recovery of rack rents in arrear."

Rectors, with consent of bishop, may demise the allotments.

Sect. 31. "It shall and may be lawful for the rectors of the said rectories and the vicars of the said vicarages respectively for the time being, by indentures under their respective hands and seals, with the consent and approbation of the bishop of the diocese for the time being, and of the patron of the said rectories and vicarages, from time to time to lease and demise all or any part

of the allotments to be set out and allotted to them respectively by virtue of this act, to any person or persons whomsoever, for any term not exceeding twenty-one years, so that the rent or rents for the same shall be thereby reserved to such rectors and vicars for the time being by four equal quarterly payments in every year, and so that there be thereby reserved to such rectors and vicars the best and most improved rent or rents that can be reasonably gotten for the same, without taking any fine, foregift, premium, sum of money, or other consideration for granting any such lease, and so that no such lessee by any such lease or demise be made dispunishable for waste by any express words to be therein contained, and so that there be inserted in every such lease power of re-entry on non-payment of rent or rents to be thereby reserved within a reasonable time, to be therein limited, after the same shall become due, and so that a counterpart of such lease be duly executed by the lessee or lessees to whom such lease shall be made as aforesaid; and every such lease shall be valid and effectual, any law or usage to the contrary notwithstanding."

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Sect. 32. Provided always, "That in case, through the necessity of situation or any other accident or circumstance, it shall happen that one or more of the said proprietors shall not have an equal or proportionable quantity of boundary mounds or fences allotted to him, her or them on the said intended inclosure, it shall be lawful for the said commissioner or commissioners, when he or they shall judge it necessary and reasonable, to award, order, ascertain and appoint what sum or sums of money such proprietor or proprietors shall respectively pay and contribute towards making the mounds and fences of the allotments of such other proprietor or proprietors who shall or may have too great a proportion of mounding or fencing allotted to him, her or them by virtue of this act, the same to be settled by the said commissioner or commissioners in such manner as he or they shall order, direct or appoint; and the money so ordered, directed or appointed to be paid shall be raised, levied and recovered in such and the same manner as the other expenses of this act are herein or by the said recited act ordered and directed to be levied and recovered."

Commissioners in certain cases to apportion expenses of erecting boundary fences.

Sect. 33. Provided always, "That nothing in this act contained shall extend or be construed or adjudged to extend to revoke, make void, alter or annul any settlement, deed, will or lease, or to prejudice any person having any right or claim of dower, jointure, annuity, rent-charge, debt or incumbrance whatsoever in, out of, upon or affecting any of the lands, tenements or hereditaments hereby authorised to be divided and allotted, or which shall be exchanged or assigned in compensation for any other estate or right in pursuance of this act; but as well the lands allotted as the tenements or other hereditaments which shall be assigned in exchange or as a compensation for any other estate or right shall, immediately after such allotment, exchange or assignment shall be made, (*a*) be vested, remain and enure, and the several persons to whom the same shall be allotted, assigned or given in exchange as aforesaid, shall thenceforth stand and be seised and possessed thereof respectively, to, for and upon such and the same uses, estates, intents, trusts and purposes respectively, and subject and liable to such and the same deeds, wills, settlements, limitations and remainders, conditions, charges, tenures, rents, services and incumbrances, as the several lands, tenements and hereditaments in respect whereof such allotments, assignments and exchanges shall have been made, should or would have stood severally limited, settled, or subject or liable to, or been held by, in case the same had not been allotted, assigned or exchanged, and this act had not been made or acted upon; save and except such rents and services as shall have been compensated for and extinguished, and such leases and tenancies at rack-rents as shall become

Act not to affect settlements.

(*a*) It would seem, however, that the property does not vest even under this section until the award made. (*Doe* d. *Beaufort* (*Duke*) v. *Neeld*, 3 *Scott, N. R.* 618.) But certainly, where possession is taken under the allotment, without award made, the allottee may maintain *trespass*. (*Greathead* v. *Morley*, 3 *Scott, N. R.* 538.)

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void, by virtue of this act, and subject nevertheless to all such mortgages and sales as shall be made by authority of this act or of the said act of the forty-first year of the reign of his late Majesty King George the Third."

Leases at rack-rent may be voided.

Sect. 34. Provided also, "That all leases, agreements and tenancies at rack-rent subsisting of any part or parts of the lands and grounds hereby authorised to be divided, allotted and inclosed at the time of the first appointment of any commissioner or commissioners for the inclosure thereof, or which shall be exchanged in pursuance of this act, shall, so far only as respects the lands hereby authorised to be divided and allotted or exchanged, cease and be void at such time or times as the said commissioner or commissioners shall by writing under his or their hands direct or appoint, so as the respective lessors or landlords of such lands or tenements do, before or at the respective times at which such leases or tenancies shall be directed to cease, make and pay such satisfaction to the respective lessees or tenants for the loss which shall be sustained by the determination of such leases respectively, so far as regards the said lands the tenancy and leases whereof are hereby authorised to be determined, as shall be mutually settled and agreed between them, or as the said commissioner or commissioners, being required by either of the parties, shall ascertain and direct; and the said commissioner or commissioners, being so required, are hereby empowered and directed to apportion a reasonable and proportionable part, according to the season of the year, of the rent reserved on any such lease or agreement, for or in respect of the time which shall have elapsed between the last day on which any payment of the rent shall have become due, and the determination of any such lease or agreement; and such part of the rent shall be recoverable by such ways and means as may by law be used for the recovery of rent in arrear; and the said commissioners are hereby empowered and directed in every case where such lands or other hereditaments shall be held by virtue of such lease or agreement, together with other lands or hereditaments, by one entire rent, to apportion and determine what part of such rent shall be deducted in respect of such of the lands or other hereditaments in such lease or agreement comprised as to which the same shall be determined as aforesaid, and from what time such deduction shall take place; and the rest of the rent reserved on any such lease or agreement shall, during the remainder of the term thereof, be the rent of and for the residue of such lands and hereditaments, and shall be payable and recoverable in like manner as the entire rent reserved by such lease or agreement shall immediately before such apportionment be payable and recoverable."

Exchanges may be made.

Sect. 35. "It shall be lawful for the said commissioner or commissioners to set out, allot, and award any lands, tenements, or hereditaments whatsoever, whether situate within the boundary of such open and common lands or fields as aforesaid, or adjoining thereto, within the parishes, townships, or places in which the lands to be allotted and inclosed are situated, or any of them, in lieu of and in exchange for any other lands, tenements, or hereditaments within the same parishes, townships, or places respectively, or any of them, or within any parish, township, or place adjoining to the said parishes, townships, or places respectively, or any of them; provided that all such exchanges shall be ascertained, specified, and declared in the award of the said commissioner or commissioners, and be made with the consent in writing (*a*)

(*a*) Certain landholders, through their agents, met and agreed to inclose their common under the provisions of the General Inclosure Acts. They chose a commissioner to allot and exchange the various parcels; and the parcels which each was willing to exchange were set down, and the consent of each landowner that the commissioner should deal with these lands was obtained. The commissioner made the allotments and exchanges, but did not publish an award: Held, that this was not a final measure; that, to bind the parties, the commissioner must publish an award; and that the several landowners must give a consent under seal, after the allotments and exchanges made, to receive the specific parcels which had been assigned to them, as well as the previous consent to part with certain lands on their behalf. (*Doe* d. *Beaufort* (*Duke*) v. *Neeld*, 3 *Scott*, *N. R.* 618.)

of the proprietor or proprietors of the hereditaments and premises which shall be so exchanged, whether such proprietor or proprietors shall be a body or bodies politic, corporate, or collegiate, corporation aggregate or sole, rector, parson, vicar, or other ecclesiastical person or persons, or a tenant or tenants in fee simple or for life, or in fee tail, special or general, or by the courtesy of England, or for years determinable on any life or lives, by and with the consent of the lessor or lessors, but not otherwise, or with the consent of the guardians, husbands, committees, or attorneys of or acting for any such proprietor or proprietors who at the time of making such exchange or exchanges shall be respectively infants, femes coverts, idiots, lunatics, or under any other legal disability, or who shall be beyond the seas, or otherwise disabled to act for themselves, himself, or herself, or of the trustees or feoffees for charitable, parochial, or other uses, or of the person or persons having power to sell and dispose of the hereditaments and premises which shall be so exchanged; (such consent to be testified in writing under the common seal of the body politic, corporate, or collegiate, and under the hands of the other consenting parties respectively); and all and every such exchange and exchanges so to be made respectively shall be good, valid, and effectual in the law to all intents and purposes whatsoever: provided, nevertheless, that no exchange shall be made of any lands, tenements, and hereditaments held in right of any church, chapel, or other ecclesiastical benefice, without the consent, testified as aforesaid, of the patron thereof, and of the bishop of the diocese in which such benefice shall be situate."

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Sect. 36. Provided always, "that the lands, grounds, and hereditaments which shall be allotted or exchanged by virtue of this act shall be held in like manner, under and by virtue of the same terms and rents, and shall be thereafter deemed to be of the same quality and tenure, as the lands, tenements, or hereditaments in respect of which such allotment or allotments or exchanges shall be made were held or deemed to be of immediately before the making of every such allotment or exchange respectively: provided always, that when the tithes of any common lands or fields agreed to be allotted or inclosed under the provisions of this act belong to different persons or do not extend over the whole of such common lands or fields, it shall be lawful for the commissioners or commissioner to allot the tithes as well as the land, in order that all persons may have tithe-free allotments in lieu of lands which were before exempted from tithes."

Allotments to be under the same tenure as the lands in respect of which they are allotted.

Sect. 37. Provided also, "that all costs, charges, and expenses attending the making any exchanges and partitions shall be paid and borne by the several persons making such exchanges and partitions in such manner and in such proportions as the said commissioner or commissioners shall, by any writing under his or their hands, order and direct."

For defraying expense of exchanges.

Sect. 38. "The said commissioner or commissioners shall and may scour out, widen, and alter all such ancient ditches, drains, watercourses, tunnels, gates, and bridges in the respective open common arable, meadow, or pasture lands or fields (or any one of them) hereby authorised to be allotted and inclosed, and also shall and may set out, widen, and made any new ditches, drains, watercourses, tunnels, gates, and bridges in, through, and over the lands and grounds hereby authorised to be divided, allotted, and inclosed, (the expenses thereof to be raised and defrayed as the other expenses of executing the powers of this act are herein directed to be raised and defrayed), and of such breadth, depth, and dimensions, and in such directions, as the said commissioners shall think proper; and the said commissioner or commissioners shall and may and they are hereby directed and required in and by their awards to order and determine by whom, and at whose expense, and at what time and in what manner, the said ditches, drains, watercourses, tunnels, gates, and bridges shall be afterwards cleansed, scoured, and maintained, and also shall and may direct, order, and award all or any of the streams, springs, and watercourses within the said lands and fields hereby authorised to be divided, allotted, and inclosed, to be carried, diverted, and turned into such courses, and through, over, and across such parts of the lands and fields hereby authorised to be divided, allotted, and inclosed, as they the

Ditches, &c. may be cleaned, altered, or widened.

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said commissioners shall in their discretion judge proper for the draining or watering the several allotments so to be made as aforesaid."

Power to commissioners to make drains through land not proposed to be inclosed, due compensation being made for damage done.

Sect. 39. Provided always, "that if it shall be necessary, for the purpose of carrying off the water from such drains as may be made under the authority of this act, to make drains through any land not to be inclosed, divided, or allotted under the same, it shall be lawful for the said commissioners and their servants to enter upon such lands, and make such drains accordingly, due compensation being made for any damage done to such lands thereby; and it shall be lawful for such commissioners in their award to direct by which of the persons to whom any allotment shall be made in any field so divided and inclosed such drains shall be maintained, and the persons so directed to maintain such drains shall maintain the same accordingly, and have the same authority to enter upon such lands as hereinbefore described, for the purpose of maintaining the same, as is hereinbefore given to the said commissioners and their servants for the making of the same, making due compensation for any damage which may be done to such lands."

Upon the consent of seven eighths in number and value, an inclosure may take place without the intervention of commissioners.

Sect. 40. "In case seven eighths in number and value of the persons being seised, possessed of, entitled to, or interested in any open and common arable fields, or open and common meadow or pasture lands or fields, in England or Wales, and any rights of common or any other rights therein, being persons having such estates or interests in the said lands, fields, or rights as are hereinbefore required for the purpose of consenting to any such proposed inclosure as aforesaid, shall by themselves or their known agents, or if covert, infants, idiots, or lunatic, then by their husbands, guardians, or committees, at a public meeting to be called for that purpose in the manner and after the notice hereinbefore provided for, or at some adjournment thereof, enter into an agreement for such inclosure under the provisions of this act, but without the intervention of commissioners, and for the discharge of the lands to be inclosed from all rights of common, and for the granting of compensation to such persons as may be possessed of such rights, whether consenting parties to any such agreement or not, and shall sign or seal (as the case may require) the schedule hereinafter mentioned, every such inclosure shall, from and immediately after the expiration of the notices of such schedule having been deposited as hereinafter mentioned, be as valid and effectual to all intents and purposes (subject only to the right of appeal hereinafter given) as if the same had been effected by means of commissioners to be appointed under this act."

Schedule of land proposed to be inclosed to be deposited with the clerk of the parish and the clerk of the peace; and a notice thereof affixed on the church door, and published in some newspaper circulating in the county.

Sect. 41. "Before any land shall be inclosed under the provisions herein contained for inclosure without the assistance of commissioners, a schedule of such land, containing a correct description thereof, and signed by the persons proposing to make such inclosure, and also by the persons whose consent to such inclosure is hereinbefore required to be given, and whenever the inclosure shall be proposed to be made by any person having a less estate than a fee simple or under disability, then accompanied by a copy of the several limitations contained in the deed or will under which such person may be entitled, shall be deposited with the clerk of the parish, township, or chapelry, and also with the clerk of the peace of the county in which the land proposed to be inclosed may be situated; and a notice of such schedule having been so deposited (such notice containing a description of the land intended to be inclosed) shall be published in some newspaper usually circulating in the county wherein such land is situated, at three several times in three successive months after such schedule shall have been so deposited, and a copy thereof shall be affixed on the principal outer door of the church or chapel of the parish or township in which the land may be situated, before the commencement of divine service, or if there be no church or chapel then in some conspicuous place there, for three successive Sundays after such schedule shall have been so deposited: provided always, that whenever such inclosure shall be proposed to be made by a corporation aggregate, or the consent of a corporation aggregate shall be necessary thereto, the affixing of the common seal of such corporation to such schedule shall be deemed a sufficient compliance with the provisions of this act."

Incapacitated persons enabled to

Sect. 42. "It shall be lawful for any person who shall be seised or pos-

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sessed of or entitled in possession to any land or tenement in respect of which compensation may be proposed or ought to be given, or to which any right of common may attach, or who, having no land in the common field in which an inclosure is proposed to be made, may nevertheless have a right of common therein, whether such person shall be tenant in fee simple, or fee tail, general or special, or for life or lives, or by the courtesy of England, or for any other estate of freehold, or for years determinable on any life or lives, and also for any person whose right of common may be merely personal, and for the guardian, trustee, feoffee for charitable or other uses, husband, or committee of such person who shall be an infant, idiot, lunatic, or feme covert, or under any other disability, to consent and agree to the compensation which may be offered or which ought to be given by the persons making such inclosure, not only as to the nature and amount of such compensation, but as to the manner in which the same shall be secured, and to sign the agreement for that purpose; but no such agreement shall be valid if entered into by any person having a limited interest only, or by any incumbent of a benefice, without the consent of the same persons and to be testified in the same manner as is hereinbefore required in the case of such persons being respectively parties to any agreement for inclosure: provided always, that in case such compensation or any part thereof shall be agreed to be paid in money, and such money shall belong to any persons who in the said first recited act are mentioned or described as persons incapacitated to receive the same, then such money shall be paid and applied in such and the same manner as money belonging to such persons is directed to be applied under the provisions of the said first recited act."

enter into an agreement for compensation.

Sect. 43. "Whenever any agreement for compensation may or may not have been entered into, and notwithstanding any such agreement, if any person interested in any such inclosure, other than a person who may have signed such agreement or otherwise consented thereto, shall object to such inclosure, or to the nature and amount of any compensation which may be offered, or to the manner in which such compensation may be proposed to be secured, or on account of there not having been any compensation offered, it shall be lawful for him to state such objection in writing, and to deposit the same with the clerk of the peace at any time within six calendar months from the expiration of the aforesaid notices of the deposit of such schedule; and such schedule and copy of limitations, and every statement and document annexed to such schedule, and every statement of objection which may be so deposited, shall be open to the inspection of any person interested, and the deposit of such statement of objections in manner aforesaid shall be deemed and taken to be a sufficient notice to all persons interested in such inclosure."

Persons having objections to such inclosure to deposit them with the clerk of the peace, within six months;

to be open to inspection.

Sect. 44. "The clerk of the peace shall cause the schedule and statement of objections, and all other papers relating thereto, and which shall have been so deposited with him, to be laid before the justices at the general quarter sessions of the peace, or at some adjourned meeting thereof, which shall be held not earlier than twenty-eight days next after the deposit of such objections, in and for the county, riding, or division wherein the lands proposed to be inclosed, or the greater part thereof, shall be situate; and all such objections shall be heard and determined by the said justices in manner hereinafter provided."

Clerk of peace to lay schedule, &c. before justices at quarter sessions, who shall hear and determine upon such objections.

Sect 45. "It shall and may be lawful for any person or persons interested in the said allotments at any time to mortgage, sell, demise or dispose of all such estate, right, title, interest and property which he, she, or they shall then have in or to the said open and common arable, meadow, or pasture lands or fields (or any one of them), and of the allotments set out in lieu thereof, before the execution of the award of the said commissioner or commissioners; and it shall be lawful for the said commissioner or commissioners, and he or they are hereby authorised and required, upon the conveyance or other instrument by which such sale or disposition is confirmed being produced to them, and the execution thereof proved to their satisfaction, to allot the same to the purchaser or purchasers thereof respectively; and if not so allotted, such conveyance or other instrument shall be valid and effectual

Persons interested in allotments may sell the same before the award; and commissioners may allot them to the purchasers.

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in law, notwithstanding it may have been so made before the execution of the said award."

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Tenants for life empowered to sell part of allotments to defray expenses.

Sect. 46. "It shall be lawful for the said commissioner or commissioners, in case he or they shall be requested by writing under the hand or hands of any person or persons being tenant for life, or other person being in possession of, but not having the absolute estate or interest in any lands hereby authorised to be allotted and inclosed, to sell and dispose of any part or parts of the allotment or allotments belonging to such person or persons, for the purpose of defraying his, her or their shares of the costs, charges, and expenses of putting into execution this act and the said recited act of the forty-first year of the reign of his late majesty King George the Third, and the expenses of fencing, ditching, subdividing and inclosing such allotment or allotments; and the said commissioners shall accordingly sell such part or parts of such allotment or allotments, either by private contract or public auction, as they shall think proper, to such person or persons as shall be willing to purchase the same, and shall convey the same to such purchaser or purchasers by any deed under their hands and seals; and the receipt of the said commissioners for such money shall be a full and complete discharge to such purchaser or purchasers for such purchase-money; and the said commissioners shall apply the purchase money in or towards the payment of such expenses, and in fencing, ditching, subdividing and inclosing the said allotment or allotments respectively, and not otherwise; but such purchaser or purchasers shall not be liable to see to the necessity or expediency of such sale, nor be answerable nor accountable for the misapplication of such purchase money; and upon the payment of such purchase money or purchase monies into the hands of the said commissioner or commissioners, the lands so to be sold as last aforesaid shall immediately thereupon be vested in fee simple in possession (if such allotment or allotments is or are made in right of freehold) in the purchaser or purchasers thereof, and the same shall be thenceforth held in severalty by such purchaser or purchasers thereof respectively, as his, her or their private property, and shall be allotted accordingly by the said commissioner or commissioners."

When allotments to a tenant for life are in different parishes, commissioners may sell the land in one parish to defray expenses attending the other portion of the allotment.

Sect. 47. Provided always, "Where any allotment or allotments so to be made to any person or persons being tenant for life or in tail, or other person being in possession, but not having the absolute estate or interest in any lands hereby authorised to be allotted and inclosed, which stand limited to the same uses, shall be situated partly in one and partly in another parish, or township or place, it shall and may be lawful to and for the said commissioner or commissioners, in case they shall be requested as last hereinbefore mentioned, to sell and dispose of, and to convey and assure to the purchaser or purchasers thereof, any part or parts of the said allotments belonging to such person or persons in any one or more of the said parishes, townships, or places, in manner in that behalf hereinbefore mentioned, as well for the purpose of defraying his, her or their share or shares of the costs, charges and expenses of putting into execution this act and the said recited act, and the expenses of fencing, ditching, subdividing and draining such allotment or allotments in respect of such of the said lands as are situated within the same parish wherein the said allotment or allotments so sold may be situated, as for and in respect of such of the said lands or other hereditaments or allotments as may be situated in any other township or place: provided always, that it shall not be lawful to raise by such sale any further or greater sum of money than the person or persons part of whose allotment or allotments may be sold or disposed of would have been empowered and authorised to borrow or charge upon his, her or their allotment or allotments under or by virtue of the said recited act or this act, reckoning 5*l.* for each and every acre of such allotment or allotments."

Proviso.

Not to charge land with expenses unless the sum to arise by the sale shall be less than 5*l.* per acre.

Sect. 48. Provided always, "That it shall not be lawful for the proprietor or person from whose allotments lands shall be as aforesaid deducted to charge his, her, or their lands or hereditaments, by virtue of the said recited act or this act, with any money towards payment of such expenses, unless the money to arise by such sale shall be less than the sum of 5*l.* per acre;

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and then and in such case it shall be lawful for such person or persons to charge his, her or their estate or estates with, or to raise by mortgage thereof, or other means or ways, as mentioned in the said recited act or this act, such further sum of money as may be necessary for the payment of the expenses of executing this act, and subdividing the said allotments, as, together with the value of the lands so deducted, shall not exceed the amount that might be borrowed and charged on the lands to be divided and allotted at the rate of 5*l.* for each and every acre."

For payment of expenses of measuring, dividing, allotting and inclosing open and common lands.

Sect. 49. "The charges and expenses of surveying, valuing, planning, measuring, dividing and allotting the said open and common arable, meadow or pasture lands or fields hereby authorised to be divided, allotted and inclosed, and of fencing the lands of the persons from whom a deduction of land shall be made as hereinbefore directed, and also the expenses of preparing and enrolling the awards of and the allowances and payments to be made to the said commissioner or commissioners, umpire, and surveyors respectively, as hereinbefore directed, and all other charges and expenses incident to or attending the carrying this act into execution, shall be paid, borne, and defrayed by all the proprietors of the lands and hereditaments so authorised to be divided, allotted and inclosed, or exchanged, in such proportions as the said commissioner or commissioners shall settle, adjust, and determine, to be paid at such time or times and to such person or persons as they the said commissioner or commissioners shall order and direct; notice thereof in writing under their hands being given thirty days before the time such payment shall be required: provided always, that in case any number of persons whose allotments shall not exceed two acres respectively shall have required their allotments to be thrown together as aforesaid, such persons shall not be liable to pay, bear, or defray any part of the charges and expenses as aforesaid: provided also, that it shall be lawful for four-fifths in number and value of the proprietors and persons interested as aforesaid, at any meeting to be held as hereinbefore is mentioned, to agree that any persons whose allotments shall not exceed five acres respectively shall not be liable to pay, bear, or defray any part of the charges and expenses aforesaid, and such persons shall, by virtue of such agreement, be exempt from all liability thereto."

Commissioners to account.

Sect. 50. "Once at least in every year, to be computed from the first appointment of such respective commissioner or commissioners, the accounts of the said commissioners, commissioner, or umpire, containing a true statement of all and every sum and sums of money by them received and expended, or due to them for their trouble and expense in the execution of this act and the said recited act of the forty-first year of the reign of his late majesty King George the Third, until such account shall be finally settled, shall, together with the vouchers relating to the same, be by them laid before three of his majesty's justices of the peace for the county in which the lands to be inclosed, or the greater part of them, shall be situated, to be by them examined and balanced; and such balance shall be stated in the books of account to be kept in the office of the clerk of the said commissioners; and no charge or item in such account shall be binding on the parties concerned, or valid in law, unless the same shall be so allowed: provided also, that it shall not be lawful for the commissioners to be appointed in pursuance of this act, or any of them, to retain or pay to themselves or clerk, out of any monies to be received by them or over which they may have any control in the execution of any inclosure to be effected under this act, any sum or sums of money on account of any allowance hereinbefore directed to be made to such commissioners and clerk respectively beyond one-third of such allowance as they shall respectively be entitled to as aforesaid, until after the expiration of six calendar months from the day of the delivery of the award hereby directed to be made in the church of the parish in which the lands inclosed may be situate."

Awards.

Sect. 51. "The said commissioner or commissioners shall make and execute awards, with maps or plans thereto annexed, and shall cause the same to be enrolled in manner as directed by the said recited act; and such

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awards shall be deposited in the respective parish churches of the parishes wherein the lands so to be allotted and inclosed, or the greater part thereof, are situated."

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Provisions of recited acts, where not altered or repealed, extended to this act.

Sect. 52. "All and every the clauses, provisions and enactments contained in the said act of the forty-first year of the reign of King George the Third, and of the first year of the reign of King George the Fourth, or such of them as are applicable to and consistent with the purposes and object of this act, shall and may be in full force and effect for carrying into effect the allotments, division, inclosures, and exchanges hereby authorised to be made, as fully and effectually as if such clauses, provisions and enactments had been herein repeated and re-enacted, and had been made part of this act, with such alterations and variations as would adapt them and render them applicable to the object and purposes of this act."

Appeal to quarter sessions where parties think themselves aggrieved. (*a*)

Sect. 53. "It shall be lawful for all persons who shall think themselves aggrieved by any thing done by virtue of this act or the said recited act (except in cases where the things so done are herein or by the said act of the forty-first year of his late majesty King George the Third declared to be

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(*a*) See 3 & 4 Vict. c. 31, s. 1, *post*, 857, as to what acts deprive a party of right of appeal. An act for the inclosure of certain lands in Middlesex, contained a clause giving an appeal "within six months from the time when the cause of complaint shall have arisen." The commissioners, at a meeting under the act, on 18th June, 1818, showed the map to the appellant, having marked out upon it what the commissioner had assigned to him the appellant. The latter raised some objections to it, and desired the commissioner to reconsider it. He did so, but did not think fit to make any alteration; and having received no further application, on the 28th August following sent a formal notice to the appellant, that the land remained allotted to him according to the map exhibited to him on the 18th June previous, and on the same day the said allotment was accordingly staked out by command of the said commissioner. To the local act, as well as the general inclosure, no allotment ought to be made till the roads have been set out, and the roads in this case could not be staked out till the end of July, because the crops were on the ground. The appeal was lodged on the 9th January, and respited till the 20th April, when it was opposed on the ground of not having been lodged in time, i. e. within six months of the cause of complaint arising, and the justices dismissed the appeal on this ground, but the Court granted a *mandamus* to them to hear the appeal, being of opinion that there was no actual setting out of the allotment, according to the true construction of the act, till something was actually done founded on the plan. (*R.* v. *Middlesex (Justices)*, 1 *Chit. R.* 367.)

A local inclosure act gave an appeal to parties grieved by anything done in pursuance of the act, to any general quarter sessions holden for the county within four calendar months next after the cause of complaint shall have arisen." An allotment was made and staked out by the commissioners in March, and the appellant cropped it. It was held, that though the mere staking out of the ground might not be a grievance, as it might be done without notice to the party, yet his cropping showed him too late in his appeal at the October sessions. (*R.* v. *Wilts (Justices)*, 13 *East*, 353; see *R.* v. *Cumberland (Justices)*, 1 *B. & Cr.* 64.)

By an act for inclosing lands in a parish and extinguishing its tithes, the commissioner was directed to value the tithes as being equal to a fixed proportion of the net annual value of the lands, and then to find an equivalent corn-rent; and by his award, or some previous writing under his hand, to be annexed thereto, to set forth the same, and to apportion the corn-rent upon the lands of the respective proprietors, and to fix when the first payment of the corn-rent should be made, and when the tithes should be extinguished; and a right was given to any person aggrieved by anything done in pursuance of that act, to appeal to any general or quarter sessions in the county, held within four months next after the cause of complaint should have arisen. The commissioner having determined the amount of the corn-rent, and fixed the day for the first quarterly payment of it, and also the day from which the tithes should cease and be extinguished, by a previous writing, which afterwards was annexed to the award: held, that an appeal by the rector on the ground of the corn-rent being inadequate, must be within four months of such previous writing, and that an appeal within four months of the date of the award was not in time.

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final, binding, and conclusive), to appeal to the general quarter sessions of the peace which shall be held in and for the county, riding or division wherein the lands, or the greater part thereof, in respect of which the matter of complaint may arise, shall be situated, or any adjournment thereof, within six calendar months next after the cause of complaint shall have arisen, (*a*) first giving or causing to be given twenty eight days' notice thereof in writing to the said commissioner or commissioners, or one of them, or to the parties intended to be appealed against; and the justices at their said quarter sessions, or any adjournment thereof, are hereby authorised and required to hear and determine the matter of every such appeal, and shall also hear and determine any appeal against the sum agreed to be paid to any commissioner or surveyor, or against the adoption of any plan, map, admeasurement or valuation, or against any rules, conditions, and principles which may have been agreed upon in manner aforesaid for the guidance of the commissioner or commissioners or umpire in making allotments, and shall also hear and determine all objections (if any) which may have been made in manner aforesaid to any inclosure without the assistance of commissioners, or to the nature or amount of the compensation which may have been offered, or to the manner in which the same may have been proposed to be secured, or on account of there not having been any compensation offered, and to make such order in every such case respectively, and to award such costs as to them in their discretion shall seem meet, and by their warrant to levy the costs awarded by distress and sale of the goods and chattels of the parties respectively adjudged to pay the same, rendering the overplus (if any) to the respective owners of such goods and chattels, after deducting the reasonable charges of such distress and sale; and every determination of the said justices shall be final and conclusive on all parties concerned; and no such complaint, appeal, or proceeding shall be removed or removable by certiorari or any other writ or proceeding whatsoever into any of his majesty's courts of record at Westminster or elsewhere; but in case such appeal shall appear to the said justices to be frivolous, vexatious, or without foundation, then the said justices shall award such costs to be paid by the appellant or appellants as to them in their discretion shall seem reasonable, and to be levied in manner aforesaid."

Act not to affect rights of lords of manors.

Sect. 54. Provided always, "That nothing in this act contained shall in any case authorise the inclosure of any waste whatsoever, whether the soil thereof shall or shall not be vested in the lord of any manor, and whether with or without the assent of the lord of such manor; nor shall any thing in this act contained prejudice, lessen, or defeat the right, title, or interest of the respective lords for the time being of any such manors in or to any of the royalties or seignories, fisheries, manorial and other rights, customs, and services incident or belonging to the said respective manors or any of them; but that such respective lords, and all and every person and persons claiming in trust for him or them as such respective lords for the time being of the said several and respective manors shall and may at all times for ever hereafter have, hold, receive, take, and enjoy all rents, services, courts, perquisites and profits of courts, fines, goods and chattels of felons and fugitives,

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(*R.* v. *Nookolds*, 3 *Nev. & M.* 334; 1 *Adol. & Ellis*, 245.)

Semble, that no notice of the corrents having been fixed, and the tithes extinguished by the previous writing, was requisite, though the act required that all notices necessary to be given by the commissioners should be given in a particular way, eight days before the period for doing the business to which such notice should relate. (*Id.*)

But it was held, that, supposing that the four months could not be allowed to run until the party injured had notice that his rights had been affected, notice given by the commissioner in the manner required by the act in other cases was sufficient, although the notice, which stated in general terms what had been done, referred for particulars to a schedule deposited at a distant place; and held, also, that private notice was sufficient. (*Id.*)

See also *R.* v. *Gloucestershire (Justices)*, 3 *M. & S.* 127; see further as to appeals, *ante*, "*Appeal.*"

(*a*) See *ante*, 854, note (*a*).

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felons of themselves and put in exigent, deodands, waifs, estrays, and forfeitures, privileges and jurisdictions of their several and respective manors, to the respective lords thereof, or any person or persons claiming under him or them, incident, belonging, or appertaining, except in respect of any land or estate for which compensation is hereinbefore authorised to be made, in as full, ample, and beneficial manner to all intents and purposes as the same might or ought to have been held and enjoyed in case this act had not been passed."

Act not to authorise the inclosure of any open or common fields within certain distances of large towns.

Sect. 55. Provided always, "That nothing in this act contained shall authorise the inclosure of any open or common arable fields, or of any open or common meadow or pasture lands or fields, situate and being within ten miles of the city of London, or of any open or common meadow or pasture lands or fields situate and being within one mile of any city or town of five thousand inhabitants, or within one mile and a half of any city or town of fifteen thousand inhabitants, or within two miles of any city or town of thirty thousand inhabitants, or within two miles and a half of any city or town of seventy thousand inhabitants, or within three miles of any city or town of one hundred thousand inhabitants; provided that in all cases the number of such inhabitants shall be ascertained by the then last parliamentary census thereof, and that such distance shall be measured in a direct line from the town hall if there shall be any town hall, or if there shall be no such town hall then from the cathedral or church, if there shall be only one church, or if there shall be more churches than one, then from the principal market place of any such city or town."

Meaning of certain words in this act.

Sect. 56. "The words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in the construction of this act, except when the nature of the provision or the context of the act exclude such construction, be interpreted as follows: (that is to say) the words 'proprietor,' 'owner,' and 'person,' shall respectively extend as well to an individual as to a body politic, corporate, or collegiate, and to a corporation as well aggregate as sole, whether such corporation be eleemosynary or civil, ecclesiastical or lay; the word 'benefice' shall extend to and be taken to comprehend rectories, vicarages, donatives, perpetual curacies, parochial and consolidated chapelries and churches, and chapels having a district assigned thereto; the word 'tithes' shall extend to any rent-charge or payment in lieu of tithe; the word 'land' shall extend to every species of land, whether arable, meadow, or pasture, and whether freehold, copyhold, or customary, or held by any other tenure, and as well to one piece or parcel as to any number of pieces or parcels of land; the word 'parish' shall be construed to include any parish, township, liberty, precinct, vill, village, hamlet, tithing, chapelry, or any other place or division or district of a place, whether parochial or extra-parochial; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing."

Saving the rights of his majesty in respect of the duchy of Cornwall, or of the Duke of Cornwall for the time being.

Sect. 57. Provided further, "That nothing in this act contained shall extend or be construed to extend to affect, prejudice, or derogate from the estate, right, title, interests, privileges, or authority of the king's most excellent majesty, his heirs and successors, in right or in respect of his duchy of Cornwall, or of the Duke of Cornwall for the time being, or to authorise, sanction, or permit the inclosure of any lands, grounds, tenements, or hereditaments whatsoever, or give any right or title whatsoever to any encroachment or intake heretofore made thereupon, or otherwise affect any lands, grounds, tenements, or hereditaments whatsoever belonging to or held of or being within and forming part and parcel of any manor, messuage, or tenement, open field, pasture, common, or other land or ground whatsoever, or any advowson, rectory, or vicarage, parcel of the possessions of the duchy of Cornwall, or wherein or whereunto, or over, upon, or with reference whereto, his majesty, in respect of his said duchy of Cornwall, or the Duke of Cornwall for the time being, may have or claim to have any estate, right, title, or interest whatsoever, nor at any time or times be admitted in any court of law or equity, or otherwise considered as evidence upon any occasion

to affect in any manner his majesty, his heirs and successors, in right or in respect of his said duchy of Cornwall, or the Duke of Cornwall for the time being."

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Sect. 58. Provided always, "That nothing in this act contained shall authorise the inclosure of any open lands in, to, or over which his Majesty, in right of his crown or of his duchy of Lancaster, has or may have or claim to be entitled to any estate, right, title, or interest whatsoever."

Saving as to the duchy of Lancaster.

Sect. 59. "Saving also to the king's most excellent majesty, his heirs and successors, and to all and every other person and persons, bodies politic and corporate, ecclesiastical and civil, his, her, or their respective heirs, successors, executors, and administrators (other than and except the persons to whom any allotment or compensation shall be made by virtue of this act, in respect of the interest or property for which such allotment or compensation shall be made to them in respect of such right, and except such other rights and interests as the intents and purposes hereby authorised shall absolutely require to be barred, destroyed, or extinguished by this act, and all persons respectively claiming under them or in remainder after them), all such estate, right, title, interest, claim, and demand as they, every or any of them, had or enjoyed of, in, to, or out of the said open and common arable, meadow, or pasture lands or fields hereby authorised to be divided, allotted, and inclosed, before the passing of this act, or the carrying the powers thereof into execution, or could or might have held or enjoyed in case this act had not been made, or the powers thereof had not been carried into execution."

General saving.

By 3 & 4 Vict. c. 31, intituled "*An Act to extend the Powers and Provisions of the several Acts relating to the Inclosure of open and arable Fields in England and Wales*" [23d July, 1840], reciting the passing of the 41 Geo. III. c. 109, and the 6 & 7 Will. IV. c. 115, and "it is desirable that awards under the secondly recited act should be rendered final and conclusive, and that the powers of the commissioners acting under or in execution of the said recited acts, or either of them, for the ascertaining and determining boundaries, should be extended in the respects hereinafter mentioned," it is enacted, "that (subject and without prejudice to the right of appeal given by the said secondly-recited act) all awards that shall be made in pursuance of that act and of this act, or either of them, shall immediately after the execution thereof be conclusive evidence that the provisions of the said acts have in all respects been complied with, and that all necessary consents have been given; and no other evidence than such awards shall be requisite to establish the title under the inclosure of the parties concerned or interested in the same: provided always, that if any party concerned or interested in any such inclosure shall, after the making of the award thereunder, take possession of, or proceed to inclose or to cultivate, any allotment, or any lands given in exchange, which shall have been thereby awarded to such party, all right of appeal which might otherwise have been exercised by such party against the said award shall, from the time of such taking possession, or of such proceeding to inclose or to cultivate (as the case may be), be deemed and taken to have been absolutely waived and surrendered."

3 & 4 Vict. c. 31.

The award to be conclusive evidence that the provisions of the act have been complied with, &c.

Parties taking possession of their allotments deemed to waive all right of appeal.

Sect. 2. "And whereas by the said first-recited act power is given to the commissioner or commissioners appointed in or by virtue of any act of inclosure to ascertain and determine the boundaries of parishes, manors, hamlets, or districts to be divided and inclosed, and of parishes, manors, hamlets, or districts adjoining thereto: and whereas it is expedient that the power of such commissioner or commissioners should extend to the straightening of boundaries in cases in which the lands in any parishes, manors, hamlets, or districts so to be divided and inclosed are or are reputed to be intermixed with the lands of any adjoining parish, manor, hamlet, or district; be it enacted, that so much of the powers and provisions in the said first-recited act contained as relates to the ascertaining, setting out, determining, and fixing the boundaries of parishes, manors, hamlets, or districts shall extend and be applicable to the straightening of the boundaries of any parish, manor, hamlet, or district to be divided and inclosed under the said recited acts, or either of them,

Powers of commissioners as to setting out boundaries extended.

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3 & 4 Vict. c. 31. Commissioners to declare by their award the parish to which any land cut off shall be annexed.

whenever the lands of such parish, manor, hamlet, or district shall be or be reputed to be intermixed with the lands of any other parish, manor, hamlet, or district."

Sect. 3. "In every case in which the commissioners shall, in the exercise of the powers given to them by the said recited acts or by this act, for the purpose of ascertaining or straightening boundaries, sever any land from any parish, manor, hamlet, or district to which it may have been reputed to belong, they shall, in and by their award, declare to what parish, manor, hamlet, or district such land shall be annexed; and the same shall thenceforth, for all purposes, belong to the parish, manor, hamlet, or district to which it shall have been so declared to be annexed as aforesaid."

Powers of 6 & 7 Will. 4, c. 115, extended to lands commonable only during part of the year.

Sect. 4. "And whereas by the said secondly above recited act it was enacted, that it should be lawful for two-third parts in number and value who should be interested in manner therein mentioned in any open and common arable fields, including any untilled ships or balks therein, or any open and common meadow or pasture lands or fields in any parish, township or place (except as therein excepted) in England and Wales, known by metes and bounds, or occupied according to known legal rights, to inclose in manner therein mentioned such said lands and fields; and whereas doubts have arisen whether the said secondly above-recited act applies to and includes such open and common arable fields as have adjacent thereto (but not separated by any fence therefrom) certain tracts of grass land commonable during part of the year, and holden in severalty, or by lot or apportionment, by or among persons interested therein, during other parts of the year; be it therefore enacted, that the said secondly above recited act, and all powers and provisoes therein contained or mentioned, shall be adjudged and construed to apply and extend to all such open and common fields and tracts of grass land as are herein last-before mentioned."

Act to be construed with that of 6 & 7 Will. 4.

Sect. 5. "This act shall be construed as one with the said secondly above recited act."

Forms.

Schedule to which the Act 41 Geo. III. c. 109, refers.

(1.) Affidavit of notices. (a)

A. B. of *maketh oath and saith* [or, being one of the people called Quakers, *upon his solemn affirmation saith*], *that he did see a copy of the notice hereunto annexed, affixed on the church door of the parish of* *in the county of* [or, *on the several church doors of the respective parishes of* *in the county of* or, *in the several counties of* *and* ,] *on the several Sundays hereinafter mentioned, videlicet* [specifying the days on which the notices were affixed.]

(Signed) *A. B.*

Sworn [or, *solemnly affirmed*] *before us, two of his Majesty's justices of the peace acting in and for the* *and subscribed in our presence, by the above-named A. B. this* *day of* *in the year* 18 .

As witness our hands and seals.

(2.) Affidavit of consent. (a)

A. B of *maketh oath and saith* [or, being one of the people called Quakers, *upon his or her solemn affirmation saith*], *that he* [or *she*] *believes himself* [or *herself*] *to be interested in the proposed inclosure of the* *in the* [here describe the place, whether parish, hamlet, or place] *in the county of* *by virtue of* [here set forth the interest of the deponent,] [or *that he* or *she believes that C. D. of* *for whom he* or *she is guardian, &c.* as the case may be, *is interested, &c.;*] *and that he* [or *she*] *hath seen a copy of an act* [here set forth the title of this act] *and also a copy of the bill intended to be presented to parliament, and hath subscribed his* [or *her*] *name, or hath set his* [or *her*] *mark to the same respectively, and doth consent to the said bill being passed into a law.*

(Signed or marked) *A. B.*

Sworn [or *solemnly affirmed*] *before us, two of his Majesty's justices of the peace,*

(a) The 41 Geo. III. c. 109, gives this form.

acting in and for the *and subscribed in our presence, by the above-mentioned A. B., this* *day of* *in the year* 18 .
As witness our hands and seals,

Forms.

The same form may be applied, *mutatis mutandis*, to the case of several persons, whose interests are joint, or whose interests, though distinct, are of a similar nature.

(3.) Affidavit of allegations of the bill. (a)

A. B. of *maketh oath and saith* [or, being one of the people called Quakers, *upon his or her solemn affirmation saith*], *that* [here set forth such of the several facts alleged in the preamble of the bill as are within the knowledge of the witness] [or *that he* or *she*] *is informed and verily believes that* [here set forth such of the said facts as are within the belief of the witness.]

(Signed) *A. B.*

Sworn [or *solemnly affirmed*] *before us, two of his Majesty's justices of the peace, acting in and for the* *and subscribed in our presence, by the above named A. B., this* *day of* *in the year* 18 .
As witness our hands and seals.

(4.) Affidavit of admeasurement. (a)

A. B. of *maketh oath and saith* [or, being one of the people called Quakers, *upon his solemn affirmation saith*] *that he has surveyed and admeasured the several* *lands in the parish or hamlet of* *in the county of* [or *counties of*] *described in the bill intended to be presented to parliament, and signed by the deponent, by the name* [or *names*] *of* *and that the quantity of such lands amounts to* *and no more, according to such admeasurement, and the best of this deponent's judgment.* *A. B.*

Sworn [or *solemnly affirmed*] *before us, two of his Majesty's justices of the peace, acting in and for the* *and subscribed in our presence, by the above-named A. B., this* *day of* *in the year* 18 .
As witness our hands and seals.

Schedule to which the Act, 1 & 2 Geo. IV. c. 23, refers.

(5.) Order of commissioners to take possession of allotment, &c.

I, A. B., [or, in case of two or more commissioners, *we, A. B., C. D., &c.*] *the commissioner* [or *commissioners*] *named and appointed in and by an act of Parliament lately made and passed, intituled 'An Act, &c.'* [here insert the title of the act by which the commissioner or commissioners is or are appointed,] *do hereby order and direct, permit and authorise T. F., or his* [*her* or *their*] *bailiff or agent, to take possession of all that allotment* [here describe the allotment or allotments by metes and bounds] *by me* [or *us*] *set out or allotted, and staked or marked out to and for him,* [or *her* or *them*, as the case may be] *under and by virtue of the said act, and to cultivate and manage, or to let and demise the same allotment* [or *allotments*] *to any tenant or tenants as he* [or *as she* or *they*, as the case may be] *shall think proper: but nevertheless subject and without prejudice to any such order or orders, direction or directions as I* [or *we*] *may think proper and expedient to make, in and by the award or awards to be hereafter executed by me* [or *us*], *so far as respects such allotment* [or *allotments*] *so set out and allotted, and staked or marked out to and for the said T. F.*
As witness my hand [or *our hands*] *this* *day of* 18 .
Witness, (Signed) *A. B.*

(6.) Distress warrant for rates.

See the form given by the 3 & 4 Will. IV. c. 35, *ante*, 833.

III. Putting Stoned or Infected Horses, and Sheep, &c. on Commons.

Putting stoned horses on commons, &c. prohibited.

By stat. 32 Hen. VIII. c. 13, ss. 2, 10, No person shall put in any forest, chase, moor, heath, common, or waste, where mares or fillies are used to be kept, any stoned horse above the age of two years, not being fifteen hands high, within the shires and territories of Norfolk, Suffolk, Cambridge, Buckingham, Huntingdon, Essex, Kent, South Hampshire, North Wiltshire, Ox-

(a) See note (a), *ante*, 858.

3. *Putting stoned and infected Horses and Sheep on.*

ford, Berkshire, Worcester, Gloucester, Somerset, North Wales, South Wales, Bedford, Warwick, Northampton, Yorkshire, Cheshire, Staffordshire, Lancashire, Salop, Leicester, Hereford, and Lincoln; nor under fourteen hands in any other county, (except Cornwall, stat. 21 Jac. I. c. 28, s. 12,) on pain of forfeiting the same.

But by stat. 18 Eliz. c. 8, s. 3, this shall not extend to the marshes in the counties of Cambridge, Huntingdon, Suffolk, Northampton, Lincoln, and Norfolk; provided that the horses be of thirteen hands.

Stoned horses breaking out of an inclosure.

Also, by stat. 32 Hen. VIII. c. 13, s. 5, nothing herein shall extend to any stoned horse, that shall happen once in a year to break out of any pasture into such common, so that he do not stay there above four days after notice given at the dwelling-house of the owner, or after publication thereof on a Sunday or other festival in the parish church, where the owner or possessor of such horse dwelleth.

Seizing horses under size.

Sect. 3. Any person may seize any such horse so being under size in manner following; he shall go to the keeper of such forest, or (out of such forest) to the constable of the next town, and require him to go with him, to bring such horse to the next pound, and there to be measured by such officer, in the presence of three other honest men to be appointed by the officer; and if he shall be found contrary to what is above expressed, such person may take him for his own use.

Sect. 4. And if such keeper, or constable, or other of the three persons shall refuse to do as is aforesaid, he shall forfeit 40*s*.

Driving the common.

Sect. 6. All such commons and other places shall, within fifteen days after Michaelmas yearly, be driven by the owners and keepers, or constables, respectively, on pain of 40*s*., and they may also drive the same at any other time when they shall think meet.

Defective mares, &c.

Sect. 7. If, in any of the said drifts, there shall be found any mare, filly, foal, or gelding, that shall then be thought not able nor like to grow to be able to bear foals of reasonable stature, or to do profitable labours, by the discretion of the drivers, or of the more number of them, they may kill or bury them.

Penalties.

All which said forfeitures shall be half to the king, and half to him that shall sue; and the justices in sessions, and stewards of leets, may inquire thereof: and the stewards shall certify their presentments to the next sessions.

Putting scabbed horses on commons.

Sect. 9. No person shall have, or put to pasture, any horse, gelding, or mare, infected with scab or mange, in any common, or common fields, on pain of 10*s*., which offence shall be inquirable in the leet, as other common annoyances be, and the forfeitures shall be to the lord of the leet.

Turning out scabbed sheep on commons, &c.

By the 38 Geo. III. c. 65, s. 1, "If any person or persons whosoever shall turn out, keep, or depasture, in or upon any forest, chase, wood, moor, marsh, heath, common, waste land, open field, or other undivided or uninclosed land, any sheep or lambs infected with such complaint or disorder called scab or mange, or shall wilfully and knowingly turn out, keep, or depasture, in or upon any such forest, chase, wood, moor, marsh, heath, common, waste land, open field, or other undivided or uninclosed land, any sheep or lamb which, at any time within the space of six calendar months immediately previous thereto, shall have been infected as aforesaid, every such person, on being thereof convicted on the oath of one or more credible witness or witnesses, or on his or her confession, before any one or more justice or justices of the peace for the county, district, or place, wherein such offence shall have been committed, shall forfeit and pay any sum not exceeding 10*l*. nor less than 20*s*. for every such offence, together with all reasonable costs and charges attending such conviction, such costs and charges to be ascertained by the justice or justices before whom such conviction shall take place; and so *toties quoties*, as often as any such sheep or lamb shall be so turned out, kept, or depastured."

Sheep and lambs three months old to be marked.

Sect. 2. "The owner or owners of each and every sheep and lamb of the

age of three months, which shall be turned out, kept, or depastured, on any forest, chase, wood, moor, marsh, heath, common, waste land, open field, or other undivided or uninclosed land, shall cause such sheep and lambs to be marked with the initial letters of his, her, or their christian name and surname, or christian name and surnames, or with such marks with which such sheep or lambs have for three preceding years been usually marked, such letters or marks not being less in length than three inches; and in case of neglect thereof, the owner or owners shall, for each and every such sheep and lamb not so marked, forfeit and pay any sum not exceeding 2s., and so *toties quoties*, as often as any such sheep or lamb not so marked shall have been so turned out, kept, or depastured."

3. *Putting stoned and infected Horses and Sheep on.*

38 Geo. 3, c. 65.

Sect. 3. "For the better and more effectually discovering the offenders, and punishing the offences herein mentioned, it shall and may be lawful to and for any person or persons having sheep or lambs actually depasturing, or entitled to be depastured, on such forest, chase, wood, moor, marsh, heath, common, waste land, open field, or other undivided or uninclosed land, who shall perceive, or have reasonable ground or foundation for believing, that there is or are any sheep or lambs, sheep or lamb, depasturing or being in or upon the same, contrary to the direction and provisions of this act, to apply to any one or more justice or justices of the peace of the county, district, or place, wherein such lands severally do lie, who, upon complaint on oath made thereof before him or them, is and are hereby authorised and required to issue a warrant or warrants under his hand and seal, or their hands and seals, directed to the keeper or keepers of the said forests or chases, or his or their deputy or deputies, or to the petty constable or constables, bailiff, headborough, or tithingman, of any parish, hamlet, or township within or near which any such forest, chase, wood, moor, marsh, heath, common, waste land, open field, or other undivided or uninclosed land, shall lie and be situate, or unto any other person or persons, who shall consent and be willing to be inserted in such warrant or warrants, and shall command and empower him or them, or any of them, to take or drive all and every such sheep and lambs, sheep and lamb, to the next pound, or to some other convenient place, there to be examined by the person or persons who shall have made such application to such justice or justices as aforesaid, his, her, or their servant or agent, and by the person or persons to whom the said warrant shall be directed, any or either of them, notice being first given six hours at the least before such examination shall take place, by the person or persons making such complaint, or by his, her, or their servant or agent, to the owner or owners of such sheep or lambs, sheep or lamb, or unto his, her, or their hind, bailiff, or servant, or left at his, her, or their last or usual place of abode, if any or either of them be known, and do reside in the parish or parishes, hamlet or hamlets, township or townships, where such sheep or lambs, sheep or lamb, shall have been so found, describing the pound or place the same have been taken or driven to, in order that he, she, or they may, should he, she, or they judge proper, be present at such examination; and if, after such examination, it shall be proved to the satisfaction of the justice or justices granting such warrant or warrants, that such sheep or lambs, sheep or lamb, have or hath not been kept or depastured in or upon such lands and grounds, contrary to the directions and provisions of this act, then and in such case each and every such sheep and lamb shall be taken and driven back to the place or places from whence it was taken or driven previous to such examination, and such justice or justices shall award such costs, charges, and damages to the owner or owners thereof, as to him or them shall seem reasonable; and such costs, charges, and damages, shall be paid by the person or persons making such complaint, and shall be recovered in like manner as any forfeitures or penalties are by this act directed to be recovered."

Persons having a right on commons, &c., may complain to a justice, and have suspected sheep examined.

If not found defective, to be returned to the place from which taken.

Sect. 4. "If, upon any such examination, it shall appear to such justice or justices, that any such sheep or lambs, sheep or lamb, have or hath been turned out, kept, or depastured in or upon any such lands or grounds, infected as aforesaid, or which at any time within the space of six calendar

If found defective, to be marked, and delivered, on demand, to the owner.

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months immediately previous thereto shall have been infected as aforesaid, then and in such case the said justice or justices shall and may direct the same to be impounded, detained and kept, and to be forthwith marked on both sides with the letter S (the length of such letter not being less than five inches), such marks to be made with pitch or tar, or some other adhesive material, such as sheep have been usually marked with in the neighbourhood, and shall also cause the left ear of each such sheep and lamb to be cut or slit in a horizontal line (such cut or slit not exceeding the length of one inch), and the same, when so marked, shall be delivered, upon demand, to the owner or owners thereof; and the costs, charges and expenses attending the taking, driving, keeping, impounding and marking of the same, having been ascertained by such justice or justices, shall be paid by the owner or owners of such sheep or lambs, sheep or lamb, together with the penalties and forfeitures imposed by this act, for each and every such sheep and lamb, and such costs, charges and expenses shall be recovered in like manner as any penalties or forfeitures imposed by this act are directed to be recovered; and any such mark or marks, when made, shall be, and be deemed evidence of the fact that such sheep or lambs, sheep or lamb, have been turned out, kept or depastured, contrary to the directions and provisions of this act, without any other evidence whatsoever."

Persons destroying marks, and owners not renewing them.

Sect. 5. "If any person or persons, at any time within the space of six calendar months after any such sheep or lambs shall have been so marked as directed by such justice or justices, shall cut out, alter, or destroy the mark herein directed to be made in the ear of any such sheep or lambs, or if the owner or owners of any such sheep or lamb shall not immediately renew or cause to be renewed, in like manner, the mark or marks herein directed to be made in the side or sides of every such sheep or lamb, when and as often as such mark or marks on the side or sides shall be defaced, altered, obliterated or destroyed, by any means whatsoever, every such person, for each and every sheep and lamb, the said mark in the ear of which shall have been by him or her so cut out, altered or destroyed, and such owner or owners, for each and every sheep and lamb, not having the said mark or marks on the side or sides thereof, immediately renewed as aforesaid, shall forfeit and pay on conviction any sum not exceeding 20*s.*, nor less than 2*s.*; and the justice or justices before whom such conviction* be had shall, and he and they is and are hereby required to cause every such mark so cut out, altered, defaced, obliterated or destroyed, to be immediately renewed, and the sheep or lambs, sheep or lamb, to be detained and impounded until every such mark shall have been renewed."

Sic.

Sheep not demanded in five days after marking may be sold.

Sect. 6. "If such sheep or lambs, sheep or lamb, so detained or impounded, shall not be demanded and taken away by the owner or owners thereof within five days after the same shall have been so marked as aforesaid, it shall and may be lawful to and for any justice or justices of the peace of the county, district or place, in which such sheep or lambs, sheep or lamb, shall have been so detained or impounded, by warrant under his or their hand and seal, or hands and seals, to direct the same to be sold, and the money arising by such sale, after deducting the costs, charges and expenses of taking, driving, keeping, detaining, impounding and marking the same, shall be paid to the overseer or overseers of the poor of the parish, hamlet or place where such sheep or lambs, sheep or lamb, shall have been so detained or impounded; and in case the owner or owners of such sheep or lambs, sheep or lamb, shall not claim such money within twelve calendar months after such payment, the same shall be applied in aid of the poor-rate of such parish, hamlet, township or place."

Penalties, how to be recovered and applied.

Sect. 7. "All penalties and forfeitures by this act imposed for any offence against the same, shall be levied by distress and sale of the goods and chattels of the offender or offenders, by warrant under the hand and seal of some justice of the peace for the county or place where the offence shall be committed, rendering the overplus of the money arising by such distress and sale (if any), upon demand, to the owner of such goods and chattels, after deducting the costs and charges of making such distress and sale; which warrant such justice

is hereby empowered and required to grant, upon conviction of the offender or offenders, by confession or upon the oath of one or more credible witness or witnesses; and one moiety of such penalties and forfeitures, when so levied, shall be paid to the informer, and the other moiety to the overseer or overseers of the parish or township where the offence shall be committed, to be applied by him or them in aid of the poor-rate."

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Sect. 8. "That in all cases where any conviction shall be had for any offence or offences committed against this act, or against any order of sessions, or any adjudication for the marking of sheep or lambs made, the form of conviction, and the form of adjudication for the marking of any sheep or lambs, shall be in the words or to the effect following; that is to say,

Form of conviction and adjudication.

" } *BE it remembered, that on this day of , in the year of the reign*
to wit. } *of , A. B. is convicted before of his majesty's justices of the peace for the of , by virtue of an act of parliament made in the thirty-eighth year of the reign of King George the Third, intituled* [here set forth the title of the act(a), and specify the offence, and the time and place when and where the same was committed]: *and I* [or *we*], *the said , do adjudge him* [*her*, or *them*] *to forfeit and pay for the same the sum of . Given under my hand and seal* [or *our hands and seals*], *the day and year aforesaid.*"

The Form of Adjudication.

" } *UPON the report upon the oath* [or *oaths*] *of , this day of ,*
to wit. } *in the year of our Lord , made unto of his majesty's justices of the peace for the of , respecting certain sheep* [and *lambs*] *detained* [or *impounded*] *in a , in the parish of , in the said county, by virtue of a warrant under our hands and seals* [or *my hand and seal*], *do hereby adjudge that such sheep* [*and lambs*] *belonging to A. B.* [or, *the owner or owners thereof being unknown*], *appearing to me* [or *us*] *to be infected with the scab or mange,* [or, *having within the space of months immediately previous to the date hereof, been infected with the scab or mange*], *be marked forthwith according to the directions of an act made in the thirty-eighth year of the reign of King George the Third, intituled* [here set forth the title of the act]. *Given under our hands and seals* [or *my hand and seal*], *the day and year aforesaid.*"

Appeal.

Sect. 9. "If any person or persons shall think himself, herself or themselves aggrieved by any thing done by or in pursuance of this act, such person or persons may appeal to the justices of the general quarter sessions of the peace to be holden for the county or place where such matter of appeal shall arise, next after the expiration of four calendar months from the time such matter of appeal shall have arisen, and the justices in such sessions are hereby authorised and required to hear and determine the matter of such appeal in a summary way, and to make such determination therein, and to award such costs as they shall judge proper; and such determination shall be final, binding and conclusive to all parties, and to all intents and purposes whatsoever."

Distress not deemed unlawful for want of form; nor proceeding to be removed by *certiorari*.

Sect. 10. "Where any distress shall be made for any sum or sums of money to be levied by virtue of this act, the distress itself shall not be deemed unlawful, nor the party or parties making the same be deemed a trespasser or trespassers on account of any defect or want of form in the summons, conviction, warrant of distress, or other proceedings relating thereto; nor shall the party or parties making the same be deemed a trespasser or trespassers *ab initio*, on account of any irregularity which shall afterwards be done by the party or parties distraining; and the person or persons aggrieved by such irregularity may recover full satisfaction for the special damage in an action on the case: provided always, that no plaintiff or plaintiffs shall recover in any such action for such irregularity, or for any trespass or other wrongful proceeding, if tender of sufficient amends hath been made to him, her or them, or his, her or their attorney, or by or on

(a) "*An Act for preventing the Depasturing of Forests, Commons and Open Fields, with Sheep or Lambs infected with the Scab or Mange, in that part of Great Britain called England.*"

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the behalf of the defendant or defendants, before such action brought; and in case no such tender shall have been made, it shall be lawful for the defendant or defendants in any such action, by leave of the court, after such action shall have been brought, at any time before issue joined, to pay into court such sum of money as he, she or they shall think fit, whereupon such proceedings, order and judgment shall be made and given in and by such court, as in other actions where the defendant is allowed to pay money into court."

Common Prayer.

See *ante*, "*Church*," and "*Churchwardens*."

Who to provide common prayer book in parish.

BY the 1 Eliz. c. 2, the book of common prayer shall be provided at the charge of the parishioners of every parish, and see 13 & 14 Car. II. c. 4.

Performing of church service.

By the general law, the church service ought to be regularly performed every Sunday morning and evening. Any relaxation is to be supposed to have been permitted by the diocesan, owing to the circumstances of the parish, and the terms prescribed must be strictly observed. (*Bennett* v. *Bonaker*, 2 *Hagg. R.* 27.)

Resident incumbent to read the common prayer once a month, though he keep a curate.

By stat. 13 & 14 Car. II. c. 4, s. 7, where an incumbent resides upon his living, and keeps a curate, the incumbent himself (not having lawful impediment, to be allowed by the bishop) shall at least once a month openly and publicly read the common prayer, and (if there be occasion) administer the sacraments and other rites of the church, on pain of 5*l.* to the poor, on conviction, by confession, or oath of two witnesses, before two justices; and in default of payment in ten days, the same to be levied by the churchwardens or overseers by distress and sale by warrant of such justice.

Public worship in the navy.

All commanders, captains, and officers at sea, shall cause the public worship of Almighty God, according to the liturgy of the church of England, to be performed in their respective ships; and prayers and preachings by the chaplains shall be performed diligently. (Stat. 22 Geo. II. c. 33, art. 1.)

Qualifications of lecturer.

By stat. 13 & 14 Car. II. c. 4, ss. 19, 20, 21, no person shall be received as a lecturer, or allowed to preach or read any lecture or sermon, without licence from the bishop, and assenting to the thirty-nine articles, and reading the common prayer, before his first sermon, and on the first lecture day of every month; on pain of three months' imprisonment for every offence, by two justices of the peace, or certificate from the bishop of the offence committed.

Impugners of book of common prayer.

Impugners of the form of worship in the church of England, established by law, and contained in the book of common prayer; of the thirty-nine articles; of the rites and ceremonies of the church; and the episcopal government; shall be excommunicated *ipso facto*, and not restored but by the bishop or archbishop on their repentance. (*Can.* 5, 6, 7.) See now as to excommunication, *ante*, 661.

Ministers derogating from the book of common prayer.

By stat. 1 Eliz. c. 2, s. 4—8, if any parson, vicar, or other minister, that ought to use the common prayer, or to administer the sacraments, shall refuse to do the same, or (wilfully standing in the same) shall use any other form, or shall speak any thing in derogation of the same book or of any thing therein contained; he shall on conviction for the first offence forfeit to the king one year's profit of all his spiritual promotions, and be imprisoned for six months; for the second offence, shall be deprived of all his spiritual promotions, and be imprisoned for a year; and for the third offence, shall be deprived of all his spiritual promotions, and be imprisoned during life. And if he has no spiritual promotion, he shall for the first offence be imprisoned for a year, and for the second during life.

But this shall not restrain the spiritual court from proceeding against these offenders; and they may be deprived by the said court, according to the

course of the spiritual law, for the first offence. (1 *Eliz.* c. 2, s. 16, 23; 1 *Hawk.* c. 7, s. 4; 1 *East's P. C.* 10.)

By the same statute, sect. 13 and 20, if any person whatsoever shall in plays, songs, or by other open words, speak any thing in derogation of the same book or any thing therein contained; or shall by open fact cause or procure any minister in any place to say common prayer openly, or to minister any sacrament, in other form, or shall interrupt or let any minister to say the said common prayer; he shall (being indicted for the same at the next assizes) forfeit to the king for the first offence 100 marks, and for the second 400 marks; which if not paid in six weeks after conviction, he shall suffer six months' imprisonment for the first offence, and twelve months for the second; and for the third offence shall forfeit all his goods and chattels, and be imprisoned during life. (See *ante*, "*Blasphemy.*")

Any person depraving the book of common prayer.

By stat. 1 Edw. VI. c. 1, if any person shall speak irreverently of the sacrament of the Lord's Supper, he shall suffer imprisonment, and make fine and ransom at the king's will. And three justices, one being of the quorum, may take information by the oaths of two witnesses, and afterwards, at the sessions, may inquire thereof by the oath of twelve men upon indictment. And they shall, at the sessions where the offender shall be indicted, direct a writ to the bishop to appear by himself or deputy at the trial. But no person shall be molested, but within three months after the offence committed.

Speaking irreverently of the sacrament.

By stat. 1 Mar. sess. 2, c. 3, if any person shall disturb *a preacher in his sermon* by word or deed, he shall be apprehended and carried before a justice of the peace, who shall commit him to safe custody, and within six days he and another justice shall examine the fact, and if they find him guilty by two witnesses, or confession, they shall commit him to gaol for three months, and further to the next sessions; and if at the sessions he repents and is reconciled, he shall be discharged on finding sureties for his good behaviour for a year; if not, he shall be continued in gaol till he does; saving the ecclesiastical jurisdiction; and he shall not be punished both ways.

Disturbers of public worship.

This statute, though made in Queen Mary's reign, extendeth to the divine service now established. (*Gibs.* 372; 1 *Hawk.* c. 63, s. 61.)

The 1 Vict. c. 45, enacts that no proclamation or other public notice for a vestry meeting, or *any other matter*, shall be made or given in any church or chapel during or after divine service, or at the door of any church or chapel at the conclusion of divine service. But this act is not to extend to notices purely ecclesiastical, such as the publication of banns, nor to prevent the minister from publishing what is prescribed by the book of common prayer. Before this act, a parish clerk refused to read in church a notice which was presented to him for that purpose, and the person presenting it read it himself at a time when no part of the church service was actually going on, viz. whilst the minister was walking from the communion table to the vestry room. The defendant, a constable, by order of the minister, took him out of the church and detained him an hour after the service was over. He then allowed plaintiff to go, on his promise to attend a magistrate the next day, which he accordingly did, but no complaint being made against him he was discharged. For this the plaintiff brought an action of trespass for an assault and false imprisonment, and obtained a verdict. *Adolphus*, on a motion for a new trial or a nonsuit, cited the stats. 1 Mar. sess. 2, c. 3, s. 3; 1 W. & M. c. 18, s. 18, in support of it. *Sed per Abbott*, C. J. "It appears to me, that the 1 Mar. sess. 2, c. 3, merely gave to the common law cognizance of an offence which was before punishable by the ecclesiastical law; in order to be within that statute, the party must maliciously, wilfully, or of purpose, molest the person celebrating divine service. Had the notice been read by the plaintiff whilst any part of the service was actually going on, we might have thought that he had done it on purpose to molest the minister; but the act having been done during an interval when no part of the service was in the course of being performed, and the party apparently supposing that he had a right to give such a notice, I am not prepared to say that the 1 Mar. sess. 2, c. 3, warranted his detention, in order that he might be taken before a justice of the peace. Neither does the case come within the Toleration Act, 1 W. & M.

The disturbance must be malicious and wilful.

c. 18. That only applies where the thing is done wilfully, and of purpose maliciously to disturb the congregation or misuse the preacher. The detention of the plaintiff after the time when the service ended was therefore illegal, and we ought not to disturb the verdict which has been found." (*Williams* v. *Glennister*, 2 *B. & Cres.* 699; 4 *D. & R.* 217, S.C.)

Disturbers of religious worship, how punished.

By stat. 1 W. & M. sess. 1, c. 18, s. 18, "if any person or persons, at any time or times after the 10th day of June, 1688, do and shall willingly and of purpose, maliciously or contemptuously come into any cathedral or parish church, chapel, or other congregation permitted by this act, and disquiet and disturb the same, or misuse any preacher or teacher, such person or persons, upon proof thereof before any justice of peace, by two or more sufficient witnesses, shall find two sureties to be bound by recognizance in the penal sum of 50*l.*, and in default of such sureties shall be committed to prison, there to remain till the next general or quarter sessions; and upon conviction of the said offence at the said general or quarter sessions, shall suffer the pain and penalty of 20*l.* to the use of the king's and queen's majesties, their heirs and successors."

The Court of Queen's Bench refused to grant a *certiorari*, to remove an indictment at the sessions for a person not behaving himself modestly and reverently at the church during divine service; which although punishable by ecclesiastical censures, yet the Court conceived it a proper cause within cognizance of the justices of the peace. And this was before the above-mentioned statute of 1 W. & M. c. 18. (*Rex* v. ——, 1 *Keb.* 491.) But in *Rex* v. *Hube and others* (5 *T. R.* 542), it was held that an indictment upon stat. 1 W. & M. c. 18, at the quarter sessions, may before verdict be removed by *certiorari* into the Queen's Bench, and upon conviction of several defendants, each is liable to the penalty of 20*l.* (See 3 *Burn's Eccl. Law*, tit. *Public Worship.*)

Disturbing dissenters.

As to disturbing dissenting congregations, see "*Dissenters*," Vol. II.

Almanac.

The almanac at the beginning of the common prayer is good evidence, *ante*, 144.

Commutation of Tithes, see "*Tithes*," Vol. VI.

Compensation, see *post*, "*Costs*." Vol. II.; "*Rewards*," Vol. V.

Compounding, see *ante*, "*Award*," p. 317; *As to Compounding Felony*, see "*Felony*," Vol. III.; *As to Compounding Misdemeanors*, see "*Misdemeanors*," Vol. V.; *As to Compounding Informations*, see "*Information*," Vol. III.

Compromise, see *ante*, "*Award*;" "*Felony*," Vol. III.

Confederacy, see *post*, "*Conspiracy*."

Confession.

CONFESSIONS made by the party accused may be considered as regards,

I. *Confessions made at the Trial of Defendant*, 867.

II. *Confessions made before Justices on Examination, or before Coroners*, 867.

III. *Confessions made on other occasions, proof of*, 869.

I. Confessions on the Trial of Defendant.

Confessions made by the accused on his trial may be either expressed or implied. On trial of defendant.

An *express* confession is, where a defendant *pleads guilty* and thereby directly confesses the crime with which he is charged, which is the highest conviction that can be. (2 *Hawk.* c. 31, s. 1; 1 *Chit. C. L.* 428.) Express by pleading guilty.

But it is usual for the Court, especially if the punishment be capital, to advise the party to plead and put himself upon his trial, and not presently to record his confession, but to admit him to plead. (2 *Hale*, 225.)

In smaller offences, as assaults, or the like, it may be advisable to confess the indictment, as the defendant may afterwards produce affidavits to show that the prosecutor made the first assault, which he cannot do after conviction. (*Reg.* v. *Templeman*, 1 *Salk.* 55.)

And in trifling personal injuries, the prosecutor and defendant frequently settle the charge in private, and the latter comes into Court and pleads guilty to the indictment; and upon proving a general release given by the former, submits to a small fine for the breach of the peace which his conduct has occasioned. (*Dick. Sess.* 156; *Cro. C. C.* 21; and see "*Sessions*," Vol. V. p. 965.)

When a defendant pleads guilty, if he persist in his plea, it is immediately recorded by the proper officer; and the same, where a defendant yields himself to the Queen's mercy, and desires to submit to a small fine. (See 1 *Chit. C. L.* 428.)

As to the mode in which confession is made, and the subsequent proceedings on charges of felony, see *Chit. C. L.* 428, 429.

An *implied* confession is, where a defendant in a case not capital doth not directly own himself guilty, but in a manner admits it by yielding to the Queen's mercy, and desiring to submit to a small fine; which submission the Court may accept of if they think fit, without putting him to a direct confession. (2 *Hawk.* c. 31, s. 3.) Implied.

II. Confessions at Examinations before Magistrates, or before Coroners.

Confessions, when duly made on examinations before magistrates, in pursuance of the 7 Geo. IV. c. 64, s. 2, (Vol. II. p. 467,) are of themselves evidence Confessions at examinations before justices. (a)

(a) A magistrate should not only be upon his guard against extorted, but also against collusive confessions. A remarkable instance of this kind is mentioned by Mr. Dickenson, as singularly illustrative of the propriety of this caution. Two brothers committed a robbery in a dark night to a large amount, and fled. A younger brother, who was innocent, in order to favour their escape, contrived to draw suspicion on himself, and, when examined, tacitly admitted his guilt. He was afterwards committed to prison, and all pursuit of his brothers was discontinued. On the trial, he proved *an alibi* on the clearest and most satisfactory evidence, and was consequently acquitted. In the mean time, the actual felons had safely arrived in America with their plunder. 1 *Dick. Just.* 460.

2. *Confessions at Examinations before Magistrates or Coroners.*

against the confessor. The mode of conducting the examination, and the formalities to be observed in taking it, will be found "*Examination*," Vol. II. 463. The effect of this statute is, so far as respects the evidence of a confession, that a written examination taken as the statute directs is evidence of itself, and the only admissible of defendant's declaration; whereas at common law, unless defendant signed the paper, or on its being read allowed it to be true, the confession must have been proved by some person who heard it, and the writing could only have been made use of by the person who wrote it to refresh his memory. (2 *Russ.* 650; *Jer. Arch. C. L.* 9th edit. 122.)

A confession before a magistrate, if taken down in writing at the time, should be produced, and proved to have been duly taken. And it was formerly supposed that it must be proved by the magistrate who took and signed it, or by his clerk who wrote it; (1 *Hale*, 585; 2 *Hawk.* c. 46, s. 43; 1 *Leach*, 240, 348; *R.* v. *Bell*, 5 *C. & P.* 162;) but it is now settled, that it may be given in evidence on the prisoner's hand-writing being proved by any person who was present at his examination. (*R.* v. *Chappel*, 1 *M. & Rob.* 395; *R.* v. *Hopes*, *id.* 396, n.; 7 *C. & P.* 136; *R.* v. *Foster*, 7 *C. & P.* 148; *R.* v. *Rees*, *id.* 568; *R.* v. *Reading*, *id.* 619.) But in serious cases it is desirable the justice or his clerk should attend. (*Reg.* v. *Pikesley*, 9 *C. & P.* 124.) Where a prosecutor proved that when the prisoner was before the magistrate, she was duly cautioned, and that she made a statement, which was taken down and read over to her, and to which she made her mark, the magistrate also signing it, and the prosecutor identified the paper by his own signature to his own deposition, being on the same sheet of paper: it was held, that the prisoner's statement might be given in evidence without examining either the magistrate or his clerk. (*Reg.* v. *Hearn*, 1 *Car. & M.* 109.)

If it be clearly shown that the examination of the defendant was not reduced to writing, or, perhaps, if the writing be lost or destroyed, then parol evidence of it may be admitted. (*R.* v. *Fearshire*, 1 *Leach*, 202; *see R.* v. *Lamb*, 2 *Leach*, 582) Until the contrary be shown, it shall be intended that the magistrate did his duty, and took down the examination of the defendant in writing. (*R.* v. *Jacob*, 1 *Leach*, 309.) And where the magistrate returned with the depositions that the prisoner said, "I decline to say anything," parol evidence of a confession alleged to have been made by the prisoner in the presence of the magistrate, and while under examination, was rejected. (*R.* v. *Walter*, 7 *C. & P.* 267.) But, upon clear and satisfactory evidence, it will be competent to prove something said by the defendant, beyond what is taken down by the magistrate. (*Rowland* v. *Ashby*, *Ry. & M. N. P.* 231; *R.* v. *Harris*, 1 *Mood. C. C.* 338; *Reg.* v. *Wilkinson*, 8 *C. & P.* 662; *R.* v. *Reed*, *R. & Moo.* 403.) Where the magistrate's clerk, in taking down the statement of several prisoners charged with the same offence, had left a blank where either of the prisoners had mentioned the name of another of them, the judge would not allow those blanks to be supplied by parol evidence. (*Reg.* v. *Morse*, 8 *C. & P.* 605; *Jer. Arch. C. L.* 9th edit.) So if the examination taken in writing be inadmissible in evidence by reason of irregularity, parol evidence will not, it seems, be received of what the prisoner said. (*Rex* v. *Reosis*, 7 *C & P.* 177; *Reg.* v. *Pikesley*, 9 *C. & P.* 124; *sed vide R.* v. *Reed*, *R. & Mood.* 403.)

Where the prisoner was sworn by mistake, but as soon as the mistake was discovered the deposition was destroyed, his subsequent statement was received in evidence. (*Rex* v. *Webb*, 4 *C. & P.* 564.) And where a statement made by the prisoner upon oath at a time when he was not under suspicion was tendered in evidence, *Vaughan*, B., received it. (*Rex* v. *Tubby*, 5 *C. & P.* 530.) In a more recent case, however, where the prisoner and others were examined upon oath, no specific charge being at the time made against any person, but in the result the prisoner was committed for the offence, *Gurney*, B., refused to receive in evidence what the prisoner had stated upon that occasion. (*Rex* v. *Lewis*, 6 *C. & P.* 161; *Jer. Arch. C. L.* 9th edit. 119.)

Whether statements made by a prisoner upon oath, on a coroner's inquest relating to the same transaction, are admissible. In one case, *Alderson*, B., refused to receive in evidence, on an indictment for murder, a statement made by the prisoner before the coroner, which was taken down in writing, and purported to be taken on oath, and would not allow evidence to be given to show that in fact it was not taken on oath. (*Reg.* v. *Wheeley*, 8 *C. & P.* 251.) In a subsequent case, on an indictment for rape, statements voluntarily made upon oath at the inquest held on the party alleged to have been ravished, were received in evidence; (*Reg.* v. *Owen*, 9 *C. & P.* 83;) but afterwards, on the trial of the same prisoners for the murder of the same person, the same depositions were rejected. (*Id.* 238.) On the other hand, in *R.* v. *Howarth*, *Greenw. Coll. Stat.* 137, *Parke*, B., received in evidence, on an indictment for murder, a deposition made by the prisoner on oath as a witness before the coroner: and in *Reg.* v. *Sandys*, 1 *C. & Mar.* 347, *Erskine*, J., received similar evidence, and reserved the point, but the prisoner was acquitted; and this would seem to be the better opinion. (*Jer. Arch. C. L.* 9th edit. 119.)

2. Confessions at Examinations before Magistrates or Coroners.

Confessions before coroners.

III. Confessions on other occasions, &c. Effect and Proof of, in general.

Effect of Confessions in general.]—The general rule as to the effect of a confession against the accused was very fully considered in a judgment delivered by Mr. Justice *Grose*, in a case reserved for the opinion of the twelve judges, and it seems to be now clearly settled that a *free and voluntary* confession, made by a prisoner accused of an offence, whether made before he is apprehended or after, whether on a judicial examination or after commitment, whether reduced into writing or not; in short, that any voluntary confession made by a prisoner to any person at any time or place, is *strong evidence* against him. (*Lamb's case*, 2 *Leach*, 552; 2 *Hawk*, c. 46, s. 31.)

Effect of confessions in general.

The confession of the prisoner is sufficient ground for a conviction, though there be no other proof of his having committed the offence, or of the offence having been committed, if that confession was in consequence of a charge against him and the confession be direct and unequivocally positive. (*Rex* v. *Eldridge*, *R. & R.* 440; *Rex* v. *White*, *id.* 508; *Rex* v. *Tippet*, *id.* 509.) And especially if there is evidence that he had been desirous to keep out of the way of the person upon whom the offence is supposed to have been committed, or if any of his companions under the same charge have attempted to do so. (*Rex* v. *Falkner*, *id.* 481.)

Where a witness answers questions upon examination on trial, tending to criminate himself, and to which he might have demurred, his answers may be used for all purposes. (*Stockfleth* v. *De Tastet*, 4 *Camp.* 10; *Rex* v. *Merceron*, 2 *Stark. C. N. P.* 366.) But the latter case seems incorrectly reported. (See *per* Lord *Tenterden*, C. J., in *Rex* v. *Gilham*, *R. & M. C. C.* 203, *post*, 873.)

It is said by Mr. J. *Blackstone*, that confessions, even in cases of felony at the common law, are the weakest and most suspicious of all testimony, ever liable to be obtained by artifice, false hopes, promises of favour, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence. (4 *Black. Com.* 357.)

Before any confession can be received in evidence, it must be ascertained *with certainty* that such confession was neither obtained by threats nor promises, but was *perfectly free* and *voluntary*; (2 *East's P. C.* 657;) for, says Lord *Hale*, I have often known the prisoner disown his confession upon his examination, and hath sometimes been acquitted against such his confession. (2 *Hale*, 284, 285.)

The confession must be voluntary.

The confession will be presumed to be freely made until the contrary appear; and the magistrate's clerk cannot, unless the prisoner alleges that

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the confession was unduly obtained, be asked by the prisoner's counsel whether the confession was voluntarily made. (6 *St. Tri.* 831.)

Justices should caution the accused as to effect of.

If the promise or menace, &c. take place previously to the prisoner's being brought before the magistrate, and the confession be before the magistrate, the Court will in general refuse to admit the confession to be given in evidence, unless it appear that the prisoner was undeceived by the magistrate, and cautioned by him not to expect the favour, or not to regard the menaces held out to him. (2 *East's P. C.* 658; and see *Rex* v. *Lingate*, 1 *Phil. Ev.* 165.)

But where a defendant, having been told by a constable that he might do himself some good by confessing, afterwards asked the magistrate if it would benefit him to confess, and the magistrate saying he could not say it would, the defendant then declined to confess, but afterwards, when going to prison, made a confession to the constable; the judges held the confession to be admissible, because the answer of the magistrate was sufficient to remove any expectation which the constable might have caused. (*Rex* v. *Rosier*, 1 *Phil. Ev.* 105. See *Rex* v. *Green*, 5 *C. & P.* 312; *Rex* v. *Richards*, 5 *C. & P.* 318; *Rex* v. *Howes*, 6 *C. & P.* 404.)

A person charged with murder made a confession before the coroner. It appeared that before he made this confession, B, who was both a clergyman and a magistrate, had had an interview with him: held, that the prosecutors were not bound to call B. before they put in the confession, but that it would be fair for them to do so; and that if the prosecutors did not call B., the prisoner might call him before the confession was made, to prove that some inducement was held out. (*Rex* v. *Clewes*, 4 *C. & P.* 221.)

Confession to whom made.

There was, it seems, a difference of opinion among the judges, whether a confession made to a person who has no authority, after an inducement held out by that person, was receivable in evidence; (*Rex* v. *Spencer*, 7 *C. & P.* 776;) but it is now said to be the opinion of the judges, that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority; and that if a person not in any office or authority hold out to the accused party an inducement to confess, this will not exclude a confession made to that party. (*Reg.* v. *Taylor*, 8 *C. & P.* 733.) But where a person, not having authority, held out an inducement in the presence of the prosecutor's wife, who expressed no dissent, the confession was held not receivable. (*Rex* v. *Spencer*, 7 *C. & P.* 776; *Reg.* v. *Hewett*, 1 *C. & M.* 534.) And in another case, where an innkeeper, to whose house the prisoner was taken, held out an inducement to him to confess in the constable's hearing, whereupon he made a confession, which the constable was called to prove, the evidence was rejected. (*Rex* v. *Pountney*, 7 *C. & P.* 302.)

What not a voluntary confession.

With respect to what shall be deemed a threat or promise; a confession induced by saying, "unless you give me a more satisfactory account, I will take you before a magistrate," cannot be received in evidence. So also saying to the prisoner that it would be *worse* for him if he did not confess, or that it would be *better* for him if he did, is sufficient to exclude the confession, according to constant experience. (*Rex* v. *Thompson*, 1 *Leach*, 291; 2 *East's P. C.* 659.)

Where a prosecutor said to the prisoner, "I should be obliged to you if you would tell us what you know about it; if you will not, we, of course, can do nothing:" this was held such an inducement to confess, as would exclude what the prisoner said. (*Rex* v. *Partridge*, 7 *C. & P.* 551.) A constable who apprehended a prisoner, asked him what he had done with the tap he had stolen from the prosecutor's premises; and said, "You had better not add a lie to the crime of theft:" a confession then made to the constable was held not receivable in evidence. (*Rex* v. *Sheppard*, 7 *C. & P.* 579.)

Even if a confession be procured by a threat to send for a constable; (*Rex* v. *Richards*, 5 *C. & P.* 518;) or by saying, "tell me where the things are and I will be favourable to you;" (*Rex* v. *Cass*, *Id.* 220, *n.*;) or, "you had better tell all you know;" (*Rex* v. *Kingston*, 4 *C. & P.* 387;") or, "you had better tell where you got the property;" (*Rex* v. *Dunn*, 4 *C. & P.* 543;) or, "you had better split, and not suffer for all of them;" (*Rex* v. *Thomas*, 6 *C.*

& P. 353;) or, "it would have been better if you had told at first;" (*Rex* v. *Walkeley*, 6 *C. & P.* 175;) the confession will not be admissible.

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In the case of Thomas Cass, he was indicted at the Old Bailey in Feb. Sess. 1784, for stealing on the 4th of the same month an iron bar, the property of Edward Meux, Esq. It was the bar of a window belonging to a public-house in High Street, Bloomsbury, and the prisoner, on pretence of drinking a pint of beer, contrived to take it away. On going the ensuing evening to the same house, the publican suspecting that he was the person who had stolen the bar, sent for a constable, by whom, on the charge given, he was taken to the watch-house, where he remained all night. On the next morning the constable, as he was taking him to the magistrates, called with him at the publican's house, and in the conversation which took place, the publican said, "I am in great distress about my irons; if you will tell me where they are, I will be favourable to you." In consequence of which the prisoner confessed that he had taken the property, and told him where it was; but there being no other evidence, *Gould*, J., told the jury they must acquit the prisoner; for that the *slightest hopes of mercy* held out to a prisoner to induce him to disclose the fact, was sufficient to invalidate a confession. (1 *Leach*, 328, *notis.*)

In the case of *Rex* v. *Jones* (*R. & R.* 152), the prosecutor had asked the prisoner, on finding him, for the money he (the prisoner) had taken out of the prosecutor's pocket; but before *the money was produced* said, "he only wanted his money, and if the prisoner gave him that, he might go to the devil, if he pleased;" after which, the prisoner took eleven shillings and sixpence halfpenny out of his pocket, and said it was all he had left of it: and a majority of the judges held, that the confession ought not to have been received. And see *Rex* v. *Parratt*, 4 *C. & P.* 570.

Where a girl, being apprehended for the murder of her child, was left by the constable in custody of a woman, who told her she had better tell the truth, otherwise it would lie upon her, and the man would go free, upon which she made a confession: *Parke*, J., and *Taunton*, J., held this confession not receivable, as it was made in consequence of an inducement held out to the prisoner by a person who had her in custody. (*Rex* v. *Enoch*, 5 *C. & P.* 535.)

A servant was charged with attempting to set fire to her master's house. It was proved that the furniture in two of the bed-rooms was on fire, and a spoon and other articles were found in the sucker of the pump. The master told the prisoner that if she did not tell the truth about the things found in the pump, he would send for the constable to take her, but he said nothing to her respecting the fire: it was held, that this was such an inducement to confess as would render inadmissible any statement that the prisoner made respecting the fire, as the whole was to be considered as one transaction. (*Reg.* v. *Hearn*, 1 *C. & M.* 109.)

And a confession, with a view, and under a hope of being thereby permitted to turn king's evidence, has been holden inadmissible. (*Rex* v. *Hall*, 2 *Leach*, 559. See *Rex* v. *Bailey*, 2 *Stark. Ev.* 23.) But the mere knowledge by a prisoner of a handbill, by which a government reward and a promise of a pardon are offered in a case of murder, are not sufficient ground for rejecting a confession of such prisoner, unless it appear that the inducements there held out were those which led the prisoner to confess. (*Reg.* v. *Boswell*, 1 *C. & M.* 584.) And where it afterwards appeared that a handbill was shown to him by a constable, by which a reward and free pardon was offered to any but the person who struck the blow, and the prisoner three days afterwards made a statement, and said to another constable, on the night before he made the statement, that he saw no reason why he should suffer for the crime of another, and that as the government had offered a free pardon to any one concerned who had not struck the blow, he would tell all he knew about the matter: the judge held, that the statement so made was not properly receivable. (*Id.*)

A female servant, being suspected of stealing money, her mistress, on a Monday, told her that she would forgive her if she told the truth. On the

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Tuesday she was taken before a magistrate, and was discharged, no one appearing against her. On the Wednesday the superintendent of police went with her mistress to the Bridewell, and told her in the presence of her mistress that she "was not bound to say any thing unless she liked, and that if she had any thing to say her mistress would hear her;" but the superintendent, not knowing that her mistress had promised to forgive her, did not tell her that if she made a statement it might be given in evidence against her. The prisoner made a statement: it was held that this statement was not receivable in evidence, as the promise of the mistress must be considered as still operating on the prisoner's mind at the time of the statement, but that, if the mistress had not been then present, it might have been otherwise. (*Reg.* v. *Hewett*, 1 *C. & M.* 534.)

A. being in the custody of a constable on a charge of felony, was taken by him to an inn, where the innkeeper, in the hearing of the constable, held out an inducement to A. to confess, and A., in the hearing of the constable, made a confession to the innkeeper, which at the trial the constable was called to prove: held, that this confession was not receivable in evidence. (*Rex* v. *Pountney*, 7 *Car. & P.* 302.)

To exclude a confession made under the influence of a promise or threat, the promise or threat must be of a description which may be presumed to have such an effect on the mind of the defendant, as to induce him to confess: and therefore an exhortation, admonition, promise, or threat, proceeding at a prior time from some one who has no concern in the apprehension, prosecution, or examination of the prisoner, but interferes without any authority, will not be sufficient to render a confession inadmissible. (*Rex* v. *Rowe*, *R. & R.* 153; *Rex* v. *Hardwick*, 1 *Phil. Ev.* 105; *Rex* v. *Gibbons*, 1 *C. & P.* 97; *Rex* v. *Tyler*, *Id.* 129; *Rex* v. *Clewes*, 4 *C. & P.* 221; *Rex* v. *Thomas*, 7 *C. & P.* 345.)

A confession made in consequence of questions put by the officer who had charge of the prisoner, a boy about fourteen years of age, on a charge of felony, and when he had no food for nearly a day, but obtained without threat or promise, was held admissible. (*Rex* v. *Thornton*, *R. & M. C. C.* 27.)

A prisoner was charged with stealing a guinea and two promissory notes; the prosecutor told him that it would be better for him to confess. It was held, that after this admonition, the prosecutor might be allowed to prove that the prisoner brought him a guinea and a 5*l.* note, which he gave up to the prosecutor *as the guinea and* one of *the notes* that had been stolen from him. (*Rex* v. *Griffin*, *R. & R.* 151.)

If a prisoner, who is committed on a charge of felony, ask the turnkey of the gaol to put a letter into the post, addressed to the prisoner's father, and the turnkey promise to do so, and instead of that, on receiving the letter, he conveys it to the visiting magistrates of the gaol, who forward it to the prosecutor. This letter is evidence against the prisoner, notwithstanding the manner in which it was obtained. (*Rex* v. *Derrington*, 2 *C. & P.* 418.)

A. was in custody on a charge of murder. B., a fellow prisoner, said to him, "I wish you would tell me how you murdered the boy—pray split." A. replied, "Will you be upon your oath not to mention what I tell you." B. went upon his oath that he would not tell. A. then made a statement: which was held evidence, as this was not such an inducement to confess as would render the statement inadmissible. (*Rex* v. *Shaw*, 6 *C. & P.* 372.)

Where, on a prisoner being brought before a magistrate on a charge of forgery, the prosecutor said, in the hearing of the prisoner, that he considered the prisoner as a tool of G.; and the magistrate then told the prisoner to be sure to tell the truth; upon this the prisoner made a statement: this statement was held receivable in evidence. (*Rex* v. *Court*, 7 *C. & P.* 486.)

A witness stated, that a prisoner charged with felony asked him if he had better confess; and the witness replied, that he had better not confess, but that the prisoner might say what he had to say to him, for it should go no further. The prisoner made a statement: and it was held receivable in evidence on the trial. (*Rex* v. *Thomas*, 7 *C. & P.* 345.)

Where a person, who made a confession to a constable in consequence of

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a promise held out, was taken before a magistrate, who, knowing what had taken place, cautioned the prisoner against making any confession before him, but the prisoner, notwithstanding, did make a confession to the magistrate: this second confession was held receivable in evidence on the trial of the prisoner, though it did not appear that the magistrate told the prisoner that his first confession would have no effect, and he therefore might have acted under an impression that, having once acknowledged his guilt, it was too late to retract. (*Rex* v. *Howes*, 6 *C. & P.* 404.)

A prisoner charged with felony, being in custody, handcuffed, in the house of the prosecutor, after a conversation with the prosecutor and another person, in which he was told that they would do all they could for him, said, "If the handcuffs are taken off, I will tell you where I put the property:" this statement was considered receivable in evidence, and was not objectionable either as a confession made under a promise, or a statement obtained by duress. (*Rex* v. *Green*, 6 *C. & P.* 655.)

In another case, where A. and his wife were separately in custody on a charge of receiving stolen property, a person who was in the room with A. said, "I hope you will tell, because Mrs. G. (the prosecutrix) can ill afford to lose the money;" and the constable then said, "If you will tell where the property is, you shall see your wife:" a statement made by A. afterwards was held admissible in evidence. (*Rex* v. *Lloyd*, 6 *C. & P.* 393.)

The inducement to render the confession inadmissible must refer to a *temporal* benefit; for hopes which are referable to a future state merely are not within the principle which excludes confessions obtained by improper influence. A prisoner, committed on a charge of murder, sent for the chaplain of the gaol to pray with him. The chaplain told him that, as the minister of God, he ought to warn him not to add sin to sin by attempting to dissemble with God, and that it would be important for him to confess his sins before God, and to repair, as far as he could, any injury he had done. The chaplain stated that he considered he had made a great impression, and that he told the prisoner he did not wish him to confess to him. There were two interviews; and the chaplain said he was almost sure that he always used the terms confessing his sins before God, but was not quite positive that he mentioned the words "before God" every time. After this the prisoner sent for the gaoler, who warned him not to tell him any thing but what he wished to be repeated to the magistrates. The prisoner then made a confession. After this the prisoner sent for the mayor, who said, "Before you say any thing I must apprise you (as I have done several times), that it will be probably given in evidence against you; you are therefore to exercise your own discretion, and say little or nothing, as you think best; and if you have changed your mind and don't choose to say any thing, I will retire, and shall not feel at all angry at your having brought me down." The prisoner made another confession, which was taken down and read over, and he admitted its correctness, but he could not sign it, as his hand shook so much. These confessions were objected to by the prisoner's counsel, but, after argument, the twelve judges held that they were rightly received. (*R.* v. *Gilham*, *R. & M. C. C.* 186; *Car. C. L.* 61, S. C.)

It is no objection to the admissibility of a confession that it was elicited by questions, if no undue influence be used, (*R.* v. *Ellis*, 1 *R. & M.* 432; *R.* v. *Thornton*, *R. & M.* 27,) or was in answer to questions by the magistrate (*Rex* v. *Bartlett*, 7 *C. & P.* 832); and declarations of a defendant, though made as a witness before a committee of the House of Commons, and under compulsory process, were holden by *Abbott*, C. J., in *R.* v. *Merceron* (2 *Stark.* 366), to be admissible against the defendant, upon an indictment for corruptly granting licenses to public-houses. (See *R.* v. *Gilham*, *R. & M.* 203.)

A., a prisoner charged with murder, was visited by B., who was both a magistrate and a clergyman; B. told him that if he was not the person who struck the fatal blow, and he would tell all that he know, he (B.) would use his endeavours and influence to prevent any thing from happening to him, and that if he (A.) did not make a disclosure, some one else would probably

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do so. After this, B. wrote to the secretary of state, who returned an answer that mercy could not be extended to A., which answer was communicated by B. to A. After this, A. sent for the coroner, and wished to make a statement. The coroner told him that if he did so it would be used as evidence against him. The prisoner made a confession: held, that this confession was admissible. (*R.* v. *Clewes*, 4 *C. & P.* 221.)

Where it appeared that the prisoner, on being taken into custody, had been told by a person who came to assist the constable that it would be better for him to confess, but that, on his being examined before the committing magistrate on the following day, he was frequently cautioned by the magistrate to say nothing against himself; a confession under these circumstances before the magistrate was held to be clearly admissible. (*R.* v. *Lingate*, 1 *Phil. Ev.* 7th edit. 115; *R.* v. *Hardwick*, *id.*; *R.* v. *Rosier*, *id.*; *Stark. on Ev.* Part IV. 2350.)

But where a girl was charged with administering poison with intent to murder, the surgeon said to her, "You are under suspicion of this, and you had better tell all you know;" and after this she made a statement to the surgeon; *Parke*, J., after having conferred with *Littledale*, J., held that evidence of this statement was not admissible. (*R.* v. *Kingston*, 4 *C. & P.* 387.)

It is no objection to the admissibility of a confession, that it was made under a mistaken supposition that some of the defendant's accomplices were in custody, even though it were created by artifice, with a view to obtain the confession. (*Rex* v. *Bailey*, 1 *Phil. Ev.* 104.)

A statement, made by a prisoner when he is drunk, is receivable in evidence; and *semble*, that if a constable gave him liquor to make him so, in the hope of his saying something, that will not render his statement inadmissible, but it will be matter of observation for the judge in his summing up. (*Rex* v. *Spilsbury*, 7 *C. & P.* 187.)

What a prisoner is overheard to say to his wife, or even what he is overheard to say to himself, is receivable in evidence against him on a charge of felony: it is, however, a species of evidence to be acted on with caution, as it is very liable to be unintentionally misrepresented by the witnesses. (*Rex* v. *Simons*, 6 *C. & P.* 540.)

If a prisoner, when examined before a magistrate, say that the deposition of F. T. is true, the deposition of F. T. may be read at the trial as a part of the prisoner's statement, although F. T. has been examined at the trial as a witness for the prosecution. (*Rex* v. *John*, 7 *C. & P.* 324.)

But if two prisoners be taken before a magistrate on a charge of felony, what the first prisoner says in his statement before the magistrate cannot be given in evidence against the second prisoner, because, when before the magistrate, the second prisoner is only called upon to answer the statements in the depositions taken on oath, and not what any other prisoner may have said in his examination. (*Reg.* v. *Swinnerton*, 1 *Car. & M.* 593.)

Confession if not in evidence cannot be used in reply.

Where the prisoner made his defence before the committing magistrate, and on his trial he relied on matter of excuse, wholly repugnant to his former statement; that former statement had not been given in evidence in the case for the prosecution, and therefore the court would not allow it to be read afterwards, to contradict the defence set up on the trial. (*Reg.* v. *Powell*, 1 *Car. & M.* 500.)

General result of cases.

The only questions in these cases are—was any promise of favour, or any menace or undue terror made use of, to induce the prisoner to confess?—and if so, was the prisoner induced by such promise or menace, &c. to make the confession attempted to be given in evidence, or was such promise or menace operating on his mind when he made it? If the judge be of opinion in the affirmative upon both these questions, he will reject the evidence. If, on the contrary, it appear to him from circumstances, that although such promises or menaces were holden out, they did not operate upon the mind of the prisoner, but that his confession was voluntary notwithstanding, and he was not biassed by such impressions in making it, the judge will admit the evidence. (*Jer. Arch. C. L.* 9th edit. 120.)

If a confession be obtained by undue means, nothing the prisoner afterwards says, under the influence of having made that confession, can be received. (*R.* v. *Sarah Nute*, 1 *Burn's J.* 24th edit. 688.)

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Acts subsequent to an extorted confession.

In *R* v. *Jenkins* (*R. & R.* 492), it was held, that if a confession be improperly obtained, it is a ground for excluding evidence, not only of the confession, but of any act done by the prisoner in consequence towards discovering the property.

But although a confession may not be receivable in evidence, yet any discovery that takes place in consequence of such confession will be admitted as a substantive fact: as if a man by promise of favour be induced to confess that he knowingly received certain stolen goods, and that they are in such a room in his house, and the goods be found there accordingly, although the confession itself cannot in that case be given in evidence, yet it may be proved that in consequence of something the witness heard from the defendant, he found the goods in question in the defendant's house. (*R.* v. *Lockhart*, 2 *East's P. C.* 658; 1 *Leach*, 430; and see 1 *Leach*, 300, n. and 301, n.)

And it would seem that declarations of the defendant accompanying the acts may be received in evidence, even though the confession itself may be inadmissible. (*R.* v. *Griffin*, *R. & R.* 151.)

The whole confession must be taken altogether.

It is fully settled, that whenever a person's confession is made use of against him, it must all be taken together, and not by parcels. If the confession be not in writing, the whole of what the prisoner said must be fully stated, although it may happen that some part of it concerns other prisoners who are tried on the same indictment; in such case it is not possible to make any selection, for until the evidence has been heard it cannot be known what it is, or to whom it relates, and all that can be done is to direct the jury not to take into their consideration such parts as affect the other prisoners. But a distinction might perhaps be made in this respect, in case the confession has been reduced into writing, if that part which relates to the other prisoners is capable of being separated and detached from the rest, and can be omitted without affecting in any degree the prisoner's narrative against himself. (2 *Hawk.* c. 46, s. 42, 43, 44; 4 *Taunt.* 245; and see the *Queen's case*, 2 *B. & B.* 294.)

If there be proof of recent possession of stolen property, and the prosecutor give in evidence a declaration in which the prisoner asserted that he bought the goods of A. B, the prosecutor having made the prisoner's declaration evidence, it must be taken as true until it is contradicted; but if there be other evidence to falsify it, the judge will leave both the prisoner's declaration and the evidence contradicting it to the jury for their consideration. (*R.* v. *Jones*, 2 *C. & P.* 129.)

In a case in which a party's declaration had been given in evidence against him, *Abbott*, C. J., left the whole conversation to the jury, to consider whether the facts asserted by the party in his own favour were not true, as well as those against him. (Cited in *R. & M. C. N. P.* 258; *Smith* v. *Blandy*, *id.*)

If a prisoner, in a confession made before a coroner, which is taken down in writing, mention the names of two other persons who are also charged with the same offence, the confession when read in evidence must be read with these names in it, just as it is, and the officer of the court must not say "another person" and a "third person" instead of reading the names. (*R.* v. *Clewes*, 4 *C. & P.* 221; *R.* v. *Jones*, *id.* 217.)

If a prisoner charged with murder, say in his confession, which is read in evidence against him, that he was present at the murder, but took no part in the commission of it, this is evidence for him as well as against him; but the judge will not direct an acquittal, as the jury may believe one part of the confession and disbelieve another; however, if it is meant to be charged that the prisoner did more than is stated in the confession, there ought to be some evidence to show that (*R.* v. *Clewes*, 4 *C. & P.* 221.)

How far evidence

How far Evidence against Accomplices.]—The confession of the defendant

3. *Confessions in general, &c.*

himself, whether taken on an examination before justices of the peace in pursuance of the statute of 7 Geo. IV. c. 64, s. 2 (Vol. II. p. 467), upon a bailment or commitment for felony or misdemeanor, or in discourse with private persons, is allowed to be given in evidence against the party confessing, but not against others. (2 *Hawk.* c. 46, s. 3; *Hale*, 585.)

against accomplices, &c.

It is not evidence against his accomplices, although he charge his accomplice in his hearing, and the accomplice do not deny it. (*R.* v. *Appleby*, 3 *Stark.* 33; 1 *Phil. Evid.* 7th edit. 116; *Reg.* v. *Swinnerton*, 1 *Car. & M.* 593, *ante*, 874.) So the confession of a principal is not evidence against an accessary to prove the guilt of the principal, which must be proved *aliunde.* (*R.* v. *Turner*, *R. & M. C. C.* 347.) The confession of the principal may, however, sometimes be used in evidence against the receiver of stolen property. (*R.* v. *Blick*, 4 *C. & P.* 377.) In *Tinkler's case*, the dying declarations of an accomplice were holden by the judges to be good evidence against the principal; and the majority of the judges were of opinion that this evidence would of itself be sufficient to convict, although the testimony of the accomplice, if living, would not, unless corroborated by other evidence. (1 *East, P. C.* 354.) Also, in cases of conspiracy, and of high treason in compassing the Queen's death, &c., any thing said or written by one of the accomplices, not as a confession simply, but for the purpose of furthering the common design, is admissible evidence against the others. (See *R.* v. *Watson*, 2 *Stark.* 140, 141; *R.* v. *Salter*, 5 *Esp.* 125; *R.* v. *Stone*, 6 *T. R.* 527.)

Proof of confession.

Proof of Confession.]—In a criminal case, the judge will not allow the case to be tried upon admissions made by the attornies on both sides, nor unless they be made at the trial by the defendant or his counsel. (*Reg.* v. *Thornhill*, 8 *C. & P.* 575.)

Admissions or confessions to other persons than magistrates, if in writing, are proved as any other written instrument; if by parol, they are proved by parol evidence of some person who heard them. (*Jer. Arch. C. L.* 9th edit. 122.)

In all cases of high treason, a confession in open court precludes the necessity of proving the treason by witnesses. (1 Edw. VI. c. 12, s. 22; 5 & 6 Edw. VI. c. 11, s. 12; 7 & 8 Will. III. c. 3, s. 2; *Fost.* 241.) In treason the confession of an overt act, upon an examination before a magistrate, or other person having authority for that purpose, if proved at the trial by two witnesses, is sufficient to convict the defendant (*R.* v. *Francia*, 1 *East, P. C.* 133, n.; *Fost.* 243); but evidence of a confession to a person not having such authority, although proved by two or more witnesses, can only be received in corroboration of the other evidence in the case; and the treason must still be proved by two witnesses notwithstanding. (*R.* v. *Willis*, 8 *St. Tr.* 250, 255; and see *Fost.* 243.)

This, however, must be considered as having reference only to confessions given in evidence as proof of the offence charged in the indictment; but a confession before a magistrate or other person may be given in evidence to prove a collateral fact, as, for instance, that the defendant is a natural-born subject (*R.* v. *Vaughan*, 5 *St. Tr.* 25; *R.* v. *Smith*, *Fost.* 242), or the like, and may be proved by one witness, as in ordinary cases. (*Jer. Arch. C. L.* 9th edit. 122.)

As to proof of confessions before magistrates when taken on the examination of the party, see *ante*, 868.

Confidential Communications, *how far privileged in Evidence.* *See* "*Evidence*," Vol. II. p. 427, 428.

Conies, see "*Game*," Vol. III.

Conjuration, see "*Witchcraft*," Vol. VI.; "*Sessions*." Vol. V. p. 969.

Conspiracy.

I. *What amounts to*, 877.
II. *Prosecution and Indictment for*, 881.
III. *Evidence of*, 883.
IV. *How punishable*, 887.
V. *Forms*, 887.

I. What amounts to. (a)

CONSPIRACY is when two or more combine together to execute some act for the purpose of injuring a third person or the public. What it is.

(a) Mr. Serjt. Talfourd, in his much improved and useful edition of Dickenson's Sessions, makes the following observations as to this offence:—

"The offence of conspiracy is more difficult to be ascertained precisely than any other for which indictment lies, and is indeed rather to be considered as governed by positive decisions than by any consistent and intelligible principles of law. It consists, according to all the authorities, not in the accomplishment of any unlawful or injurious purpose, nor in any one act moving towards that purpose, but in the actual concert and agreement of two or more persons to effect something, which, *being so concerted and agreed*, the law regards as the object of an indictable conspiracy. There are two classes of cases in which the criminality of such agreement is perfectly intelligible and obvious 1. Where the object proposed would, if accomplished, be a criminal offence in all parties acting in it. 2. Where, though the ultimate object may be lawful, the means by which the parties, conspirators, propose to effect their purpose necessarily involve in them an indictable offence. Of the first kind are conspiring to commit a felony—conspiring to obtain money under false pretences — conspiring to suborn or abstract a witness—where the object, if carried into effect, would be a substantive offence, and where therefore *concert* is indictable as an *act* in itself tending to produce it. Of the second kind is a conspiracy to support a cause, in itself just, by false testimony, and the same principle would apply here, for whether the concerted offence be the end or the means, it is equally an offence, which, if consummated, would subject the offenders to the visitation of criminal justice. But it is not easy to understand on what principle conspiracies have been holden indictable, where neither the end nor the means are, in themselves, regarded by the law as criminal, however reprehensible in point of morals. Mere concert is not in itself a crime, for associations to prosecute felons, and even to put laws in force against political offenders, have been holden legal. (*R.* v. *Murray and others*, tried before *Abbott*, C J., at Guildhall, 1823.) If then there be no indictable offence in the object, no indictable offence in the means, and no indictable offence in the concert, in what part of the conduct of the conspirators is the offence to be found? Can several circumstances, each perfectly lawful, make up an unlawful act? And yet such is the general language held on this subject, that at one time the immorality of the object is relied on, at another the evidence of the means, while at all times the concert is stated to be the essence of the charge, and yet that concert, independent of an illegal object or illegal means, is admitted to be blameless." Mr. Serjt Talfourd then proceeds to comment on *Macklin's case*, 2 *Campb.* 369; the case of *R.* v. *Farmer*, 13 *East*, 228, and that of *R.* v. *Grey*, 3 *St. Tr.* 519, and considering it a hopeless task to lay down any fixed principles whereby this offence may be governed, he points out the several instances of cases wherein parties have been convicted of conspiracies, and which will be found collected in the above text.

1. *What amounts to.*

By the common law.

1. By the common law there can be no doubt but that all confederacies whatsoever wrongfully to prejudice a third person or the public are highly criminal; as where divers persons confederate together by indirect means to impoverish a third person, or falsely and maliciously to charge a man with being the reputed father of a bastard child, or to maintain one another in a matter whether it be true or false. (1 *Hawk.* c. 72, s. 2.)

By statute.

2. And conspiracy by statute is as follows: "Conspirators be they that do confeder or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously to indict, or cause to indict, or falsely to move or maintain pleas; and such as retain men in the country with liveries or fees for to maintain their malicious enterprises; and this extendeth as well to the takers as to the givers: and stewards and bailiffs of great lords, which by their office or power undertake to bear or maintain quarrels, pleas, or debates, that concern other parties than such as touch the estate of their lords or themselves." (33 Edw. I. st. 2.) As to conspiracies among workmen, see 6 Geo. IV. c. 129, "*Servants*," Vol. V.

From this definition of conspirators, it seems clearly to follow, contrary to the opinion of Lord *Coke*, that not only those who actually cause an innocent man to be indicted, and also to be tried upon the indictment, whereupon he is lawfully acquitted, are properly conspirators, but that those also are guilty of this offence who barely conspire to indict a man falsely and maliciously, whether they do any act in prosecution of such conspiracy or not. (1 *Hawk.* c. 71, s. 2; *Reg.* v. *Best*, 2 *Ld. Raym.* 1169.)

Action for.

But an *action* will not lie for the conspiracy unless it be put in execution; for in such case the *damage* is the ground of the action. (*Savile* v. *Roberts*, 1 *Ld. Raym.* 378.)

Instances of conspiracy against individuals.

Combining together by unlawful means or devices to marry a girl to get her fortune amounts to a conspiracy, and is indictable. (3 *Ves. & B.* 173.)

Conspiring to seduce a girl is indictable. (*R.* v. *Lord Gray and others*, 3 *St. Tr.* 519.)

If a man and woman marry in the name of *another*, for the purpose of raising a specious title to the estate of the person whose name is assumed, it is a conspiracy. (*R.* v. *Robinson and Taylor*, 1 *Leach*, 37.)

It is indictable to conspire for the purpose of bringing about the marriage of paupers, in order to burthen a parish with the maintenance of both, if it were accomplished by threats, force, or other unfair or unlawful means, otherwise not. (*R.* v. *Seward*, 3 *Nev. & M.* 557; 1 *Ad. & Ellis*, 706; and see *R.* v. *Tarrant*, and *R.* v. *Fowler*, 1 *East's P. C.* 461, *post.*)

A conspiracy to procure a marriage between poor persons of different parishes, for the purpose of exonerating the parish of the woman, and charging the other parish, is not an indictable offence, unless the parties were unwilling to marry, or some forcible or fraudulent means of bringing about the marriage were resorted to. A conspiracy to exonerate from the prospective burthen of maintaining a pauper, not at the time actually chargeable, and to throw the burthen upon another parish, by means not in themselves unlawful, is not indictable. In such an indictment, a statement that the woman was a poor unmarried woman with child is not equivalent to a statement of actual chargeability. (*R.* v. *Seward*, 3 *Nev. & M.* 557; 1 *Ad. & Ellis*, 706, S. C.)

A conspiracy to injure the reputation of an individual by indicting or preferring a complaint before a magistrate, though no indictment or complaint be preferred, is indictable; (*R.* v. *Parsons*, 1 *Bla. Rep.* 392;) and this though the offence intended to be charged was not cognizable in the temporal courts. (1 *Salk.* 174.)

It seems an indictment lies for conspiring to cheat and defraud a man by selling him an unsound horse. (*R.* v. *Gill*, 2 *B. & Ald.* 204; 1 *Stark. C. P. N.* 402.)

The third count of an indictment to obtain money under false pretences, charged the offence in general terms as a conspiracy to cheat the prosecutor of his money, without setting out the false pretences. The evidence was, that the prosecutor was told by the defendant that the horses in question had been the property of a lady deceased, and were then the property of her sister, and

never had been the property of a horse-dealer, &c., all these statements being false, and the defendants knowing that nothing but a belief of their truth would have induced the prosecutor to make the purchase. The conspiracy was proved: it was held, that this count was sufficient, and that it charged an indictable offence. (*Reg.* v. *Kenrick*, 12 *L. J.* (*N. S.*) *M. C.* 135.) The fourth and fifth counts of the same indictment charged the obtaining of money by false pretences; the evidence was, that the defendant, in order to induce the prosecutor to make the contract of purchase, made the false pretences aforesaid respecting the horses sold, and thereby induced him to buy: and it was held, that these counts were good, and that the liability to an action did not of itself furnish any answer to the indictment. (*Id.*)

1. *What amounts to.*

In another case it was considered, that an agreement by brokers, before a sale by auction, that one only should bid for each article sold, and that all articles thus bought by any of them should be sold amongst themselves at a fair price, and the difference between the auction price and the fair price divided amongst them, is indictable as a conspiracy. (*Levy* v. *Levy*, 6 *C. & P.* 239.)

But it is not the combining to do *any* wrongful act that constitutes a conspiracy; and it has been held that no indictment lies for conspiring to commit a civil trespass on a preserve to take game, though effected in the night, and with destructive weapons. (*R.* v. *Turner*, 13 *East*, 228.)

An agreement between individuals to support each other in all undertakings, lawful or unlawful, is illegal. (9 *Co.* 56.)

But associations to prosecute felons, and even to put laws in force against political offenders, are lawful. (*R.* v. *Murray and others, cor. Abbott*, C. J. Guildhall, 1823.) And two or more persons may consult and agree to prosecute a person who is guilty, or against whom there are reasonable grounds of suspicion, without being liable to this offence. (*R.* v. *Best*, 1 *Salk.* 174; 2 *Ld. Raym.* 1167.)

An agreement amongst several to hiss and condemn a play, &c. is indictable. (*Clifford* v. *Brandon*, 2 *Camp.* 358; see a declaration on the case in an action for such a conspiracy, and the law, in *Gregory* v. *Duke of Brunswick*, 13 *L. J.* (*N. S.*) 34, C. P.)

A conspiracy to deprive a man of an office under an illegal trading company, is not indictable. (*R.* v. *Stratton*, 1 *Camp.* 549, n.)

But an indictment for a conspiracy to fabricate false shares in a joint stock company, and sell them as good shares, may be sustained, although such company may not be well constituted. (*R.* v. *Mott*, 2 *C. & P.* 521.)

Against the public.

A conspiracy to injure public trade, to affect public health, to violate public police, or to insult public justice or the like, is indictable. Thus it is an indictable offence to conspire on a particular day by false rumours to raise the price of the government funds, with intent to injure the subjects who should purchase on that day; (*R.* v. *De Berenger*, 3 *M. & Sel.* 67;) for, as there observed by Lord *Ellenborough*, C. J., the purpose itself is mischievous; it strikes at the price of a vendible commodity in the market, and if it gives it a fictitious price, by means of false rumours, it is a fraud levelled against all the public, for it is against all such as may possibly have any thing to do with the funds on that day. And it was held in the same case, that an indictment for such an offence need not specify the particular persons who purchased as the persons intended to be injured, for the conspiracy is the thing which constitutes the crime; and it is sufficient if the indictment state the conspiracy as it existed at the time when the crime was complete.

A conspiracy by persons to cause themselves to be reputed men of property, in order to defraud tradesmen, is indictable. (*R.* v. *Roberts & al.*, 1 *Campb* 399.)

So is a conspiracy to defraud the public by issuing and negociating bills in the name of a fictitious and pretending banking firm. (*R.* v. *Hevey & al.*, 2 *East's P. C.* 858.)

A conspiracy by magistrates to present a false certificate that a road under indictment is in repair is indictable. (*R.* v. *Mawbey*, 6 *T. R.* 619, 638.)

So is a conspiracy to prevent a prosecution for a felony. (14 *Ves.* 65.)

1. *What amounts to.*

So is a conspiracy to commit a felony or misdemeanor. (*R.* v. *Pollman*, 2 *Camp.* 229: *R.* v. *Roberts*, 1 *Camp.* 399.)

So, where several persons conspired to procure others to rob one of them, in order, by convicting the robber, to obtain the reward then given by statute in such a case, and the party who accordingly committed the robbery was afterwards convicted and actually executed; these persons were indicted for the conspiracy, and convicted. (*R.* v. *Macdaniel & al.*, 1 *Leach*, 45; *Fost.* 130.)

Journeymen confederating and refusing to work for certain wages, may be indicted for a conspiracy, notwithstanding the statutes which regulate their work and wages do not direct this mode of prosecution; for the offence consists in *conspiring*, and not in the refusal, and all conspiracies are illegal, although the subject-matter of them may be lawful. (*R.* v. *Journeymen Tailors of Cambridge*, 8 *Mod.* 11; *R.* v. *Edwards*, *id.* 320.)

A conspiring to sell unwholesome provisions is indictable. (*R.* v. *Macarty*, 2 *Ld. Raym.* 1179.)

No act need be done.

To complete the offence of conspiracy to do an unlawful act, no act need be done in consequence thereof. A bare conspiracy to do a lawful act to an unlawful end is a crime. Suppose there is a conspiracy to let lands of 10*l.* a-year value to a poor man, in order to get him a settlement, or to make a certificate man a parish officer, or a conspiracy to send a woman big of a bastard child into another parish to be delivered there, and so to charge that parish with the child; certainly these are crimes *indictable*. (*Per. cur. R.* v. *Edwards and others*, 8 *Mod.* 321; and see *R.* v. *Parsons*, 1 *Bla. Rep.* 392; *R.* v. *Seward*, 3 *Nev. & M.* 557; 1 *Ad. & Ell.* 706, S. C.)

How many must be concerned in.

One person alone cannot be guilty of a conspiracy (1 *Hawk.* c. 72, s. 8); but one person may be prosecuted for having conspired with others, and may be tried and convicted alone, if the others escape or die before the time of trial, or the finding of the bill. (*R.* v. *Kinnersley*, 1 *Stra.* 193; *R.* v. *Niccolls*, 2 *Stra.* 1227) And if all but one be acquitted, and it is not stated as a conspiracy with certain persons unknown, the conviction of a single defendant will be invalid and no judgment can be passed on him. (*Poph.* 202; *R.* v. *Scott*, 3 *Burr.* 1262; *R.* v. *Sudbury*, 12 *Mod.* 262; 1 *Hawk.* c. 72, s. 8.) But if an action on the case in nature of a conspiracy be brought against several persons, and all but one be acquitted, yet judgment may be given against that one only. (1 *Hawk.* c. 72, s. 8.)

And where two conspire and one dies, the survivor may still be indicted for the conspiracy. (*R.* v. *Niccolls*, 2 *Stra.* 1227; 13 *East*, 412, n. S. C.)

And even where the other defendant has pleaded and is alive, but has not been tried, a verdict of guilty of conspiring with him may be sustained, and judgment given on it, although it is possible he may be afterwards acquitted. *R.* v. *Cooke*, 5 *B. & Cress.* 538; 7 *D. & R.* 672, S. C.)

If a conspiracy be formed and a person joins it afterwards, he is equally guilty with the original conspirators. (*Reg.* v. *Murphy*, 8 *C. & P.* 297.)

Husband and wife guilty of.

A husband and wife alone cannot be indicted for a conspiracy, because they are esteemed but as one person in law. (1 *Hawk.* c. 72, s. 8.)

But in the case of *R.* v. *Cope and others* (1 *Stra.* 144), the husband and wife and servants were indicted for a conspiracy to ruin the trade of the prosecutor, who was the King's card maker. The evidence against them was, that they had at several times given money to the prosecutor's apprentices to put grease into the paste, which had spoiled the cards. But there was no account given that ever more than one at a time was present, though it was proved they had all given money in their turns. It was objected that this could not be a conspiracy; for several persons might do the same thing, without having any previous communication with each other. But it was ruled, that the defendants being all of a family, and concerned in making of cards, it would amount to evidence of a conspiracy. And see further, *post*, 883.

II. Prosecution and Indictment for, and Trial of.

2. *Prosecution for.*

Modes of proceeding for.

In the case of a conspiracy to indict a person of a crime, or carry on any other malicious prosecution against him, his remedy is by action on the case, or else by indictment (see 5 *East*, 582); or sometimes he may move the Court of Queen's Bench for and obtain a criminal information against the offenders, but then he will generally be compelled to abandon any civil remedy. (*R.* v. *Fielding*, 2 *Burr.* 719; *R.* v. *Sparrow*, 2 *T. R.* 198.) To sustain an action on the case some actual damage must be sustained. (*Savile* v. *Roberts*, 1 *Ld. Raym.* 378. See *Gregory* v. *Duke of Brunswick*, 1 *Cur. & K.* 24.) The most usual course, especially where pecuniary compensation is not the object, is to indict the parties. (See 5 *East*, 582.)

Indictment.

Indictment.]—The venue should be laid in the county where the conspiracy took place (*Reg.* v. *Best*, 1 *Salk.* 174; 2 *Ld. Raym.* 1167, S. C.) It seems it may be laid in the county in which an act was done by any one of the conspirators in furtherance of their common design. (*R.* v. *Brisac*, 4 *East*, 164.)

It is usual to set out the overt acts, that is to say, those acts which may have been done by any one or more of the conspirators, in pursuance of the conspiracy, and in order to effect the common purpose of it; but this is not absolutely requisite if the indictment charge what is in itself an unlawful conspiracy. (*R.* v. *Seward*, 1 *Ad. & Ell.* 706; 3 *Nev. & M.* 557, S. C.; and see *R.* v. *Gill*, 2 *B. & Ald.* 204; 1 *East, P. C.* 461.) "The indictment ought to show that the conspiracy was for an unlawful purpose, or to effect a lawful purpose by unlawful means." (Per *Denman*, C. J. in *R.* v. *Seward*, 3 *Nev. & M.* 561; 1 *Ad. & Ell.* 713, S. C.)

If the indictment lay the offence to be an *unlawful* conspiracy, showing the facts to constitute it such, this, whether it be to charge a man with *criminal* acts, or such only as may affect his *reputation*, is fully sufficient. The several charges in the indictment are not to be considered as distinct and separate counts, but as one and the same united and continued offence, pursued through its different stages. (*R.* v. *Rispal*, 1 *Bla. Rep.* 368.)

An indictment against several persons for conspiring together, "*by indirect means*," to prevent one H. B. from exercising the trade of a tailor, was held good, without stating the mode. The illegal combination is the gist of the offence, and it is enough to state the conspiracy and the object. (*R.* v. *Eccles and others*, 1 *Leach*, 274; 13 *East*, 230, n. S. C.)

An indictment charging that the defendants conspired "by divers false pretences, and subtle means and devices, to obtain and acquire to themselves of and from P. D. and G. D. divers large sums of money of the respective monies of the said P. D. and G. D., and to cheat and defraud them respectively thereof," was held sufficient; for the gist of the offence being the conspiracy, if that fact and its object be stated, the particular means and devices need not be set out. (*R.* v. *Gill and another*, 2 *B. & Ald.* 204.)

But in a more recent case it was, it seems, considered that an indictment stating merely that the defendants conspired "by false, artful and deceitful stratagems and contrivances, as much as in them lay, to injure, oppress, aggrieve and impoverish" the prosecutor, was too general and indefinite. (*R.* v. *Biers*, 3 *Nev. & M.* 475; 1 *Ad. & Ell.* 327, S. C.) So a conspiracy "to defraud the creditors of W. E." is too general. (*R.* v. *Fowle*, 4 *C. & P.* 492.) And an indictment for a conspiracy to cheat and defraud a party of the fruits and advantages of a verdict obtained, is also bad for generality. (*R.* v. *Richardson*, 1 *M. & Rob.* 402.)

When the object of the combination is to indict the prosecutor, it is not necessary to show with what particular offence it was intended to charge him, but it will suffice to say that they conspired "to indict him of a crime punishable by the laws of this kingdom," and then it may be alleged that they, according to the conspiracy, did falsely indict him (*R.* v. *Spragg*, 2 *Burr.* 993.) In such a case, there is no occasion to aver the innocence of

2. *Prosecution for.*

the party injured, if the conspiracy be laid *falsely;* for he will be presumed guiltless until the contrary appears. (*R.* v. *Best*, 1 *Salk.* 174; *R.* v. *Kinnersley*, 1 *Stra.* 193.)

So, in an indictment for conspiring to pervert the course of justice, by producing a false certificate of justices of peace that a road indicted was in repair, in order to influence the judgment of the court, it is not necessary to allege that the defendants knew the certificate to be false; it is sufficient that they agreed to certify the fact as true, without knowing it to be so. (*R.* v. *Mawbey*, 6 *T. R.* 619.)

An indictment for a conspiracy "to defraud J. W. of divers goods, and in pursuance of the conspiracy defrauding him of divers goods, to wit, of the value of 100*l.*" is good, without specifying such goods (1 *Chit. Rep.* 698); and the court in such case would not, it should seem, call upon the prosecutor to deliver a particular of such goods (*Id.*); and an indictment for conspiracy to defraud divers persons seems sufficient, without stating their names. (*R.* v. *De Berenger*, 3 *M. & Sel.* 75; *sed vide* 4 *C. & P.* 492; *R.* v. *Biers*, 1 *Ad. & Ell.* 337; 3 *Nev. & M.* 475, *supra.*)

An indictment for a conspiracy to obtain goods by false pretences is bad if it does not state to whom the goods belonged. And an averment that the defendants conspired by false pretences to obtain goods from A., and in pursuance of such conspiracy fraudulently did obtain the goods from A., and did cheat and defraud A. thereof, to the great damage of A., does not sufficiently state that the goods were A.'s goods. (*Reg.* v. *Parker*, 2 *Gale & D.* 709.)

A count for conspiring to deceive and defraud divers of her majesty's subjects who should bargain with defendants for the sale of goods, of great quantities of such goods, without making payment, remuneration, or satisfaction for the same, with intent to obtain profit and emolument to defendants (not stating with particularity what the defendants conspired to do), is bad, as not showing that the conspiracy was for a purpose necessarily criminal. But it is no objection that the count does not name the parties who were to have been defrauded. (*Reg.* v. *Peck*, 9 *Ad. & E.* 686.)

And a count charging that defendants, being indebted to divers persons, conspired to defraud them of the payment of such debts, and in pursuance of such conspiracy executed a false and fraudulent deed of bargain and sale and assignment of certain goods from two of themselves to a third, with intent thereby to obtain emoluments to themselves, is bad, for omitting to show in what respect the deed was false and fraudulent. (*Reg.* v. *Peck*, 9 *Ad. & Ell.* 686.)

An indictment charged the defendants with conspiring to cause goods, which had been imported, &c., and in respect of which certain duties of customs were payable to the queen, to be carried away from port without payment of duties, with intent to defraud the queen in her revenue of customs; there were also counts charging the defendants generally with conspiring to defraud the queen of duties by false and fraudulent representations of the value and nature of the goods: Held, that the gist of the indictment being the conspiracy, the indictment was sufficiently certain, without showing what the goods were, or what duties were payable on them. (*R.* v. *Blake*, 13 *Law J. N. S. Mag. Ca.* 131.)

Where, in an indictment for a conspiracy, the overt acts were charged to have been done with intent to defraud L. G, who was entitled to receive the sum of money in question, and the jury found that L. G. was not so entitled: it was held, that a verdict of guilty could not be supported. (*Reg.* v. *Dean*, 4 *Jur.* 364.)

An indictment charged that defendants did conspire, &c. to cheat and defraud certain liege subjects, being tradesmen (not naming them), of divers large quantities of their goods and chattels. It then set out several overt acts, namely, the purchase, by one of the defendants, of goods of several tradesmen (naming them) upon credit, and of other tradesmen, whose names were unknown, with direction that the goods should be delivered at the house of that defendant; that no payment was ever made for them; the pre-

tence that certain debts were due from that defendant to the others (setting out the debts); that actions, on account of these fictitious debts, were commenced against such defendant by the others, and judgments signed for want of a plea, and writs of *fi. fa.* sued out upon the judgments, by virtue of which the goods and chattels so fraudulently obtained were taken in execution; concluding with an averment, that so the defendants did cheat and defraud the tradesmen who supplied the goods, &c. All the overt acts were alleged to have been done in pursuance of the conspiracy:—it was held, in arrest of judgment, that the count would have been good without the allegation of the overt acts; and that it was not material that the names of the tradesmen (in the early part of it) to be defrauded, should be stated; and also, that, if necessary, the overt acts might be looked to, in aid of the charging part of the indictment. (*R.* v. *King and others*, 13 *Law J. N. S. Mag. C.* 118.)

2. *Prosecution for.*

Where the act only becomes illegal from the means used to effect it, so much must be stated as will show its illegality, and charge the defendant with a substantive offence. Thus, in an indictment for a combination to marry paupers, in order to throw the burthen of maintaining them on another parish, it is necessary to show that some threat, promise, bribe or sinister means was made use of, because the act of marriage being in itself lawful, the procuring it requires this explanation in order to be charged as a crime; (*R.* v. *Fowler*, 1 *East's P. C.* 461, 462; *R.* v. *Seward*, 3 *Nev. & M.* 557; 1 *Ad. & Ell.* 706, S. C.;) it is also material in this case to show the intent of the combination, by stating that the husband was a pauper, and the wife legally settled in the parish from which she was taken. (*R.* v. *Edwards*, 8 *Mod.* 320; *R.* v. *Tanner*, 1 *Esp. Rep.* 306, 307.)

To allege in the indictment that an unmarried woman in a parish was with child is not equivalent to an allegation that she was chargeable to such parish. (*Per Lord Denman*, C. J. and *Taunton*, J. in *R.* v. *Seward*, 1 *Ad. & Ell.* 706.)

It is questionable whether an allegation that the defendants conspired together *for the purpose* of doing an act, is equivalent to an allegation that they conspired *to do* it. (See *R.* v. *Seward*, 3 *Nev. & M.* 557; 1 *Ad. & Ell.* 706, S. C.)

In an indictment for a conspiracy to indict or charge a man with an offence, it is not necessary to aver that the man is innocent of the offence; (*R.* v. *Kinnersley & al.* 1 *Stra.* 193;) for he shall be presumed to be innocent until the contrary appear. (See *R.* v. *Best*, 1 *Salk.* 174; *R.* v. *Spragg*, 2 *Burr.* 993.)

Particulars of charge.

Particulars of Charge.]—If the counts of an indictment for a conspiracy be framed in a general form, a judge will order that the prosecutor shall furnish the defendants with a particular of the charges, and that particular should give the same information to the defendants that would be given by a special count. But the judge will not compel the prosecutor to state in his particular the specific acts with which the defendants are charged, and the times and places at which those acts are alleged to have occurred. (*R.* v. *Hamilton and others*, 7 *Car. & P.* 448; and see title "*Particulars*," Vol. V.)

Jurisdiction of sessions.

Trial.]—Justices in sessions, or the recorder of a county, have no jurisdiction over the offence of illegal combination or conspiracy, except conspiracies or combinations to commit any offence which they have jurisdiction to try when committed by one person. (5 & 6 Vict. c. 38, s. 1. And see *Rex* v. *Rispal*, 3 *Burr.* 1320, 1321; 1 *W. Bla.* 368, S. C.)

New trial.

New Trial.]—On a motion for a new trial, or in arrest of judgment, all the defendants convicted must be present in court, and this though the motion be made on behalf of one of them only. (*R.* v. *Spragg*, 2 *Burr.* 936; *R.* v. *Teal and others*, 11 *East*, 307; *R.* v. *Askew*, 3 *M. & Sel.* 9; *R.* v. *Lord Cochrane*, 3 *M. & Sel.* 10, n.; *R.* v. *Hollingberry*, 4 *B. & Crcs.* 329; 6 *D. & R.* 345, S. C.)

2. *Prosecution for.*

But when the indictment is removed into the Queen's Bench by *certiorari*, and set down for argument, it is not necessary that the defendant should appear in person, because it is in the nature of a special verdict, and his innocence may still be presumed. (*R.* v. *Niccolls*, 2 *Stra.* 1227.)

III. Evidence of.

Evidence.

The evidence must bring the case within the rules already laid down as to what is a *conspiracy*. (*Ante*, 880.)

Conspiracy may be inferred.

The actual fact of conspiring need not be proved; but it may be inferred from circumstances and the concurring conduct of the defendants. (*R.* v. *Parsons*, 1 *Bla. Rep.* 392.) And so if, on a charge of conspiracy, it appear that two persons, by their acts, are pursuing the same object often by the same means, one performing part of an act, and the other completing it, for the attainment of the object, the jury may draw the conclusion that there is a conspiracy. (*Reg.* v. *Murphy*, 8 *Car. & P.* 297.)

How far acts of one defendant evidence against the rest.

In prosecutions for conspiracies it is an established rule, that where several persons are proved to have combined together for the same illegal purpose, any act done by one of the party, in pursuance of the original concerted plan, and with reference to the common object, is in the contemplation of law the act of the whole party; and therefore, the proof of such act, after proof of the combination, would be evidence against any of the others who were engaged in the same conspiracy; and any declarations also made by one of the party at the time of doing such illegal act, seem not only to be evidence against himself, as tending to determine the quality of the act, but also to be evidence against the rest of the party, who are equally responsible as if they had themselves done the act. But what one of the party may have been heard to say at some other time, when no act was committed by him, as to the share which some of the others had in the execution of the common design, or as to the object of the conspiracy, cannot, it seems, be admitted as evidence against the other defendants. (1 *Phil. Evid.* 94; *R.* v. *Salter*, 5 *Esp.* 125; 2 *Stark.* 141; *R.* v. *Roberts*, 1 *Camp.* 399.) And in *R.* v. *Henry Hunt and others*, for unlawfully meeting together with persons unknown, for the purpose of exciting discontent and disaffection, it was held (*H. Hunt* having presided at their meeting) that resolutions passed at a former meeting assembled a short time before, in a distant place, and at which *H. Hunt* also presided, and the avowed object of which meeting was that of the meeting mentioned in the indictment, were admissible in evidence to show the intention of *H. Hunt* in assembling and attending the meeting in question. (*R.* v. *Hunt*, 3 *B. & Ald.* 566.)

But if, on a charge of conspiracy to annoy a broker who distrained for church-rates, it be proved that one of the defendants (the other being present) excited the persons assembled at a public meeting to go in a body to the broker's house, evidence that they did so go is receivable, although neither of the defendants went with them; but evidence of what a person who was at the meeting said some days after, when he was himself distrained upon for church-rates, is not so. (*Reg.* v. *Murphy*, 8 *C. & P.* 297.)

For the distinction is well established between the admissibility of declarations of one accompanying the acts of the conspirators and statements subsequently made as evidence against the rest. Thus in *Reg.* v. *Blake and Tye*, T. T. 1844, which was an information at the suit of the crown against a custom-house agent and a custom-house officer, for having conspired to defraud her Majesty by causing a certain quantity of goods to be delivered out of the stores of her Majesty without the payment of the duties required by law, the counsel for the crown tendered in evidence at the trial, along with other things, two documents, for the purpose of showing *Blake's* connection with the transaction. One of these was an entry, called a "sight entry," by *Tye* in a book which, according to the course of such business, he used in the successive stages of the alleged conspiracy. The other was the counterfoil of *Tye's* own check-book with his bankers, in which he stated the fact that 82*l.*,

3. *Evidence of.*

part of the produce of the fraudulent operations of the defendants, was to be carried to the credit of *Blake* as his proportion of the proceeds. The admission of either of these two documents, as evidence against *Blake*, was objected to at the trial, but admitted. A new trial was granted on the ground that the latter was not admissible. On making the rule absolute Lord *Denman* said, that with regard to the admissibility of the sight entries made by the defendant *Tye*, there seemed to be little if any doubt that they had been properly received against *Blake*. These entries, in fact, could not so properly be considered to be mere declarations by one conspirator made in the absence of another, as acts which constituted the successive stages of the conspiracy itself, or at least as arising so necessarily and contemporaneously out of the transaction as to be a part of it; such evidence was clearly receivable according to all authorities; but the counterfoil of the check-book stood upon a totally different ground, and, in fact, was equivalent to a declaration by *Tye* that he had paid the money in question to *Blake* as his part of the fruits of the conspiracy. It was perfectly clear, according to all the principles of the law of evidence upon this point, that such a declaration of *Tye* could not be received against *Blake*. In support of this position his lordship referred to the case of *The King* v. *Hardy*, after having entered into an examination of which his lordship went on to say that the memorandum upon the counterfoil was a mere declaration by one conspirator of the part which another had in the conspiracy. If the Court were to open the door for the admission of such statements they would frequently find themselves extremely embarrassed by the fact of one conspirator making such a statement about the others or some of them as should completely exonerate himself and throw all the blame upon the others. It was clear for these reasons that a mere statement which one conspirator addresses to a third party, or which he made upon an occasion when he thought proper to do by himself anything which was not necessary for the furtherance of the common object, could not be received in evidence against any other person, and upon these grounds the rule for the new trial would be made absolute. And Mr. Justice *Patteson* also remarked on it as a singular circumstance, that in all the authorities which had been relied upon by the counsel for the crown, including *Watson's case* and the recent case of *Reg.* v. *Murphy* (*supra*), the distinction laid down in the text-books between declarations accompanying the acts of the conspirators and subsequent statements made of antecedent events preserved had been particularly insisted on.

In another case where A. was charged with having conspired with W. J. and others unknown, to raise insurrections and obstruct the laws, it was proved that A. and W. J. were members of a chartist lodge, and that A. and W. J. were at the house of the latter on a certain day, on the evening of which A. directed people assembled at the house of W. J. to go to the race-course at P., whither W. J. and other persons had gone: it was held, that, on the trial of A., evidence was receivable that W. J. had, at an earlier part of the same day, directed other persons to go to the race-course; and it being proved that W. J. and an armed party of the persons assembled went from the New Inn, it was held, that evidence might be given of what W. J. said at the New Inn, it being all one transaction. (*Reg.* v. *Shellard*, 9 *Car. & P.* 277.)

In the *Queen's case* it was considered that on a prosecution for a crime to be proved by conspiracy, general evidence of an existing conspiracy may in the first instance be received, as a preliminary step to that more particular evidence, by which it is to be shown that the individual defendants were guilty participators in such conspiracy; that this is often necessary to render the particular evidence intelligible, and to show the true meaning and character of the acts of individual defendants. But in such cases the general nature of the whole evidence intended to be adduced should be opened to the court; and if upon such opening it should appear manifest that previously no particular proof sufficient to affect the individual defendants is intended to be adduced, it would become the duty of the judge to stop the case *in limine*, and not to allow the general evidence to be received, which,

3. *Evidence of.*

even if attended with no other bad effect, such as exciting an unreasonable prejudice, would certainly be a useless waste of time. (*The Queen's case*, 2 *Brod. & Bing.* 310.)

Upon an indictment against workmen for a conspiracy against their employers, to prevent them from taking any apprentice, it was held that evidence of their having turned out from their employment with intent to compel their masters to dismiss any one apprentice, was sufficient to support the charge. (*R.* v. *Furguson and another*, 2 *Stark. N. P. C.* 489.)

Where several conspire to procure an employment under government by corrupt means, it seems that a banker, who receives the money in order to pay it over for that purpose, becomes a party to the conspiracy. (*R.* v. *Pollman*, 2 *Camp.* 233.)

In *Watson's case* (2 *Stark. C. N. P.* 140, and see *Stark. on Evid.* part iv. 404), after evidence of a treasonable conspiracy, to which the prisoner, who was upon his trial, was a party, it was held, that papers found in the lodgings of a conspirator, at a subsequent period to the apprehension of the prisoner, might be read in evidence, although no absolute proof had been given of their previous existence, strong presumptive evidence having been adduced to show that the lodgings had not been entered by any one in the interval between the apprehension of the prisoner and the finding of the papers. Upon the same trial, evidence having been given that a paper containing seditious questions and answers had been found in the possession of a conspirator, but had not been published, the court doubted whether the paper was sufficiently connected by evidence with the object of the conspiracy to render it admissible, and it was not read; but they held, that if proof were to be given that the instrument was to be used for the purposes of the conspiracy, it would clearly be admissible.

It makes no difference as to the admissibility of the act or declaration of a conspirator against a defendant, whether the former be indicted or not, or tried or not, with the latter, for the making one a co-defendant does not make his acts or declarations evidence against another, any more than they were before; the principle upon which they are admissible at all is, that the act or declaration of one is the act or declaration of both, united in one common design, a principle which is wholly unaffected by the consideration of their being jointly indicted. Neither does it make it material what the nature of the indictment is, provided the offence involve a conspiracy. Thus upon an indictment for murder, if it appeared that others, together with the prisoner, conspired to perpetrate the crime, the act of one, done in pursuance of that intention, would be evidence against the rest. (*R.* v. *Stone*, 6 *T. R.* 528.)

The letters of one defendant to another are, under certain circumstances, admissible in evidence to rebut the charge of conspiracy, if they show that he was the dupe of the other, and was not himself a participator in any fraud. (*R.* v. *Whitehead*, 1 *Car. & P.* 67.)

Where the indictment charged the defendant with conspiring with other persons unknown "to cheat and defraud J. D. and others," and laid as overt acts that the defendant did falsely pretend to J. D. that he was a merchant named G., and did, under colour of pretended contract with J. D. for the purchase of certain goods of "the said J. D. and others," obtain a large quantity of the goods "of the said J. D. and others," with intent to defraud "the said J. D. and others," it was held by the judges, that the words "and others" throughout this indictment must be taken to mean others the partners of J. D., and not other persons wholly unconnected with J. D.; and that, on the trial of the indictment, evidence was not admissible to show that the defendant attempted to defraud other persons wholly unconnected with J. D. (*Reg.* v. *Steel*, 1 *Car. & M.* 337.)

B. and C. were indicted for conspiring to extort money from the prosecutor, A., by means of a charge of forgery, in which indictment a letter written by B., in execution of the conspiracy, and charging A. with the forgery of a check on C.'s banker, is set out. The letter was given in evidence, as were also conversations referring to the check alleged to have been forged; and it was held that the prosecutor was not bound to produce the

check, though it appeared that such check was actually in existence. (*Rex v. Aldridge*, 1 *Nev. & M.* 776.) 3. *Evidence of.*

Where two defendants were indicted for a conspiracy to commit a fraud, and the defence of one was, that he himself had been deceived by the representations of his co-defendant, and part of a written correspondence having been received in evidence for the crown; it was held, that the whole of the correspondence between the defendants, up to the time of the overt act of the conspiracy, was admissible in evidence for the defence. (*R.* v. *Whitehead, D. & R. C. N. P.* 61.)

If the manuscript of a hand-bill, published by order of a defendant, be given in evidence, a witness will be allowed to prove that he received a number of the printed copies of it from the defendant, without those copies being produced. (*Reg.* v. *Murphy*, 8 *C. & P.* 207.)

Where one of several defendants charged with a conspiracy has been acquitted, the record of acquittal is evidence for another defendant subsequently tried. (*R.* v. *Horne Tooke, Old Bailey*, 1794.) Where one of defendants acquitted.

Where one defendant in conspiracy dies between indictment and trial, it is no ground of *venire de novo* for a mis-trial if the trial proceeds against both, no suggestion of the death being entered on the record. (*Reg.* v. *Kenrick*, 12 *Law Journ. N. S. M. C.* 135.) Where one dies between indictment and trial.

Where on an indictment for a conspiracy against A., B., and C., C. called a witness, and examined him as to a conversation between himself (C.) and A., it was held, that the counsel for the prosecution were at liberty to examine as to other conversations between A. and C., although they tended chiefly to criminate A. who had called no witnesses. (*R.* v. *Kroche*, 2 *Stark.* 343.) Competency of witnesses.

The wife of one co-defendant, in a case of conspiracy, is not a competent witness for another defendant, for as a joint offence is charged against all the defendants, an acquittal of the others would be a ground for an acquittal of her husband. (*R.* v. *Lockyer*, 5 *Esp. C. N. P.* 107; *R.* v. *Frederick*, 2 *Stra.* 1094. See "*Wife*," Vol. VI.) Wife of co-defendant.

IV. Punishment, &c.

It is clear that those who are convicted of conspiracy at the suit of the party shall have judgment of fine and imprisonment, and to render the plaintiff his damages. (1 *Hawk.* c. 72, s. 9.) Punishment.

Also it is certain that he who is convicted at the suit of the king of a conspiracy to accuse another of a matter which may touch his life, shall have judgment that he shall lose the freedom and franchise of the law (whereby he is disabled as a juror and discredited as a witness.) (*Ibid.*)

And this is commonly called villanous judgment, which is given by the common law, and not by any statute. But it now is the better opinion, that the villanous judgment is by long disuse become obsolete, there being no instance of its having been pronounced since the reign of Edward the Third; but instead thereof the delinquents are usually sentenced to fine, imprisonment and surety for good behaviour. (4 *Bla. Com.* 136, 137; 2 *Burr.* 996; *R.* v. *Spragg, id.* 1027; 1 *Hawk.* c. 72, s. 9)

By the 9 Geo. IV. c. 31, s. 25, assaults committed in pursuance of a conspiracy to raise the rate of wages, are punishable with imprisonment with or without hard labour, for not exceeding two years, and the offender may be fined and required to find sureties for keeping the peace. (See *ante*, title "*Assault.*") Assaults to raise wages.

An attorney has been struck off the roll after a conviction for a conspiracy. (*Anon.* 1 *Chit. Rep.* 557; see *Anon.* 2 *Dowl.* 174.) Attorney.

V. Forms.

—— *THE jurors for our Lady the Queen upon their oath present, that C. D. late of the parish of , in the county of , labourer, E. F. late of the same place, labourer, G. H. &c.* [here state the names and additions of all the defend- General form of an indictment for conspiracy.

ants,] *being persons of evil minds and dispositions, on the day of , in the year of the reign of our Lady the now Queen Victoria, with force and arms, at the parish aforesaid, in the county aforesaid* [the venue], *unlawfully and wickedly* [or if the conspiracy be malicious, say *falsely and maliciously*] *did conspire, combine, confederate and agree together to* [here state the object of the conspiracy according to the substance of the facts.] *And the jurors aforesaid, upon their oath aforesaid, do further present, that the said C. D. &c. in pursuance of and according to the said conspiracy, combination, confederacy and agreement between them the said C. D. &c. as aforesaid had, did, on the day of , in the year of the reign aforesaid, at, &c.* [the place where the overt act took place, here set out the overt acts of conspiracy according to the substance of the facts], *to the great damage of the said A. B.* [the party immediately injured], *to the evil example of all others, and against the peace of our said Lady the Queen, her crown and dignity.* [Add a second count, stopping at the statement of the conspiracy, omitting the overt acts, and concluding as above. Add a third count, as general as possible, upon the principle laid down in 2 *B. & Ald.* 204, and the other cases, *ante*, 881.]

Constables.

THE office of a constable in apprehending offenders and in executing warrants, is treated of under the titles "*Arrest*," *ante*, and "*Warrant*," Vol. VI.; and in like manner the other particulars of his duty may be found under the respective titles throughout the work: this title treating only of the office of a constable in general.

As to beadles and watchmen, see title "*Watching and Lighting of Parishes*," Vol. VI.; and title "*Arrest*," *ante*, 275.

As to peace officers appointed under the Metropolitan Police Act, see "*Police*," Vol. V.

As to evidence of being constable, see title "*Evidence*," Vol. II. p. 379.

I. *Origin of Constables and Nature of Office in general*, 888.

II. *High Constables*, 890.
[13 Edw. I. st. 2, c. 6; 7 & 8 Vict. c. 33.]

III. *Parish Constables at Common Law and under the Statute 5 & 6 Vict. c.* 109 ... 891.
[5 Hen. VIII. c. 6; 32 Hen. VIII. c. 40; 13 & 14 Car. II. c. 12; 1 Will. III. c. 18; 6 & 7 Will III. c. 4; 10 & 11 Will. III. c. 23; 1 Geo. II. st. 2, c. 13; 18 Geo. II. c. 15; 31 Geo. III. c. 32; 42 Geo. III. c. 90; 52 Geo. III. c. 155; 57 Geo. III. c. 44; 7 & 8 Geo. IV. c. 27, c. 53; 3 & 4 Will. IV. c. 51; 5 & 6 Vict. c. 109; 7 & 8 Vict. c. 52.]

IV. *County and District Constables*, 923.
[2 & 3 Vict. c. 93; 3 & 4 Vict. c. 88.]

V. *Special Constables*, 942.
[1 & 2 Will. IV. c. 41; 5 & 6 Will. IV. c. 43; 1 & 2 Vict. c. 80.]

VI. *Borough Constables* (see "*Corporations*," Vol. II.)

VII. *Constables on Canals and Navigable Rivers*, 948.
[3 & 4 Vict. c. 50.]

VIII. *Forms*, 953.

I. Origin of Constables, and Nature of the Office in general.

Antiquity and origin of constables in general.

The sundry names of high constables, or constable of lathes, rapes, wapentakes, hundreds, and franchises, and the divers names also of petty constables, tithingmen, borsholders, borowheads, headborows, chiefpledges, and such

other (if there be any) that bear office in towns, parishes, hamlets, tithings, or borowes, are all in effect but two, that is to say, constables and borsholders. (*Lamb. Const.* 4.)

1. *Origin of, and Nature of Office in general.*

The word *constable* is evidently a compound, but it seems to be uncertain from whence it has been originally derived.

Borsholders.

Borsholders (which is the other general name, and doth contain within it the meaning of tithingman, borowheads, headborows, thirdborows, and chief-pledges,) is a word compounded of the Saxon *borge, borrow,* or *borhoe,* a pledge, and *ealder,* the elder, chief, or head; and *borshealder,* in one word, doth mean the chief or head of the sureties or pledges. For the understanding whereof it is to be remembered, that by the ancient laws of this realm (before the coming of King William the Conqueror) it was ordained for the more sure keeping of the peace, and for the better repressing of thieves and robbers, that all free-born men should cast themselves into several companies, by ten in each company; and that every of those ten men of the company should be surety and pledge for the forthcoming of his fellows; so that if any harm were done by any of these ten against the peace, then the rest of the ten should be amerced, if he of their company that did the harm should fly, and were not forthcoming to answer to that wherewith he should be charged. And for this cause the companies are yet in some places of England called *boroes,* of the said word *borge, borrow,* or *borhoe,* signifying a pledge or surety; and in other places they are called *tithings,* because they contain (as hath been said) the number of ten men with their families. And even as ten times ten do make an hundred, so because it was then also appointed that ten of these companies should at certain times meet together for their matters of greater weight, therefore that general assembly, or court, was and yet is called a *hundred.* Furthermore, it was then also ordained, that if any man were of so evil credit that he could not get himself to be received into one of these tithings or borows, then he should be shut up in prison, as a man unworthy to live at liberty amongst men abroad. Now whereas every of these tithings or borows did use to make choice of one man amongst themselves to speak and to do in the name of them all, he was, therefore, in some places, called the tithingman, in other places the boroes elder, (whom we now call borsholder,) in other places the borohead or headborow, and in some other places the chiefpledge, which last name doth plainly expound the other three that are next before it; for head or elder of the boroes and chief of the pledges are all one; and in some shires, where every third borough hath a constable, there the officers of the other two are called *thirdborowes.* And in these tithings or boroes sundry good orders were observed; and amongst others, first, that every man of the age of twenty-one years should be sworn to the king. Then, that no man should be suffered to dwell in any town or places unless he were also received into some such suretyship and pledge as is aforesaid. Thirdly, that if any of these pledges were imprisoned for his offence, then he ought not to be delivered without the assent of the rest of his pledges. Again, that no man might remove out of one tything or boroe to dwell in another, without lawful warrant in that behalf. Lastly, that every of these pledges should yearly be presented and brought forth by their chief pledge at a general assembly for that purpose, which we yet in remembrance thereof do call the *view of frankpledge,* or the leet court. (*Lamb. Const.* 6, 7.)

Origin of hundreds.

In some places at this day there is both a tithingman and constable, where the tithing man is as it were a deputy to execute the office in the constable's absence; but there are some things which a constable hath power to do, that tithingmen cannot intermeddle with; for the constable may do whatever the tithingman may do, but not *e converso,* the tithingman not having an equal power with the constable. But in places where there is no constable, the office and authority of tithingman seems to be all one under a different name. (1 *Bla. Com.* 357.)

Office of constable is ministerial or judicial.

The office of constable is either strictly derivative or *ministerial,* as in obeying warrants and precepts of justices, coroners, and sheriffs, and the charges of private individuals; or is original and *judicial,* as a conservator of the peace at common law; and in many cases it is exercised by virtue of particular acts

1. *Origin of, &c.*

of parliament. It has been asserted, however, that the office is wholly ministerial and no way judicial (*Bac. Abr. Const. D.* 3; *Burr.* 1263); but this seems too general a position; see *per Ashurst*, J., *R.* v. *Stubbs*, 2 *T. R.* 406; *Com. Dig. Leet, M.* 5.)

II. High Constables.

Antiquity of high constables.

By the statute of Winchester, 13 Edw. I. st. 2, s. 6, *in every hundred and franchise two constables shall be chosen to make the view of armour; and they shall present defaults of armour, and of suits of towns, and of highways, and such as lodge strangers in uplandish towns, for whom they will not answer.*

From hence Lord *Coke* and others will have it that high constables are no more ancient than this statute. But Mr. *Hawkins* (agreeably with *Lambard*, *Dalton*, and other authorities,) says, that it seems to be the better opinion that both constables of hundreds, which are commonly called high constables, and also constables of tithings, which are at this day commonly called petty constables or tithingmen, were by the common law, and not first ordained by the said statute of Winchester; for that statute doth not say that there shall be such officers constituted, but clearly seems to suppose that there were such before the making of it. (2 *Hawk.* c. 10, s. 33; *Medhurst* v. *Watt*, 3. *Burr.* 1259; *Reg.* v. *Watkinson*, 2 *Per. & D.* 617; 10 *Ad. & Ell.* 288, S. C.)

Office of high constable.

In short, the truth of the matter seems to be this; the far greatest part of the business of high constables of this day is not at all appropriated to them as high constables, but only as officers to execute the precepts of the justices of the peace, which any other person may do as well as they. The original and proper authority of a high constable, as such, seems to be the very same, and no other, within his hundred, as that of the petty constable within his vill; and therein, most probably, he is coeval with the petty constable. He has the superintendence and direction of all petty constables within his district; and he is in a manner responsible for their conduct, since he is bound to notice and to present their defaults, for his neglect of which duty he is representable himself. The other usual branches of this office, such as the surveying of bridges, the issuing of precepts concerning the appointing of overseers of the poor, surveyors of the highways, assessors and collectors of the land-tax and window duties, and in like manner the viewing of armour by the above-mentioned statute, are in him, not of necessity, but as matter of convenience, and it is discretionary in the justices whom they will appoint to be their officers in these cases; others have been superadded to their office, for the like reason of convenience, by sundry acts of parliament, such as the issuing of precepts for the licensing of alehouses, for the levying of county rates, and for returning lists of jurors; since the one person can do all much easier and cheaper than so many different persons.

In ancient times the practice was that if there was no feudal lord of the hundred, an annual officer was chosen, who was to preside over the whole hundred, who was called the high constable; but if the hundred were feudal, as it often anciently was, then such lord of the hundred administered the office himself. (*Bac. Ab. Constable*, A. 683.)

Appointment at sessions, and by justices, of high constables.

But the usual manner was, that the high constables of hundreds were chosen either at the quarter sessions of the peace, or if out of the sessions, then by the greater number of the justices of the division where they reside; and likewise that they are sworn either at the sessions or by warrant from the sessions; which course hath been often allowed and commanded by the justices of the assize. (*Dalt.* c. 28.) The reason thereof may be this, as hath been intimated above, namely, that their office at present doth not so much consist in executing the office of high constable as such, as in executing the justices' precepts, which they may do for the most part, whether they be indeed high constables or not.

The election was in the justices at large, and all must have had an opportunity of voting. (*Reg.* v. *Watkinson*, 2 *Per. & D.* 617; 10 *Ad. & Ell.* 288, S. C.)

Now by the 7 & 8 Vict. c. 33, s. 8, it is enacted, that where high constables have heretofore usually been appointed at quarter sessions, they shall hereafter be appointed by such justices as may be present at the special sessions of their division, held for the purpose of hearing appeals against the rates of the several parishes in such division, or at any adjournment thereof; but if the hundred or other like division of the county for which any high constable is to be appointed be not included within the limits of any one division of the county for which such special sessions are held, then the justices of the peace for the county assembled at general or quarter sessions, or any adjournment thereof, may from time to time determine the divisions of the special sessions at which such high constable is to be appointed, and shall cause notice of such determination to be sent by post or otherwise to the high constable for the time being of such hundred or other like division. (See the act, in the *Addenda* to title "*County Rate*," Vol. II.) 2. *High Constables.*

Where a town or other place formerly under the general jurisdiction of the county had been erected into a separate jurisdiction, as a county of itself, within time of memory, and it had no high constable before, yet such an office was held incident to such a newly created district, and that the justices might appoint a high constable. (*James* v. *Green*, 6 *T. R.* 232; *Weatherhead* v. *Drury*, 11 *East*, 168.)

By stat. 1 Geo. I. st. 2, c. 13, high constables were to take the oaths of allegiance, supremacy and abjuration, as other persons who qualify for offices; but they are not within the stat. 25 Car. II. c. 2, as to receiving the sacrament, and subscribing the declaration against transubstantiation. But now by the 7 & 8 Vict. c. 33, s. 8, *every* high constable, whether appointed at a special sessions, or at an adjournment thereof, or at a court leet, or any other special court, shall, if present at the time of his being appointed, then and there take his oath for the due execution of his office; and if otherwise, he shall forthwith, on the receipt of his appointment, go before the next or some other justice of the peace for the county in which he resides, and then and there take his said oath of office; and he shall not, in virtue of his office of high constable, be required to take any other oath than the said oath for the due execution of his office. Oath of high constable.

A high constable may appoint a deputy to do a ministerial act. (*Post*, 895). Deputy.

As to the fees and allowances to high constables in riots, &c. see *post*, 920, 920. Fees, &c. to, on riots, &c.

As to his accounting at the sessions, see *post*, 923. Accounting at sessions.

Formerly a high constable employed in collecting county rates might be required by justices to give security. (55 Geo. III. c. 51, s. 19. See *Re Lodge*, 2 *Ad. & Ellis*, 123.) But now by the 7 & 8 Vict. c. 33, high constables are relieved from the duties of collecting county rates. (See title "*County Rate*," Vol. II. and the *Addenda* to that title.) Duties as to collecting rates abolished.

They are also relieved by the same act in certain cases from the duties of attending at quarter sessions. Relieved from attending sessions.

Formerly it was the custom for high constables to issue their warrants to petty constables to make presentments of all crimes cognizable at the assizes. This is now abolished by the 7 & 8 Geo. IV. c. 38 (*post*, 908). Presentments abolished.

The appointment of high constables is not affected by the 5 & 6 Vict. c. 109, or the County Constable Acts, *post*, 923. The 2 & 3 Vict. c. 93, s. 25, expressly excepts the power of appointing them from the provisions of that act. Office of, not affected by Parish or County Constable Acts.

III. Parish Constables at Common Law, and under the Stat. 5 & 6 Vict. c. 109.

Herein of—

1. *Who may be appointed Parish Constables. Deputy Constables and Substitutes—Exemptions from Office*, 892.
2. *How Chosen and Sworn, and compellable to act*, 896.
3. *Paid Constables and Superintendents—Lock-up Houses*, 902.

1. *Who may be.*

4. *Jurisdiction and Powers under 5 & 6 Vict. c. 109—Exemption from Toll*, 903.
5. *Fees and Allowances under that Act*, 904.
6. *Recovery and Application of Penalties under that Act*, 905.
7. *Interpretation of that Act*, 907.
8. *Power and Duty of, as Conservators of the Peace*, 907.
[7 & 8 Geo. IV. c. 38.]
9. *Duty of, as Officers to Justices, and in executing Warrants, &c.* 908.
[5 Geo. IV. c. 18.]
10. *Punishment for Neglect of Duty*, 909.
[27 Geo. II. c. 20; 33 Geo. III. c. 55; 5 Geo. IV. c. 83.]
11. *Indemnity and Protection of*, 911.
[7 Jac. I. c. 5; 21 Jac. I. c. 12; 24 Geo. II. c. 44; 7 & 8 Geo. IV. c. 29, c. 30; 9 Geo. IV. c. 31.]
12. *Expenses of*, 919.
[3 Jac. I. c. 10; 27 Geo. II. c. 3; 27 Geo. II. c. 20; 18 Geo. III. c. 19; 41 Geo. III. U.K. c. 78.]
13. *Account of, and Removal from Office*, 922.
[12 Geo. II. c. 29; 13 & 14 Car. II. c. 12; 41 Geo. III. c. 78.]

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1. Who may be appointed Parish Constables, and of Deputy Constables and Substitutes—Exemptions from Office.

Preliminary observations as to the old and new office of parish constable.

It is proper to observe here that under the recent enactments relating to constables in parishes and counties, new officers called "constables" have been appointed, without entirely abolishing the old, and a good deal of complication has thus been introduced into this branch of the law. It would seem that high constables, chief constables, local constables, petty constables, parish constables, and special constables, may all now be appointed and exist concurrently; and that being the case, difficulties will doubtless frequently arise as to the limits of the duties of these several officers. In construing the recent statutes, however, one principle may be borne in mind, namely, that these acts having been passed chiefly, as it appears, with a view to the better preservation of the peace, relate only to the duties of constables in *criminal cases*, and the old constables may still be appointed as at common law for the performance of any *civil* duties hitherto entrusted to them. For this reason it will be necessary to retain here much of the old law on this subject; but as it is probable that the appointment of constables at common law will gradually fall into disuse, so much only of the old law will be stated as is likely to be useful in construing and applying the recent statutes.

Some practical instructions on the criminal duties of constables, and the manner of executing them, carefully drawn up, and applicable to all kinds of constables, will be found at the end of the Section IV. on "*County Constables*," *post*, 939.

Must be an inhabitant, &c.

At common law no person was to be a constable who was not an inhabitant of the place for which he was qualified to serve (*Feild. Pen. Stat.* 331); and actual residence in the parish was essential. (*R.* v. *Adlard*, 7 *D. & R.* 340; 4 *B. & C.* 722, S. C.) Therefore a person occupying a house and paying all parish rates in respect of it, and carrying on the trade of a printer, frequenting the house daily on all working days, and sometimes remaining there during the night at work, but not sleeping in the house, was held not liable to serve the office of constable in the parish where the house is situate (*id.*); *et per Abbott*, C. J., S. C. "The question in this case is, whether the defendant was legally liable to serve the office of constable; and the facts stated in the special case raise the question, whether the occupier of a tenement, situate within a parish, but not used as a dwelling-house, is an inhabitant, and as such liable to serve this office. The question is the same, whether the tenement consist of house or land, and whether its value be more or less. It has been contended on the part of the prosecution, that such an occupier is an inhabitant of the parish within

What a sufficient inhabitancy, &c.

which the tenement is situate; and for many purposes he certainly is. The word 'inhabitant,' however, like many others, varies in its import according to the subject-matter to which it is applied. For all the purposes of pecuniary charge it may be laid down, that such an occupier is an inhabitant, and therefore that he is liable to church rates, to which all inhabitants are by law to contribute, to the repairs of highways by common law, and to the repairs of bridges, if not by common law, at least by the statute 22 Hen. VIII. c. 5. My Lord *Coke*, in his commentary upon that statute, says that the word 'inhabitant' is the largest word of its kind, and that all occupiers are inhabitants within the meaning of the statute: but he adds, 'that servants are not within the statute.' (2 *Inst.* 702.) The poor laws I do not mention, because the statute of Elizabeth contains the word 'occupiers' as well as the word 'inhabitants.' But as was justly remarked on the part of the defendant, in all these cases the object is to raise a sum of money by the assessment of the property within the parish; and for the purpose of that assessment, it is perfectly immaterial whether the occupier is a resident within the parish or not: consequently, for such a purpose a non-resident occupier may fairly enough be deemed an inhabitant where that word happens to be the only mode of description applied to the individuals who are to bear the burden. The office of constable is of a very different character. It is a personal, not a pecuniary office, and must be performed by personal attendance within the parish. The personal presence of the constable is indispensable, for he is presumed to be known to all the inhabitants of the parish, and they are all bound to obey his orders, and to aid and assist him, whenever called upon, in the exercise of his lawful authority. In ancient times, constables were appointed at the leet or view of frankpledge, and in some places they are so still; though since the disuse of that court, other modes of appointment have been introduced and adopted pretty generally. Now the view of frankpledge is a view of the resiants within the leet, and is spoken of as such in almost all books. In alleging a prescription for a leet, the regular form is to describe it as a view of frankpledge of all the inhabitants and resiants within the parish; and even where the word 'inhabitant' only is used, as in *Gresley's case*, (8 *Rep.* 76,) it is evidently used in the sense of resiant. The statute of Marlbridge, c. 10, speaking of the sheriff's tourns, enacts, that those who have tenements in divers hundreds need not attend the tourns, except in the bailiwicks wherein they are conversant; and my Lord *Coke*, in his commentary thereon, (2 *Inst.* 122,) says 'if a man hath a house within two leets, he shall be taken to be conversant where his bed is.' That is a direct authority for saying that an inhabitant, with reference to the view of frankpledge, does not mean an occupier; nor can the word, indeed, have that meaning; for all males above the age of twelve years were bound to attend and do suit and service, many of whom could not possibly be occupiers, and if occupiers, as such, were not members of the leet, nor bound to do suit and service there; it seems to follow, necessarily, that the court could not compel them to serve this office. But it has been said, a non-resident occupier may be appointed to this office because he may serve it by deputy. I do not know that the appointee can make a deputy of his own right without the sanction of some higher authority. But even if he can, it by no means follows that he is compellable to serve an office which in its very nature requires personal services, especially when no necessity for his appointment is shown to exist. We are therefore of opinion that the verdict found at the trial was wrong, and must be set aside, and a verdict entered for the defendant." (See further as to the meaning of the term "*inhabitant*," *Donne* v. *Martyn*, 8 *B. & C.* 62; 2 *M. & R.* 98, S. C.; *R.* v. *Mashiter*, 6 *A. & E.* 153; 1 *N. & P.* 314, S. C.; title "*Poor*," Vol. IV. p. 23.)

I. *Who may be—Exemptions from Office.*

And where H. occupied a warehouse in Manchester, within the jurisdiction of the court leet, where he carried on his business, but did not reside, and he usually lodged and boarded in Manchester from Monday till Saturday; he had also premises in Haslingden, in which township he slept when not at Manchester, and he did suit and service to the court leet of Haslingden: it was held, by Lord *Denman*, C. J., and *Littledale*, J., and *semble per Patteson* and *Williams*, Js., that H. was liable to be appointed a constable

1. *Who may be—Exemptions from.*

of the Manchester leet. (*R.* v. *Mosley*, 5 *Nev. & M.* 261; 3 *Adol. & Ell.* 488, S. C.)

It was held in *R.* v. *Gener*, (*Cowp.* 13,) that one who was resident within a private leet within the hundred was not therefore exempt from serving the office of constable of the hundred; and that a custom to elect such a one was good.

Tenants in ancient demesne, &c.

Tenants in ancient demesne were liable to serve as constables. Resiants in a manor, owing suit and service to a leet within the same, but not commensurate or extensive with it, the limits of the hundred reaching beyond those of the leet, are obliged to serve as constables out of the leet, but within the hundred. (*R.* v. *George*, *Lofft.* 365, 418.)

Who now qualified to be parish constables.

Now by the 5 & 6 Vict. c. 109, s. 5, "every able-bodied man resident within the parish, between the ages of twenty-five years and fifty-five years, rated to the relief of the poor or to the county rate, on any tenements of the net yearly value of 4*l.* or upwards, except such persons as shall be exempt or disqualified as hereinafter mentioned, shall be qualified and liable to serve as constable of that parish."

Exemptions from serving as constables.

And by s. 6 it is enacted, "That all peers; all members returned to serve in the Commons House of Parliament; all judges of her Majesty's courts of record at Westminster; all justices of the peace; all deputy lieutenants; all clergymen in holy orders; all priests of the Roman Catholic faith who shall have duly taken and subscribed the oaths and declarations required by law; all persons who shall teach or preach in any congregation of Protestant Dissenters, whose place of meeting is duly registered, and who shall follow no secular occupation, except that of a schoolmaster, producing a certificate of some justice of the peace of their having taken the oaths and subscribed the declaration required by law; all schoolmasters; all serjeants and barristers at law actually practising; all members of the society of doctors of law and advocates of the civil law actually practising; all attornies, solicitors and proctors duly admitted in any court of law or equity, or of ecclesiastical or admiralty jurisdiction, in which attornies, solicitors and proctors have usually been admitted, actually practising, and having duly taken out their annual certificates; all conveyancers and special pleaders below the bar; all officers of any such courts actually exercising the duties of their respective offices; all coroners, gaolers and keepers of houses of correction; all members and licentiates of the royal college of physicians in London, actually practising; all surgeons, being members of one of the royal colleges of surgeons in London, Edinburgh or Dublin, and actually practising; all apothecaries, having obtained a certificate to practise as an apothecary from the master, wardens and society of apothecaries of the city of London, and actually practising; all officers in her Majesty's navy or army on full pay; all persons enrolled and serving in any corps of yeomanry under officers having commissions from her Majesty or lieutenants of counties, or others specially authorised by her Majesty for that purpose; all pilots licensed by the Trinity House of Deptford Strond, Kingston-upon-Hull or Newcastle-upon-Tyne, and all masters of vessels in the buoy and light service employed by either of those corporations; and all pilots licensed by the lord warden of the cinque ports, or under any act of parliament or charter for the regulation of pilots in any other port; all the household servants of her Majesty; all officers of customs and excise; all sheriffs and sheriff's officers; all high constables; the clerks of all boards of guardians of the poor, established under the act for the amendment and better administration of the laws relating to the poor in England and Wales; the masters of all union workhouses; all county or district constables; all parish clerks; all registrars and superintendent registrars of birth, deaths and marriages; all churchwardens, overseers and relieving officers, shall be freed and exempt from serving the office of constable under this act."

Licensed victuallers, beer house keepers, gamekeepers, traitors and felons, disqualified.

Sect. 7. "All licensed victuallers and persons licensed to deal in any exciseable liquors or to sell beer by retail, all gamekeepers, and all persons who have been attainted of any treason or felony, or convicted of any infamous crime, shall be disqualified from serving the office of constable under this act."

Before the passing of this act, it was holden in *R.* v. *Clarke*, (1 *T. R.* 682,) that the king may exempt any person, or whole bodies corporate, from serving the office of constable; subject however to this restriction, that the exemption be not extended so far as to prevent the existence of the office in any particular place, and grants of this nature should be construed strictly.

1. *Who may be, &c. Deputies. Substitutes.*

The Queen may exempt.

It hath been said that a custom in a town that the inhabitants shall serve the office of constable by turns, according to the situation of their several houses, is not good; for that by such a course it may come to a woman's turn to be a constable, as an inhabitant of one of those houses; yet we find such customs allowed to be good in later books; and it seems that the consequence of the reasoning above mentioned may well be denied, since a woman in such case may procure another to serve for her. (2 *Hawk.* c. 10, s. 37; 1 *Bac. Abr.* 683; *vide R.* v. *Stubbs*, 2 *T. R.* 406.) But now the above statute imposes the liability to serve on "able-bodied men" only.

Women exempt.

Foreigners, although naturalized, have been considered exempt. (*R.* v. *Ferdinand de Mierre*, 5 *Burr.* 2790.)

Foreigners.

It has been said, that if a gentleman of quality be chosen constable of a town which hath sufficient persons besides to execute this office, and no special custom concerning it exist, perhaps he might be relieved by the Queen's Bench; but it seems that even a custom cannot exempt fitting persons from serving the office of constable, where there are not sufficient besides them to execute it. But these points seem not to be settled. (2 *Hawk.* c. 10, s. 41.) Such a person would now probably be compellable to find a substitute, under the provisions of 5 & 6 Vict. c. 109, s. 12, *infra*.

Gentlemen, where there are others sufficient.

Deputy Constables or Substitutes.]—Inasmuch as the office is wholly ministerial, and no way judicial, it seems that a constable may, at common law, appoint a deputy to execute a warrant directed to him, when by reason of sickness, absence or otherwise, he cannot do it himself; yet it doth not seem to be settled that a constable can make a deputy without some special cause. (2 *Hawk.* c. 10, s. 36.)

Deputy constables.

In *Medhurst* v. *Wate*, (3 *Burr.* 1259,) the high constable appointed a deputy to billet soldiers under the Mutiny Act; this appointment was by parol only, and the deputy was not sworn. By Lord *Mansfield*, C. J. and the Court: "The high constable had power by the act to billet soldiers, and he may appoint a deputy to this particular ministerial act. This is a ministerial (not a judicial) act, and a constable may appoint a deputy to do ministerial acts."

In *R.* v. *The Inhab. of Hope Mansell*, (*Cald.* 252,) it was considered that a constable could appoint a deputy. And in *R.* v. *Clarke*, (1 *T. R.* 682,) it seemed to be admitted as a settled point that a constable may appoint a deputy. (*Sed vide per Abbott*, C. J. in *R.* v. *Adlard*, *ante*, 892.)

The deputy, when appointed, has all the privileges of the constable himself. (*Hawk.* c. 10, s. 36; *Dalt.* c. 1.)

Watchmen may be appointed by constables as their assistants, subject to the custom of the place for the appointment of watchmen. (1 *Bla. Com.* 357, 4th edit. 292.) A watchman thus appointed has for the time being the authority of the constable and his deputy. (1 *Ch. C. L.* 24.)

The superior must be answerable for his deputy upon any miscarriage, unless the deputy is duly allowed and sworn, for then he is constable. (*Wood's Inst.* b. i. c. 7.)

At common law, where a person was appointed constable, and he procured a deputy to serve for him, who was approved of by the inhabitants and sworn in at the leet, the liability of the principal was at an end, and he could not afterwards be called upon to serve the office; if therefore the substitute abscond and do not serve, the principal is discharged notwithstanding. (*Underhill* v. *Witts*, 3 *Esp.* 56.) But this is otherwise under the recent act; see *infra*.

Now by the 5 & 6 Vict. c. 109, s. 12, it is provided, "that if any qualified person chosen as aforesaid shall be unwilling to serve the office of constable in person, and shall find a substitute, to be approved by the justices,

Substitutes may be allowed.

2. *How chosen and compellable to act.*

and willing to serve for him, the person so chosen and unwilling to serve shall attend with his proposed substitute at the time and place appointed for swearing in constables; and the justices, if they shall approve of such proposed substitute, shall cause the oath to be administered to him, instead of the person so chosen and unwilling to serve; but the service of any person as substitute for another person shall not be reckoned as his own service, so as to exempt him from being sooner chosen to serve in his own person than otherwise he would have been liable to."

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2. How Chosen and Sworn, and Compellable to Act.

How and by whom to be chosen at common law.

By leet.

At common law the constable was chosen by the jury in the leet, and if the party was present and refused, the steward might fine him; if absent, the homage must have presented his refusal at the next court, and then he was amerced; also if the party chosen was present, he took the oath in the leet; if absent, before the justices of the peace, who administered the oath to him as conservators of the peace at common law. (*Fletcher* v. *Ingram*, 1 *Salk.* 175; 1 *Ld. Raym.* 69, 70; S. C. 1 *Ken. Rep.* 318.)

Sometimes the election was founded on a custom, as it frequently was in some parishes at a vestry meeting, wardmote, or otherwise. (See *R.* v. *Franchard*, 2 *Stra.* 1149.)

Anciently the practice was, that in every hundred where there was a feudal lord, the constables were sworn in and admitted by the lord or his steward in his leet; but where there was no such feudal lord, the sheriff in his torn had the swearing and placing of them in.

And moreover, every petty constable being a principal peace officer, and it being necessary for the preservation of the peace that every vill should be furnished with one, the justices of the peace have ever since the institution of their office taken upon them, as conservators of the peace, not only to swear the petty constables, which have been chosen at a torn or leet, but also to nominate and swear those who have not been chosen at any such court, on the neglect of the sheriffs or lords to hold their courts, or to take care that such officers are appointed in them. Also, it seems, that such justices have always used for good cause to displace such officers which have been so chosen and sworn by them. And this power of justices of the peace having been confirmed by the uninterrupted usage of many ages shall not now be disputed, but shall be presumed to have been grounded on sufficient authority. And some have carried this point so far, as to allow the justices at their sessions to swear one who was chosen at the leet, and unduly rejected by the steward, who had sworn another in his place. (2 *Hawk.* c. 10, s. 49.)

And in the case of Dr. Franchard, he was chosen constable at Milborne Port at the leet, which immediately adjourned; and he was afterwards sworn in by a *single* justice of the peace; and upon motion for an information as not being duly sworn, the court held this to be a good swearing. (*R.* v. *Dr. Franchard*, 2 *Stra.* 1149.)

By justices.

The justices of the county of Northampton, at their general sessions, chose a constable for Holmby, and for not coming in to take the oath proceeded against him; which proceedings being removed by *certiorari* into the King's Bench, it was moved on affidavits that there had not been a constable there for fifty years before, and that he might be discharged; alleging likewise, that Holmby was a privileged place, and that all the inhabitants were the Duke of York's tenants. But the court held that they could not discharge him on motion, and said that they must determine the matter by action of false imprisonment, or some other way; and inclined strongly that he could not any way be discharged. For, *per curiam*, though originally constables were chosen in leets, yet the constable being an officer whose duty it is to keep the peace, the justices may choose him in cases of necessity. (*Case of the Constable of Holmby*, 2 *Keb.* 557; *Bac. Ab. Constable*, A. 681.)

However, it is certain that justices of the peace had power to nominate and swear constables, on the default of the torn or leet, before stat. 13 & 14 Car. II. c. 12, and therefore that they have such authority in some cases not

mentioned in that statute, which enacts, (s. 15,) that if a constable shall die, or go out of the parish, any two justices may make and swear a new one, until the lord shall hold a leet, or till the next quarter sessions, who shall approve the officer so made and sworn, or appoint another; and if any officer shall continue above a year in his office, the justices in their quarter sessions may discharge him, and put in another till the lord shall hold a court as aforesaid. (2 *Hawk.* c. 10, s. 50.) But justices, even in sessions, are not empowered by this statute to discharge constables chosen and sworn at the court leet. (*Case of the Constables of Limington*, 2 *Stra.* 798.) And the provisions of the act must be strictly complied with by the sessions; therefore an appointment in the disjunctive, "for a year *or* until others be chosen," was quashed. (*R.* v. *Lisle*, 2 *Stra.* 1090.) The court will grant a *quo warranto* against a constable elected at a vestry and sworn in at the sessions under this statute, for *primâ facie* the right of appointing is in the leet, and the sessions have no power if there has been no default. (*R.* v. *Goudge*, 2 *Stra.* 1213; *Fitzg.* 192; *R.* v. *Routledge*, *Dougl.* 536.)

2. *How Chosen and Sworn, &c.*

Appointment by justices under local act in case of vacancy.

R. v. *Brain*, 3 *B. & Adol.* 614.—By an act of parliament for paving, lighting and watching the streets of a parish, the rector, churchwardens, overseers of the poor and vestrymen were appointed trustees for putting the act in execution. By a subsequent act, the trustees appointed to put the first act in execution were appointed trustees for executing that act, and the said trustees or any thirteen or more of them were authorised to elect four constables for the parish annually. The trustees appointed four constables for the year on the 21st of December, 1829. One of the persons so appointed having, in March, 1830, removed from the parish, and given notice of his removal to the trustees, they elected another. And the Court of King's Bench held, that the trustees, having so appointed the four constables for the year, might also, on the removal from the parish of one of the persons so appointed, elect another person in his stead; for that they were not *functi officio*, and were the proper persons to supply the vacancy.

Appointment in towns corporate by charter justices.

As to the appointment of constables in corporate towns, see the Municipal Corporation Act, 5 & 6 Will. IV. c. 76, s. 76, &c. Vol. II. title "*Corporations*," p. 90. Before this act it was held, that the charter justices had the same authority in cases of this nature as justices under a general commission. (*Wheatherhead* v. *Drewry*, 11 *East*, 168; and see *R.* v. *J. Green*, 6 *T. R.* 228.)

Parish constables not now to be appointed in courts leet or torns.

Now by the 5 & 6 Vict. c. 109, s. 21, it is enacted, "that after the passing of that act no petty constable, headborough, borsholder, tithingman, or peace officer of the like description under any name of office, shall be appointed for any parish, township or vill within the limits of this act, *except for the performance of duties unconnected with the preservation of the peace or with the execution of this act*, at any court leet or torn, or otherwise than under the provisions of this act, or under the provisions of the said act of the third year of the reign of her present Majesty, or of some act passed for the amendment thereof; but nothing herein contained shall be taken to prevent the appointment of special constables, or to apply to the city of London or the metropolitan police district, or to any borough which is within the 5 & 6 Will. IV. c. 76, or of any charter granted in pursuance of that act, or of any act made for the amendment thereof, or to any parish, town, or place in which rates are or shall be levied for the payment of constables, under the provisions of an act passed in the fourth year of his late majesty, making provision for the lighting and watching of parishes in England and Wales, or of any local act specially applying to such parish, town, or place, and that nothing hereinbefore contained shall be taken to apply to the county palatine of Chester."

This act not to apply to London or metropolitan police district, or to boroughs or to parishes where rates are levied under the 3 & 4 Will. 4, c. 90, for payment of constables, or under any local act, or to the county of Chester.

Exempting such parts of parishes as lie within boroughs exempted by 5 & 6 Vict. c. 109.

And by the 7 & 8 Vict. c. 52, s. 4, after reciting the above act, and that by the said act it is provided, that nothing therein contained shall apply to certain boroughs and places therein specified: and that doubts had been entertained as to the powers of the justices to appoint constables for any parish of which part shall be within and part without such exempted borough or place; it is declared and enacted, that with respect to any such parish the

2. *How Chosen and Sworn.*

exemptions provided by the said act shall be deemed only to exempt the men residing within that part of the parish which is within such exempted borough or place from serving as constables under the said act, or being included in any list to be made out under this act, and to disqualify the inhabitants of such part from voting in any division of the vestry under the said act."

By the 5 & 6 Vict. c. 109, s. 1, reciting "That it will increase the security of persons and property if further provision be made for the appointment of fit persons to act as constables in the several parishes of England, and if power be given to pay them for the performance of their duties; it is enacted, that after the expiration of eighty days and before the expiration of one hundred days next after the passing of this act, and on some day after the twenty-fourth day of March and before the ninth day of April in each following year, the justices of the peace of every county in England shall hold a special petty session of the peace in their several divisions for the appointment of parochial constables, of which session due notice shall be given to every justice usually acting in that division." (See the form, *post*, 952.)

Justices to hold special sessions for appointing constables.

By the 7 & 8 Vict. c. 52, after reciting the 5 & 6 Vict. c. 109, and that it was expedient that the like authority should be given to the justices of the peace of liberties within counties, it is enacted, that after the passing of this act all the provisions of the said act shall be extended and apply to every liberty in England having a separate commission of the peace, and not being an incorporated borough, and to the justices of such liberty, as if such liberty were a county of itself, and as if the said act were herein re-enacted."

Recited act to extend to all liberties having a commission.

Sect. 2. "That the constables appointed and sworn to act in any such liberty before the passing of this act, whether by the justices of the liberty acting under colour of the powers of the said act, or at any court leet or torn within such liberty, shall be deemed to have been well and lawfully appointed; and those persons who shall hold the office of constable in any such liberty at the time of the passing of this act shall continue to hold their several offices, and to execute the duties thereof, until constables shall be chosen in their stead under the provisions of this act."

Confirming previous appointments.

By the 5 & 6 Vict. c. 109, s. 4, it is enacted, "That it shall be lawful for the justices at a special petty session of the peace to be holden for that purpose, at any convenient time before the issuing of such precept as aforesaid [sect. 2, *infra*] (of which last-mentioned session due notice shall be given to every justice usually acting within the division), to make an order for uniting any parish or parishes, whenever they shall think it expedient, to any parish adjoining thereto, or for the annexing of any extra-parochial places to any parish adjoining thereto for the purposes of this act; and a copy of such order shall be served on the overseers of every parish so united, and also on the overseers of such adjoining parish and every such extra-parochial place so annexed, with the precept herein before-mentioned; and every such parish or extra-parochial place so united to any adjoining parish shall thenceforward be deemed, for all the purposes of this act, to be a part of such adjoining parish; and the inhabitants thereof shall be entitled to attend and vote at any meeting in vestry for the purposes of this act of the inhabitants of the parish to which such parish is united, as fully as if they were inhabitants of the parish where such meeting is holden." (See the form, *post*, 953.)

Small parishes and extra-parochial places may be annexed to any adjoining parish.

Sect. 2. "That the justices shall, within thirty days next after the passing of this act, and within the first seven days of February in each following year, issue a precept, under the hands of two of them, to the overseers of each parish within the division, requiring them to make out and return, within eighty days next after the passing of this act and before the twenty-fourth day of March in each following year, a list in writing of a competent number of men within their respective parishes qualified and liable to serve as constables, and also to perform all other requisitions in the said precepts contained; and with the said precepts shall be given notice to the said overseers of the time and place where such special session of the peace as aforesaid will be holden." (See the form, *post*, 953.)

Justices to issue precepts to overseers, requiring lists of men qualified to serve as constables.

Sect. 3. "That the overseers of every parish, upon the receipt of such precept, shall summon a meeting of the inhabitants in vestry to be holden

Overseers to make out lists of persons qualified to serve.

within fourteen days after the receipt of the said precept; and the vestry at such meeting shall make out a list in writing of such number as shall be named in the precept of men residing within their parish who shall be qualified and liable to serve as constables, with the Christian name and surname, and with the true place of abode, the title, quality, calling or business of each, written at full length: provided also, that it shall be lawful for the vestry to annex to the said return the names of any number of men willing to serve the office of constable, and whom the vestry will recommend to be appointed, although not having the qualification hereinafter mentioned."

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5 & 6 Vict. c. 109.

Lists to be fixed on church doors, and also kept by overseers for inspection.

Sect. 8. "That the overseers of each parish shall make out true copies of the list so agreed to in vestry; and where any of the persons named in the said list shall have been chosen to serve, and shall have served, the office of constable in the said parish, in person or by substitute, the overseers shall set against his name in the list the date of the year of such service, and shall on the three Sundays next before the day limited for making their return in this year, and on the first three Sundays in the month of March in each following year, fix a true copy of such list upon the principal door of every church, chapel and other public place of religious worship within their parish, having first subjoined to every such copy a notice, stating that all objections to the list will be heard by the justices of the peace at a time and place to be mentioned in such notice, and having also signed their names at the foot of such copy, and shall likewise keep the original list, or a true copy thereof, to be perused by any of the inhabitants of their parish at any reasonable time during the three weeks next before the day limited for making their return in this year, and during the first three weeks of the month of March in each following year, without any fee or reward, and on or before the day limited for making their return shall sign and return the original list to the justices as required by the precept."

Penalty on overseers for neglecting returns, or making false returns.

Sect. 9. "That every overseer who shall neglect or refuse to sign and return such list, or to make out, sign and publish such true copies as aforesaid, or who shall knowingly leave out the name of any person who ought to be included therein, or who shall knowingly make a false return of any particular which ought to be comprised therein, shall, upon conviction thereof before two justices of the peace, forfeit and pay for every such offence a sum not more than 5*l.*"

Overseers to attend the special session.

Sect. 10. "That the overseers of each parish shall attend the special session of the peace to be holden for the appointment of constables in their parish, and shall then and there verify the list so returned by them, and shall answer on oath such questions touching the same as shall be put to them, or any of them, by the justices then present; and if any man not qualified and liable to serve as constable as aforesaid is inserted in any such list, it shall be lawful for the said justices, upon being satisfied by the oath of the party complaining, or upon other proof, or upon their own knowledge, that he is not qualified and liable to serve as constable, to strike his name out of such list, and also to strike thereout the names of men disabled by lunacy or imbecility of mind, or by deafness, blindness or other infirmity of body, from serving as constable; and when every such list shall be duly corrected at such session, or at such adjournment thereof, it shall be allowed by the justices present, or two of them at such session, or such adjournment, who shall sign the same, with their allowance thereof."

Justices to choose constables.

Sect. 11. "That when any list shall have been allowed the justices shall choose from the allowed list the names of such number of persons as they shall deem necessary (having regard to the extent and population of the parish) to act as constables within the parish during the year then next following, and until other constables shall be chosen and sworn to act in their stead as constables for such parish: provided always, that where any person shall have been chosen to serve, and shall have served, the office of constable, either in person or by substitute, as hereinafter provided, he shall not be liable to be again chosen until every other person in the parish liable and qualified to serve shall have also served the office of constable, either in person or by substitute." (See the form, *post*, 954.)

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5 & 6 Vict. c. 100.

List of constables appointed in the division to be published;

and parish lists to be affixed to the church doors.

Provision in case of vacancy.

Sect. 14. "That within fourteen days after the appointment and swearing of such constables, the clerk to the justices shall send to every justice usually acting within the division, and also to the clerk of the peace, for the purpose of being laid before the next court of general or quarter sessions, a list containing the names of all constables so appointed in the division, and the parishes for which they have been appointed; and the overseers of the poor shall affix to the door of their respective parish churches a list of the names of the constables appointed in their respective parishes."

Sect. 16. "That in case of the death or disqualification of any constable during his year of office, of which the overseers shall forthwith give notice to a justice of the peace usually acting for the division, or in case any person who shall have been chosen constable shall refuse or neglect as aforesaid to attend and be sworn, or to find a qualified substitute to be sworn in his stead, and shall have been fined for such refusal or neglect, the person who has last served, and shall not then be disqualified or exempt, shall be bound to act in his stead until another constable shall be appointed and sworn to act for the remainder of the year, which shall be done at the next petty session of the peace for the division, of which notice shall be given to all the justices usually acting for the division; and in case the constable making the vacancy was serving as substitute for some other person, the justices shall summon the person originally chosen to attend and be sworn, or to find another substitute duly qualified to serve for the remainder of the year; or if the person originally chosen shall be then disqualified, or shall have refused or neglected as aforesaid to attend and be sworn, or to find a substitute, or if the constable making the vacancy was serving after having been chosen, and not as a substitute, the justices at such session shall choose another qualified person, out of the allowed list then in force, to serve the office of constable during the remainder of the year, and shall proceed in all respects as in the original appointment of constables for that year, and the person so chosen shall be bound in like manner, and subject to the same penalty, to attend and be sworn, or to find a substitute to be sworn in his stead to serve for the remainder of the year; and if less than two hundred days shall have elapsed since the first appointment of constables for that year, but not otherwise, the service of the person appointed to act for the remainder of the year shall be reckoned to him as service for that year; and in the first year after the passing of this act the justices at the time of first choosing constables shall also choose substitutes to serve in case of vacancies during the year of office until another appointment shall be made.

Constables to be sworn.

Oath of Constable.]—By sect. 12 it is enacted, "That the justices shall cause the persons so chosen to be summoned to appear before them on a day to be fixed by such justices (see form, *post*, 954), and shall cause to be administered to every such person the following oath, (that is to say):—

"*I, A. B. of C. do swear, that I will well and truly serve our Sovereign Lady the Queen in the office of constable for the parish of D.* [or, *parishes of D. E., &c.*] *for the year now next following, or until another constable shall be sworn in my stead, according to the best of my skill and knowledge. So help me God.*"

At common law might execute office before sworn.

At common law a month was given for taking the oath, yet the year commenced from the appointment. The party was considered in office directly he was appointed, and he might execute his office before he was sworn, though for the purpose of imposing a greater sanction in the execution of his office, it was more proper that he should be sworn. Thus in *R.* v. *Corfe Mullen*, 1 *B. & Adolp.* 211.—A tithing-man going out of office nominated his shepherd, Miller, to serve as tithing-man the following year. Miller was chosen at a court leet holden October 5th, 1824, and was ordered to be sworn into office within one month, under the penalty of 5*l.* He never was sworn in, but executed the office; while he did so he was not a householder, but lived in part of a house found for him by his employer. His successor was chosen at a court leet October 4th, 1825:—Held, that he gained a settlement in the place for which he served, *although not sworn*, by *executing* there, *on his own account*, a public annual office *for one whole year*,

pursuant to 3 & 4 W. & M. c. 11, s. 6; and that the question, whether or not he was *legally placed* in the office, according to 9 & 10 Will. III. c. 11, did not arise, he not having been a certificated person. *Et per Curiam*—"Swearing in may be rendered necessary either to enable the party to serve the office, or to impose a greater sanction on his discharge of it. We think in this case the latter is the object. A month is given for taking the oath; yet the year commences from the appointment. Can it then be said, that the party is not in office till he is sworn? In one of the cases which have been cited (*Garsington* v. *Holy Trinity, Burr. S. C.* 30, 210), the swearing in of a tithing-man at the end of half a year was considered as taking effect *ab initio*. It is laid down in an *Anonymous case* (1 *Ventr.* 267), that a churchwarden (and no distinction can be drawn between his case and that of a constable) may execute his office before he is sworn, though it is convenient he should be sworn. And it may be observed, that a *mandamus* to swear such an officer in is referred to by the Court immediately afterwards in that case; which must, therefore, be issued, not on the ground that the oath is essential to the due execution of the office, but because it is fit and proper, for the interest of the public, that the office should be executed under its sanction."

2. *How Chosen and compellable to serve.*

Mandamus to swear in.]—The Queen's Bench hath power by mandamus to compel the Court or judge to swear a constable duly chosen. (2 *Hawk.* c. 10, s. 47; *Anon.* 1 *Ventr.* 267; *R.* v. *Corfe Mullen*, 1 *B. & Adolp.* 219.)

Mandamus to compel the swearing a constable.

Quo Warranto.]—The office of constable being a burthensome one, the Court of Queen's Bench will not put a person, *de facto* elected and sworn in by the court leet, to the expense of showing by what authority he holds the office, at the relation of a different body of persons claiming the right of election, where those persons do not expressly show an immemorial custom in their body to elect, and that the deponents believe there is such custom. (*R.* v. *Lane*, 5 *B. & Ald.* 488; 1 *D. & R.* 6, S. C.)

Quo warranto.

In the case of *R.* v. *Standard Hill*, (4 *M. & Sel.* 378,) which was an application to have overseers appointed for a vill, it was held to be necessary to swear positively that it was a vill by reputation. (And see *R.* v. *Williamson*, 3 *B. & Ald.* 582.)

Constable refusing to act or be sworn, &c.]—By the 5 & 6 Vict. c. 109, s. 12, it is enacted, "That every person qualified and liable to serve, and who shall be chosen by the justices to serve, the office of constable, and shall be duly summoned to be sworn, and to take upon him the said office, and who shall refuse, or, without reasonable cause, to be allowed by the said justices, neglect to attend and to be sworn as constable, or to find a qualified substitute to be sworn in his stead, shall, upon conviction thereof before two justices, forfeit and pay any sum not more than ten pounds; and every person who, after being sworn as constable, shall refuse or wilfully neglect to act in the execution of his office, shall, upon conviction thereof before two justices, forfeit and pay for every such offence any sum not more than five pounds." (See form, *post*, 954.)

Penalty for refusing to act, or to find a substitute.

At common law, if constables when chosen refused to be sworn, a justice of the peace might bind them over to the assizes or sessions, there to be indicted. (*Dalt.* c. 28; *R.* v. *Lone*, 2 *Stra.* 920.)

How punished at common law.

But it seems there could be no commitment, either by a justice of the peace or by the sheriff or steward of the leet, but only indictment upon the refusal; and if found against him, to assess a good fine upon him, and then commit him for that cause. (*R.* v. *Crawley*, *Cro. Car.* 567; 2 *Hawk.* c. 10, s. 46.)

It is said, however, that if the party be present in the Court, he may be fined; and that if he be absent, and have a certain time and place appointed him by the sheriff or steward for the taking of the oath before a justice of the peace, and have also express notice of such appointment, and be presented at the next Court, for having refused to take it accordingly, he may be amerced. In either case he may be indicted at the assizes or sessions. (2 *Hawk.* c. 10, s. 46. See a form of Indictment, *post*.)

2. *How Chosen and compellable to serve.*

What an excessive fine.

In 1808 fines of 100*l.* had been imposed (and submitted to) for refusing the office of constable in Manchester, the parties fined not claiming exemption; since that time the duties of the office had greatly increased, and the number of resiants qualified to serve had diminished, and it was sworn that difficulty was expected in procuring persons to serve unless considerable fines were imposed for refusing: Held, that under these circumstances a fine of 300*l.* on a person merely refusing to serve by reason of an alleged exemption was excessive. (*R.* v. *Mosley*, 5 *Nev. & M.* 261; 3 *Adol. & Ell.* 488.)

Indictments for refusal.

It is advisable in all pleadings in any action concerning such a fine or amerciament, and in all indictments for such refusal, especially and expressly to set forth the manner of every such election, appointment, notice, and refusal, and before whom the Court was holden. And it hath been adjudged that it is insufficient to say in general that the party was duly elected or lawfully elected, or that he had notice, without setting forth the special circumstances thereof. Also it is said to have been adjudged that an indictment for not finding a sufficient person to serve the office of constable, without showing that the party refused to serve it himself, is insufficient. (2 *Hawk.* c. 10, s. 46; *Bac. Abr. Constable* (A.)).

R. v. *Brain*, 3 *B. & Adol.* 614.—An indictment charged that the defendant, being elected to the office of constable, had neglected and refused to take upon himself the execution of the office. The proof was, that he had refused to take the oath of office; and it was held, that that was *primâ facie* evidence of a refusal to take upon himself the execution of the office; and it was also held, on motion in arrest of judgment, that the indictment sufficiently charged an offence, by alleging that the defendant had wholly neglected and refused to take on himself the execution of the office, and that it was not necessary to state that he had refused to be sworn.

Custom of London.

By the custom of the city of London, all persons appointed constables on St. Thomas's Day attend at Guildhall on Plough Monday, and are sworn by the registrar; and those who, when vacancies occur, are appointed at any other period of the year, are sworn in before the registrar at the Lord Mayor's Court office. It was held, that that custom applied to all constables in the city of London, in whatever manner appointed, and that a party elected constable by the trustees under a local act was bound, after notice, to attend at the Lord Mayor's Court office to be sworn in. (3 *B. & Adol.* 614.) See further as to the consequences of refusing to fill an office, "*Office*," Vol. V.

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3. Paid Constables and Superintendents—Lock-up Houses.

A vestry may resolve to have paid constables.

By sect. 18 it is enacted, "That it shall be lawful for the vestry assembled for the purpose of making such return as aforesaid to resolve that one or more paid constables shall be appointed for their parish; and if the vestry shall so resolve, a copy of the resolution, and of the amount of salary which the vestry shall resolve on paying to such constable or constables, shall be sent by the overseers to the justices, with the return hereinbefore mentioned."

Justices to appoint paid constables.

Sect. 19. "That the justices at the sessions of the peace holden for the appointment of constables, upon receiving from any parish a copy of any such resolution as aforesaid, if they shall be satisfied with the amount of salary agreed to be paid, shall appoint so many paid constables to act for that parish as shall be agreed to by the resolution, or if the same resolution shall have been agreed to by more parishes than one adjoining each other, may, if they shall think fit, appoint the same paid constables to act conjointly for all such last-mentioned parishes; and in every parish in which a paid constable shall be appointed under this act the justices, if they shall think fit, need not appoint any unpaid constable, or may appoint a smaller number of unpaid constables than they had otherwise resolved on appointing for that parish; and every paid constable shall hold his appointment until he shall resign or be dismissed for misconduct by the justices of the division in petty session assembled, or until the vestry shall rescind the resolution for his appointment at any meeting of vestry holden for making such return as aforesaid." (See forms, *post*, 955-6.)

In parishes where paid constables are appointed none other need be.

Tenure of appointment.

Sect. 20. "That the amount of the salary to every such paid constable shall be paid by the overseers out of any monies in their hands collected for the relief of the poor."

3. *Paid Constables and Superintendents.*

Salary to be paid out of the poor rate.

Sect. 22. "That it shall be lawful for the justices of the peace of any county in general or quarter sessions assembled, if they shall think fit, to order that lock-up houses for the temporary confinement of persons taken into custody by any constable, and not yet committed for trial, or in execution of any sentence, shall be provided in such places within their county as the said justices shall think fit; and for that purpose to purchase and hold lands and tenements, or to appropriate to that purpose any lands and tenements belonging to the county which are not needed for the purpose to which they were applied or intended to be applied before such appropriation; or, instead of providing new lock-up houses, to order that the lock-up houses, strong rooms, or cages, belonging to any parish be appropriated for the purpose of this act, and if necessary be enlarged or improved; and the expense of building, hiring, or otherwise providing, repairing, and furnishing such lock-up houses shall be defrayed out of the county rates: provided always, that notice of the day and hour at which any business relating to providing, enlarging, or improving any such lock-up house will begin at such session shall be given by the clerk of the peace, with the notice of holding the session on the requisition of any five justices acting for such county; and that no such lock-up house shall be built or otherwise provided, enlarged or improved, except upon such plan as shall be approved by one of her Majesty's principal secretaries of state: provided also, that every such lock-up house shall be within the inspection of the inspectors of prisons."

Lock up houses and strong rooms to be provided.

Superintendents to be appointed and paid out of the county rates.

Sect. 23. "That whenever the justices shall have provided a lock-up house under this act, they shall also appoint a superintending constable to have the charge thereof, who shall have all the powers and immunities of a parish constable under this act, and shall have the superintendence of all the parish constables appointed in such parishes as shall be ordered by the said justices, and under such regulations as they shall make; and every such superintending constable shall be entitled to hold his office until dismissed by the justices in general or quarter session assembled, and shall receive such salary out of the county rates as the justices assembled as aforesaid shall order."

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4. Jurisdiction and Powers of, under 5 & 6 Vict. c. 103—Exemptions from toll.

Power of the constables.

By the 5 & 6 Vict. c. 109, s. 15, it is enacted, "That the said constables shall have within the whole county, and also within all liberties and franchises, and detached parts of other counties situated therein, and also in every county adjoining to the county in which they are appointed, all the powers, privileges and immunities, and shall be liable to all the duties and responsibilities of a constable within his constablewick, but shall not be bound to act as a constable beyond the parish for which they are severally appointed and sworn, without the special warrant of a justice of the peace: provided always, that in those counties in which any chief constable or superintendent shall have been appointed under the authority of an act passed in the third year of the reign of her present Majesty, intituled "*An Act for the Establishment of County and District Constables by the Authority of Justices of the Peace*," or of any act passed for the amendment thereof, the constables appointed under this act for any parish within the district for which such chief constable or superintendent shall have been appointed shall be subject to the authority of such chief constable or superintendent."

2 & 3 Vict. c. 93.

Horses, &c. in service of superintendent constables exempted from toll.

By the 7 & 8 Vict. c. 52, s. 3, it is enacted, "That no toll shall be demanded or taken on any turnpike road or bridge for any horse, or police van, carriage, or cart, passing along such road or bridge, in the service of a superintendent constable appointed under the provisions of the said act, provided that the superintendent constable in charge of such horse, van, carriage, or cart shall produce a certificate of his appointment, signed by the clerk of the peace of the county for which he shall have been so appointed, or shall have his dress

4. *Jurisdiction, Powers, and Exemptions of.*

according to the regulations of the said county, at the time of claiming the exemption; and every person who shall fraudulently claim or take the benefit of the exemption from toll herein contained not being lawfully entitled thereunto shall for every such offence be liable to a penalty not exceeding five pounds; and in all such cases the proof of exemption shall be upon the person claiming the same."

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5. Fees and Allowances under 5 & 6 Vict. c. 109.

Fees and allowances.

By the 5 & 6 Vict. c. 109, s. 17, it is enacted, "That the justices of the county in general or quarter session assembled shall from time to time, subject to the approval of one of her Majesty's principal secretaries of state, settle tables of fees and allowances to the clerks to the justices for the performance of their duties under this act, and to the constables for the service of summons and execution of warrants, and for the performance of such other occasional duties which may be required of the said constables, for which the said justices shall think that fees ought to be allowed; and whenever any duty for which any such fee or allowance shall have been settled, and for which the payment is not by law charged upon the county rates, shall have been performed by any clerk or by any constable appointed under this act, the amount of the fee or allowance shall be paid by the overseers of the parish in respect of which such fee has become payable out of any monies in their hands collected for the relief of the poor, upon the order of the justices in petty session assembled for the division, and under such regulations as shall be made from time to time by the justices in general or quarter session assembled, subject to the approval of the secretary of state." (*a*) (See the form, *post*, 955).

How paid.

(*a*) A Table of Fees and Allowances to the clerks to the justices of the peace and to the constables within the county of Surrey, for the performance of their duties under an act passed in the 5th and 6th years of the reign of her Majesty Queen Victoria, c. 109, intituled "*An Act for the Appointment and Payment of Parish Constables*," settled by the justices of the peace acting in and for the said county in quarter session assembled by adjournment on Monday the 5th day of December, in the year of our Lord 1842, and approved by the Right Hon. Sir James Graham, Bart. one of her Majesty's principal secretaries of state.

1. Justices' Clerks' Fees.	Fee. s.	Fee. d.	By whom payable.
"1. Every precept for holding special petty sessions for the appointment of constables	2	6	By the overseers of all the parishes in the division in equal proportions.
2. Notice to every justice and sending same—each notice	1	0	
3. List containing the names of all the constables appointed in the division, and the parishes for which they have been appointed, for every justice usually acting in the division, and sending same—each list	2	0	
And for the clerk of the peace, and sending same, including his fee of 2*s.* 6*d.*	4	6	
4. Every precept to overseers, requiring them to make out a list of men qualified and liable to serve as constables, with notice of special sessions, and a printed form of return to accompany the same, return thereto, verification thereof, and oaths, hearing objections thereto, allowance thereof, and list of the constables appointed in each parish by the overseers of that parish.....	5	6	The overseers of every parish in the division.
5. Every appointment of a constable or substitute, summons to each constable to appear and be sworn, and copy, oath of office, and certificate of the same	5	0	The overseers of every parish in the division in respect of every constable appointed for that parish.
The above fees, where applicable to be payable also in cases of vacancy.			
6. Every appointment of a paid constable, summons and copy, oath of office, and certificate (exclusive of the stamp)	7	6	Ditto.

6 Recovery and Application of Penalties under 5 & 6 Vict. c. 109

6. Recovery, &c of Penalties.

By sect. 24 it is enacted, "That all penalties herein made payable on conviction of any offender before two justices of the peace may be levied, in case

Recovery of penalties.

	Fee s.	d.	By whom payable.
7. Every precept for holding a special petty session for uniting a parish or parishes, or annexing extra parochial places to parishes	2	6	The overseers of all the parishes or places united in equal proportions
8. Notice to every justice and service—each notice	1	0	
9. Every order for uniting parishes or places	3	6	
10. Copy thereof for the overseers of every parish or place united, with the precept—each copy and service	2	0	
11 Every order for payment of clerks or constables' fees	1	0	The overseers of every parish

The foregoing table of fees and allowances to be in lieu of those settled by the general table of fees to be taken by the clerks to the justices of the peace within the said county, except fees for informations, summonses, convictions, &c. not herein settled, which are to be payable according to the said general table.

2. Constables' Fees.

	£	s.	d.
1. For the execution of every warrant, or the lawful apprehension of every person without a warrant, not exceeding	0	2	0
2. For the service of every summons, notice, order, or other document within the parish, except summonses for parochial or local rates	0	1	0
3. For the service of every summons for parochial or local rates within the parish	0	0	6
4. For every mile out beyond the limits of the parish, in each case, in addition to the above	0	0	6
5. For attendance before a magistrate, or at petty or special sessions, with a prisoner, or to prove the service of a summons, notice, order, or other document, or to make any return required by law, if on the day of apprehension, service, &c.	0	1	0
6. If on any subsequent day	0	2	6
7. For every mile out	0	0	6

The three last allowances to be made once only in a day although for the bringing up several prisoners, or proving the service of several summonses, if at the same time.

In the apprehension of vagrants or other persons with families, the parents only, and those above the age of sixteen, are to be considered as persons for whose apprehension fees are to be payable.

	£	s.	d.
8. For the apprehension and conveyance of a person to prison, on non-payment of a penalty, in default of distress, or such like cases, (exclusive of the expenses of conveyance and subsistence allowed by the county) after the rate per day of, not exceeding	0	5	0
9. For every night so employed, if allowed by a justice, after the rate per night of, not exceeding	0	3	6
10 For every day or part of a day, and for every night or part of a night, that a constable may be employed in search or pursuit of an offender, the removal of vagrants, the quelling of disturbances, or such like duties not before provided for, and expenses, if ordered or allowed by a magistrate, or in lieu of any of the above fees, if so directed by a magistrate, after the rate per day of, not exceeding	0	5	0
11 For every night or part of a night, in continuation of any day, or part of a day, after the rate per night of, not exceeding	0	3	6
12. If required for such purposes to go beyond the limits of the parish, at per mile out, in addition to the above	0	0	6

The five last mentioned fees, when allowed, to be in lieu of the foregoing allowances for execution of warrants, mileage, and attendance before a magistrate with a prisoner.

	£	s.	d.
13. For the conveyance of a prisoner to the gaol or houses of correction (exclusive of the expenses of conveyance and subsistence allowed by the county), after the rate per day of, not exceeding	0	5	0

6. *Recovery, &c. of Penalties.*

of nonpayment thereof, with the costs and charges attending such conviction, by distress and sale of the goods and chattels of the offender, by warrant.

	£	s.	d.
14. For every night so employed, after the rate per night of, not exceeding	0	3	6
As by this table of fees compensation is made to constables for their trouble and loss of time in the conveyance of prisoners to the gaol and houses of correction, it is desirable that the allowance for the expense of such conveyance, chargeable upon the county rate by the 27 Geo. II. c. 3, should be very strictly limited to the sum actually expended.			
15. For an assistant to a constable in any case if directed or allowed by a magistrate, after the rate per day of, not exceeding	0	2	6
16. And for every night so employed, after the rate per night of, not exceeding	0	2	6
17. If required to go more than two miles from his usual place of abode, at per mile beyond that distance	0	0	6
18. For subsistence of a prisoner in any case, when not chargeable upon the county, after the rate per day of, not exceeding	0	0	9
19. For subsistence and lodging of a prisoner in any case, when not chargeable upon the county, after the rate per night of, not exceeding	0	0	9
20. For conveyance of a prisoner in any case, when not chargeable upon the county, at per mile, in addition to the foregoing allowances for mileage	0	0	6
21. And for each additional prisoner	0	0	3
Whenever railways can be made available for conveyance, the allowance to be at second class railway fare, and conveyance to and from the railway, instead of mileage, at the discretion of the magistrate making the allowance.			
22. For the performance of all other occasional duties of constables where the population, according to the preceding census, does not exceed 1000, an annual allowance at the discretion of the justices in petty session of, not exceeding	5	0	0
23. And for every additional 500 of population an additional annual allowance at the discretion aforesaid of, not exceeding	2	0	0
The total to be divided in such proportions as the justices in petty session shall determine, between the constables where more than one are appointed for the same parish or place.			
The foregoing fees and allowances are not to apply or be allowed to paid constables appointed with salaries (which salaries shall be intended to be in lieu of fees and allowances), unless employed upon any duties which may require their going beyond the limits of their parishes, in which cases they shall be entitled to the mileages (or railway fare) herein specified for those duties, if allowed by the justices of the division assembled in petty sessions.			
Nor are any of the above allowances to apply or be made out of the poor rates, when constables attend as witnesses and allowances for their time and expenses are made and comprised in the magistrate's certificate of expenses granted before trial, pursuant to the provisions of 7 Geo. IV. c. 94, s. 22.			

It is ordered by this Court, that for the purpose of preventing inaccuracies, every constable shall provide himself with a book in which shall be inserted every charge he is entitled to make under the foregoing table of fees and allowances at the time of its occurrence.

And it is also ordered, that at the same time some one of the justices by whom the case may be heard, or by whom any direction or authority may have been given, shall examine and determine such charges, and, if satisfied therewith, shall affix his initials thereto; and no charges (except such as are authorised to be made periodically) shall be allowed upon the application for an order for payment that have not such initials affixed.

And it is further ordered, that each constable shall keep a register of such occasional duties as he may perform.

Lastly, it is ordered, that the accounts of the clerks to the justices and of the several constables, for the performance of their duties, for which payment is not by law chargeable upon the county rates, shall be produced by them respectively to

under the hands and seals of any justice of the peace of the county, riding or place wherein such conviction shall have taken place, with the reasonable costs of such distress and sale; and the overplus, if any, shall be returned to the party whose goods and chattels shall have been distrained."

6. *Recovery, &c. of Penalties.*

Sect. 25. "That all penalties levied under this act shall be applied in aid of the poor rates of the parish in which the offence shall have been committed for which such penalties shall be levied."

Application of penalties.

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7. Interpretation of 5 & 6 Vict. c. 109.

Sect. 26. "That in this act the word 'county' shall be taken to extend to every riding or division of a county for which there is a separate court of general or quarter sessions of peace; and the word 'parish' shall be taken to extend to every township or other district maintaining its own poor, and also to every extra-parochial place which shall not be annexed to an adjoining parish, for which places the justices in petty sessions assembled shall be empowered to appoint persons to act as overseers; and the word 'overseers' shall be taken to extend to all persons charged with collecting rates for the relief of the poor in any parish, and, in extra-parochial places not added to any adjoining parish, to the persons appointed by the justices as aforesaid."

Interpretation of act.

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8. Power and Duty of Constables as Conservators of the Peace, &c.

Every high and petty constable is by the common law a conservator of the peace. (2 *Hawk.* c. 8, s. 6; *Crom.* 6; *Dalt.* c. 1; *ante*, 273.)

Constable a conservator of the peace.

And, therefore, if any man shall make an affray or an assault upon another *in the presence of a constable*, or shall threaten to kill, beat, or hurt another, or shall be in a fury ready to break the peace, the constable may commit him to the stocks, or other safe custody for the present, and after may carry him before a justice or to gaol, until he shall find surety for the peace, which surety the constable himself may also take by obligation, to be sealed and delivered, to the queen's use; and if the party will not find surety to the constable, he may imprison the party until he shall do it. (*Dalt.* c. 1.)

A collector of land-tax, though he is not entitled by statute, or under his general authority, to take a constable with him into the house of a person from whom he is demanding payment of an arrear of the land-tax, may, if he has reasonable ground from past or present circumstances to apprehend violence from such person, call in constables to assist in keeping the peace, and such constables are justified in staying while the collector remains to be paid, as long as there is reason to expect violence; and if the owner of the house use violence to remove them, he is indictable for assaulting a peace officer in the execution of his duty. (*Rex* v. *Clark*, 3 *Ad. & Ell.* 287.)

But a constable has not, without a warrant, any authority to arrest for a breach of the peace or other misdemeanor not committed in his presence, after it is over, unless from the conduct of the offender in the constable's presence there be reasonable ground for supposing that he will be guilty of some further breach of the peace or misdemeanor.

As regards, however, charges of *felony*, a constable has authority to arrest and should arrest a party, though the constable has no warrant, upon a positive charge of felony made against him, and there being reasonable ground for suspecting him guilty of it.

For the authorities in support of these positions and for further information on this subject, and as to what the constable should do after the arrest, see *ante*, title "*Arrest*," p. 278, 279.

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the justices in petty sessions once in each quarter of the year, in order that the same may be audited and allowed, and orders made for their payment out of the poor rates of the respective parishes liable to the same."

"By the Court."

The above table is given as an example merely, as it appears that the fees settled by the justices of different counties and approved by the secretary of state are not similar.

8. *Power and Duty of.*

Constable may require any person to aid and assist him in the execution of his duty in quelling a riot.

A person may be indicted for refusing.

To support an indictment against a person for refusing to aid and assist a constable in the execution of his duty in quelling a riot, it is necessary to prove—1st, that the constable saw a breach of the peace committed; 2nd, that there was a reasonable necessity for calling on the defendant for his assistance; and 3rd, that when duly called upon to assist the constable, the defendant, without any physical impossibility or lawful excuse, refused to do so; and in such a case it is no ground of defence that from the number of rioters the single aid of the defendant would not have been of any use. (*Reg.* v. *Brown*, 1 *Car. & M.* 314.)

A person charged to aid a constable, and who does so, is protected *eundo, morando, et redeundo.* (*Reg.* v. *Phelps*, 1 *Car. & M.* 180.)

Presentments by constables.

By ancient custom (that is, by the common law of the land,) before the coming of the judges, the high constables issue their warrants to the petty constables, headboroughs, borsholders, &c. to make presentments of all crimes and offences cognizable at the assizes; to the intent (as it seemeth) that the judges thereby may have a general information and knowledge how the peace hath been kept, which presentments being delivered to the high constables, are by them delivered into Court, and make up part of the rolls and other remembrances above mentioned.

Which warrants of the high constables may be best drawn up in the words of the commission of oyer and terminer, which is the largest of all the five commissions mentioned under title "*Assizes*," *ante*. See the forms, *post*, 957.

In certain matters presentments by constables no longer requisite.

By 7 & 8 Geo. IV. c. 38, after reciting that "in some parts of England the petty constables of the several parishes have, from a very remote period, been required to appear at a petty sessions held previously to every general gaol delivery and quarter session for the county in which such parishes are situate, and to make and sign before the justice or justices of the peace attending such petty session certain presentments of various indictable and other offences: and whereas the said presentments are attended with considerable expense and loss of time, and have, in consequence of modern legislative provisions, become useless and improper:" it is enacted, "that from and after the passing of this act, no petty constable shall be required, at any petty session or elsewhere, to make, nor shall any high constable be required at any general gaol delivery, great session, or general or quarter session of the peace in England, to deliver any presentment respecting popish recusants, persons absenting themselves from their parish church or any other place of religious worship licensed by authority, rogues and vagabonds, inmates, retailers of brandy, ingrossers, forestallers, regraters, profane swearers and cursers, servants out of service, felonies and robberies, unlicensed or disorderly alehouses, false weights and measures, highways and bridges, riots, routs and unlawful assemblies, and whether the poor are well provided for, and the constables are legally chosen and sworn."

Presentments for non-repair of highways.

It was holden in *R.* v. *Bridgewater Canal Comp.* (7 *B. & Cres.* 514; 1 *Man. & Ry.* 272), that where a high constable presents persons for a nuisance in a highway, he must go before the grand jury and give his evidence on oath. Now, however, by the 5 & 6 Will. IV. c. 50, s. 99 (Vol. III.) presentments for the non-repair of highways are abolished.

See also various duties of constables collected under titles, "*Alehouses*," "*Affray*," "*Bawdy Houses*," "*Blasphemy*," "*Bridges*," "*County Rate*," "*Customs*," "*Disorderly Houses*," "*Fires*," "*Gaming Houses*," "*Harvest*," "*Hawkers and Pedlars*," "*Hue and Cry*," "*Lunatics*," "*Military Law*," "*Plague*," "*Poor*," "*Presentments*," "*Riots*," "*Servants*," "*Sessions*," "*Vagrants*," "*Warrant*," "*Weights*," "*Wrecks*," &c.

In boroughs.

As to the duties of constables in corporate boroughs, see the 5 & 6 Will. IV. c. 76, s. 78, 79, title "*Corporations*," Vol. II.

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9. Duty of, as Officers to Justices and in executing Warrants.

Is the officer to justices.

It hath always been holden that the constable is the proper officer to a justice of the peace, and bound to execute his warrants; and therefore it hath been resolved, that where a statute authorises a justice of the peace to convict

a man of a crime, and to levy the penalty by warrant of distress, without saying to whom such warrant shall be directed, or by whom it shall be executed, the constable is the proper officer to serve such warrant, and indictable for disobeying it. (2 *Hawk.* c. 10, s. 35.)

8. *Power and Duty of.*

Formerly a distinction existed between warrants directed to constables by *name* and such as were directed to them by the *description of their office.* It was considered in the former case, that a constable might execute the warrant anywhere within the jurisdiction of the magistrate issuing it; in the latter, only within the precincts of his office. (*R.* v. *Weir*, 1 *B. & Cres.* 288; 2 *D. & R.* 444, S. C.)

Constables may execute warrants out of their precincts, provided it be within the jurisdiction of the justice granting or backing the same.

Now, however, stat. 5 Geo. IV. c. 18, s. 6, reciting, "that warrants addressed to constables, headboroughs, tithingmen, borseholders or other peace officers of parishes, townships, hamlets or places, in their characters of and as constables, headboroughs, tithingmen, borseholders or other peace officers of such respective parishes, townships, hamlets or places, cannot be lawfully executed by them out of the precincts thereof respectively, whereby means are afforded to criminals and others of escaping from justice;" for remedy thereof enacts, "that it shall and may be lawful to and for each and every constable, and to and for each and every headborough, tithingman, borseholder or other peace officer for every parish, township, hamlet or place, to execute any warrant or warrants of any justice or justices of the peace, or of any magistrate or magistrates within any parish, township, hamlet or place, situate, lying or being within that jurisdiction for which such justice or justices, magistrate or magistrates, shall have acted when granting such warrant or warrants, or when backing or indorsing any such warrant or warrants, in such and the like manner as if such warrant or warrants had been addressed to such constable, headborough, tithingman, borseholder or other peace officer, specially by his name or names, and notwithstanding the parish, township, hamlet or place in which such warrant or warrants shall be executed shall not be the parish, township, hamlet or place for which he shall be constable, headborough, tithingman or borseholder, or other peace officer, provided that the same be within the jurisdiction of the justice or justices, magistrate or magistrates so granting such warrant or warrants, or within the jurisdiction of the justice or justices, magistrate or magistrates by whom any such warrant or warrants shall be backed or indorsed." See "*Distress under Justices' Warrant,*" Vol. II.

Inasmuch as before the passing of this act a constable was in no case *bound*, but only authorised, to execute a warrant addressed to him by name, *out of the precincts of his office*, neither is it now incumbent on him to execute such warrant beyond the boundary of his jurisdiction. (*Gimbert* v. *Coyney*, 1 *M'Clel. & Y.* 469.) The act merely puts warrants addressed to peace officers in their official character on the same footing as warrants addressed to them by name previously stood.

But it does not extend the constable's authority beyond what he had power to do by a bench warrant before it passed. The act is also intended to apply to justices of the peace with limited jurisdiction. The statute, therefore, does not apply to warrants issued by the judges of the Court of Queen's Bench, but is confined to warrants issued by justices of the peace having a limited jurisdiction only. (*Gladwell* v. *Blake*, 1 *Crom. M. & R.* 636.)

Mode of executing warrant.

The mode of executing warrants, and the law relative to the breaking open of doors under them, will be found under title "*Warrant,*" Vol. VI.

A constable, who is conveying a party to prison under a magistrate's order, under 49 Geo. III. c. 68, for nonpayment of a certain sum under an order of filiation and maintenance, is not bound to discharge his prisoner on tender of that sum. (*Atkins* v. *Kelly*, 11 *Ad. & Ell.* 222.)

As to the mode of executing warrants of commitment under the County Constables' Act, see 3 & 4 Will. IV. c. 88, s. 33, *post*, Sect. III.

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10. Punishment for Neglect of Duty.

By the 5 & 6 Vict. c. 109, s. 12, (*ante*, 901,) parish constables refusing

10. *Punishment for neglect.*

to act in the execution of their office are liable for every offence to a penalty of 5*l.*

As to the punishment of county constables for neglect of duty, see 2 & 3 Vict. c. 93, s. 12, *post*, 933.

Indictment for neglect.

At common law it was the duty of a constable to execute the legal warrants of justices of the peace, and to perform the functions of his office with reasonable dispatch and care; and his omission so to do, or his misconduct or extortion in his office, is punishable by indictment, upon which fine or imprisonment may be adjudged against him. (2 *Hawk.* c. 10, s. 35; 2 *Hale*, 90.)

How far one constable liable for act of the other.

If there be two constables appointed for a certain precinct, they are both officers throughout the whole of it, and each is responsible for any mischief from the neglect of duty throughout the whole, and punishable for not discharging his duty in every part of it, although there may have been a long continued usage for each of them to act only for one particular part of the precinct. (*R.* v. *Taunton*, 3 *M. & Sel.* 470.)

Liable for deputy.

As to the liability of constables for their deputies, see *ante*, p. 895.)

Justices may impose a fine.

By stat. 33 Geo. III. c. 55, s. 1, "it shall and may be lawful for any two or more of his majesty's justices of the peace, assembled at any special or petty sessions of the peace, upon complaint being made upon oath before them of any neglect of duty, or of any disobedience of any lawful warrant or order of any justice or justices of the peace by any constable, overseer of the poor, or other peace or parish officer, or upon complaint made to such two or more justices upon oath, by or on the behalf of any apprentice to any trade or business whatsoever, whether bound apprentice by any parish or township or otherwise, provided that not more than the sum of 10*l.* be paid upon the binding of such apprentice, against his or her master or mistress, of any ill usage of such apprentice by such master or mistress (such constable, overseer, or other officer, master, or mistress, having been duly summoned to appear and answer such charge or complaint), to impose, upon conviction, any reasonable fine or fines, not exceeding the sum of 40*s.*, upon such constable, overseer, or other officer, master or mistress respectively, as a punishment for such disobedience, neglect of duty, or ill usage, and by warrant under the hands and seals of any two or more of such justices, assembled at any such special or petty sessions as aforesaid, to direct such fine or fines, if not paid, to be levied by distress and sale of the goods and chattels of the person or persons so offending, rendering the overplus, (if any,) after deducting the amount of such fine or fines, and the charges of such distress and sale, to such offender or offenders; and such fine or fines which may be imposed upon any such constable, overseer, or other officer as aforesaid, shall be applied and disposed of for the relief of the poor of the parish, township, or place, where the offenders shall respectively reside, at the discretion of the justices imposing the same, and such fine or fines, which may be imposed upon any such master or mistress, shall, at the discretion of the justices imposing the same, be either so applied and disposed of as aforesaid, or be otherwise paid and applied to or for the use and benefit of such apprentice, for or towards a recompense or compensation for the injury which may have been by him or her sustained by reason of such ill usage as aforesaid; and if any person shall be aggrieved by the imposition of such fine or fines as aforesaid, or by any order or warrant of distress for raising or levying the same, or by the judgment or determination of the said justices, or by any act to be done in the execution of such warrant of distress, such person or persons so aggrieved shall and may appeal to the next general or quarter sessions of the peace to be held for the county, riding, or division, within which such person shall reside, of which appeal ten days' notice at the least shall be given; and for want of such distress, such person or persons shall be committed to the house of correction for any space of time not exceeding ten days."

Appeal.

Persons not trespassers for irregularities of proceedings.

Sect. 2. "No person acting under any such warrant of distress as aforesaid shall be deemed a trespasser *ab initio*, by reason of any irregularity or informality in such warrant, or in any proceedings thereon; but any person aggrieved by the issuing or execution of such warrant may recover the spe-

cial damages thereby by him or her sustained, in an action of trespass, or on the case, in any of his majesty's courts of record."

10. *Punishment for neglect.*

But by the stat. 27 Geo. II. c. 20, s. 2, the officer executing such warrant, if required, shall show the same to the person whose goods and chattels are distrained, and shall suffer a copy thereof to be taken. (See "*Warrant*," Vol. VI.)

Officer to show warrant.

By stat. 5 Geo. IV. c. 83, s. 11, "in case any constable or other peace officer shall neglect his duty in any thing required of him by this act, or in case any person shall disturb or hinder any constable or other peace officer in the execution of this act, or shall be aiding, abetting, or assisting therein, and shall be thereof convicted upon the oath of one or more credible witness or witnesses before one or more justice or justices of the peace where such offence shall be committed, every such offender shall for every such offence forfeit any sum not exceeding 5*l.*; and in case such offender shall not forthwith pay such sum so forfeited, the same shall be levied by distress and sale of the offender's goods, by warrant from such justice or justices; and if sufficient distress cannot be found, it shall be lawful to and for one or more such justice or justices to commit the person so offending to the house of correction, there to be kept for any time not exceeding three calendar months, or until such fine be paid; and the said justice or justices shall cause the said fine, when paid, to be forthwith delivered to the treasurer of the county, riding, division, or place, where such offence shall have been committed, to be by him added to and used as part of the stock of the said county, riding, division, or place."

Penalty on officers neglecting their duties under Vagrant Act.

Sect. 12. "In case any constable or other peace officer shall be convicted before any one or more justice or justices of the peace, for any neglect of any duty required of him by this act, or of any disobedience of any lawful warrant or order of any justice or justices of the peace issued under the provisions of this act, and in case any two or more justices of the peace shall impose any fine, or direct any penalty to be paid by such officer, under and by virtue of the powers given to justices of the peace by an act passed in the thirty-third year of the reign of his late majesty King George the Third, intituled '*An Act to authorise Justices of the Peace to impose Fines upon Constables, Overseers, and other Peace or Parish Officers, for neglect of Duty, and on Masters of Apprentices for Ill Usage of such their Apprentices, and also to make Provision for the Execution of Warrants of Distress granted by Magistrates*,' or under any other powers enabling such justices in that behalf, then and in every such case it shall be lawful for every such justice or justices, upon conviction of any such offender, to reimburse and allow to the person or persons on whose complaint or information such offender shall have been convicted, all necessary costs and expenses which such person or persons may thereby have incurred, or by any appeal made in consequence thereof, by making an order under his or their hands and seals upon the treasurer of the county, riding, division, or place, to pay to such person or persons the amount of such costs and expenses, on producing the said order and giving a receipt for the same, and the same shall be allowed the said treasurer in his accounts." (See "*Vagrants*," Vol. VI.)

On conviction of officers, &c. justices to make order for payment of expenses of prosecution.

As to the penalties attendant on constables relating to "*Alehouses*," "*County Rates*," "*Disorderly Houses*," "*Excise*," "*Highways*," and "*Militia*," see those titles respectively.

As to the punishment of constables in boroughs for neglect of duty, see "*Corporations*," *post*, Vol. II.

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11. Indemnity and Protection of.

It is an indictable offence at common law to assault or interfere with a constable or peace officer whilst in the execution of his office. (See *post*, "*Escape*," Vol. II.; "*Rescue*," Vol. V.)

Assaulting or obstructing.

We have seen, *ante*, 293, title "*Assault*," that by the 9 Geo. IV. c. 31, s. 25, where any person shall be convicted of any assault upon any peace officer in the due execution of his duty, or upon any person acting in aid of such officer,

Punishment for.

11. *Indemnity and Protection of.*

the Court may sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years, and may also fine him, and require him to find sureties for keeping the peace.

Constables acting under the Larceny or Malicious Injuries' Acts.

As to the protection of constables and persons acting without warrant under the 7 & 8 Geo. IV. c. 29, relating to larceny, see "*Larceny*," Vol. III.; and as to the protection of constables, &c. acting under the 7 & 8 Geo. IV. c. 30, relating to malicious injuries, see "*Malicious Injuries to Property*," Vol. V.

Metropolitan police.

By the Metropolitan Police Act, 10 Geo. IV. c. 44, s. 8, persons assaulting or resisting police officers, or assisting therein, are subject to a penalty of not exceeding 5*l.*, to be recovered before two justices. (See "*Police*," Vol. V.) Sect. 40 of that act entitles a metropolitan police officer to a notice of action for any act done by him as such. (See "*Police*," Vol. V. p. 575.) The 2 & 3 Vict. c. 71, s. 52, 53, also entitles a police officer to a notice of action, limits the time for bringing such action, and enables him to tender amends. (See "*Police*," Vol. V. p. 605, 606.)

Special constables.

As to the protection of special constables from assaults, &c. see 1 & 2 Will. IV. c. 41, s. 11, *post*, 945.

Justification by constables at common law.

Where a constable justifies his acts at common law under the warrant of a justice of the peace, the justification is insufficient, unless it shows that the justice had jurisdiction over the subject-matter upon which the warrant was granted. And though no want of jurisdiction appears on the face of the warrant, still the officer is not protected by it for what he does under it, unless the justice who issued it had jurisdiction in the case. (*Morell* v. *Martin*, 4 *Scott, N. R.* 306. But see *Andrew* v. *Marris*, 1 *Q. B.* 3; *Carratt* v. *Morley*, 1 *Q. B.* 18.)

By statute.

But the statute 24 Geo. II. c. 44, affords protection to constables acting under warrants in cases where the justice issuing them had no jurisdiction.

Not liable if he deliver a copy of the warrant.

By that statute, s. 6, it is enacted, "that no action shall be brought against any constable, headborough, or other officer, or against any person or persons acting by his order and in his aid, *for any thing done in obedience to any warrant under the hand or seal of any justice of the peace*, until demand hath been made or left at the usual place of his abode, by the party or parties intending to bring such action, or by his, her, or their attorney or agent, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected for the space of six days after such demand; and in case after such demand and compliance therewith, by showing the said warrant to, and permitting a copy to be taken thereof by the party demanding the same, any action shall be brought against such constable, headborough, or other officer, or against such person or persons acting in his aid for any such cause as aforesaid, without making the justice or justices who signed or sealed the said warrant defendant or defendants, that on producing or proving such warrant at the trial of such action, the jury shall give their verdict for the defendant or defendants, notwithstanding any defect of jurisdiction in such justice or justices; and if such action be brought jointly against such justice or justices, and also against such constable, headborough, or other officer, or person or persons acting in his or their aid as aforesaid, then on proof of such warrant the jury shall find for such constable, headborough, or other officer, and for such person or persons so acting as aforesaid, notwithstanding such defect of jurisdiction as aforesaid; and if the verdict shall be given against the justice or justices, that in such case the plaintiff or plaintiffs shall recover his, her, or their costs against him or them, to be taxed in such manner by the proper officer as to include such costs as such plaintiff or plaintiffs are liable to pay to such defendant or defendants for whom such verdict shall be found as aforesaid."

Demand of warrant must be made.

Action must be brought against him and the justice jointly.

Costs.

No action but within six months.

Sect. 8. "No action shall be brought against any justice of the peace for any thing done in the execution of his office, or against any constable, headborough, or other officer, or persons *acting as aforesaid*, unless commenced within six calendar months after the act committed."

By stat. 7 Jac. I. c. 5 (made perpetual by 21 Jac. 1. c. 12), if an action is

brought against a constable for any thing done *by virtue of his office*, he, and also all others which in his aid, or by his command, shall do a thing concerning his office, may plead the *general issue*, and give the special matter in evidence; and if he recover, he shall have *double costs*. (See the enactment in full, "*Justices*," Vol. III. p. 1042.) This enactment as to double costs is now repealed by the 5 & 6 Vict. c. 97, s. 3, *post*.

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General issue.

Double costs.

Sect. 5. Such action shall be laid in the county where the fact was committed, and not elsewhere.

Venue local.

The object and purport of the 6th and 8th sections of the 24th Geo. II. differ very materially. The legislature intended by the 6th section to prevent the constable or other officer, when acting in *obedience* to the warrant, from being answerable on account of any defect of jurisdiction in the justice, and to afford him an absolute protection at whatever period of time the action might be brought against him; by the 8th section, to absolve him from responsibility to the law, after the lapse of six calendar months, where he has acted not in strict obedience to his warrant, but *bonâ fide* and in *supposed* obedience thereto. (*Parton* v. *Williams*, 3 *B. & Ald.* 330; *Smith* v. *Wiltshire*, 2 *B. & B.* 619; 5 *Moore*, 320, S. C.) *Et per Abbott*, C. J. in the case of *Parton* v. *Williams*, "The legislature manifestly had very different objects in view in the 6th and 8th sections of the statute upon which the present question arises. By the common law, an officer who merely executed the warrant of a magistrate was answerable for the consequences, if the magistrate acted without authority. One object, therefore, of the legislature was to relieve the officer from that inconvenience, and to provide that if he acted in obedience to the warrant of the magistrate, he should be protected. That was the object of the 6th section, which makes it necessary to demand a copy of the warrant from the officer before he can be sued. If he gives that copy, although the party may be entitled to an action against the magistrate, yet if he joins the officer in it, the production of the warrant will be a protection to the latter, and will entitle him to a verdict. The 6th section is, therefore, obviously intended to protect the officer in those cases only where the justice remains liable. And it is necessary, in order to bring the officer within it, that he should act most strictly in obedience to his warrant. And in that case the statute gives him an absolute protection at whatever time the suit may be brought against him. To give him any further protection, when he has so acted does appear to me to be wholly useless. For I cannot understand why a limitation of time is to be imposed upon any action which the legislature has dsclared not to be maintainable at all. The 8th section must, therefore, have a very different object in view. It enacts 'that no action shall be brought against any justice of the peace for any thing done in the execution of his office, or against any constable, headborough, or other officer or persons acting as aforesaid, unless within six calendar months after the act committed.' The justice, therefore, is protected absolutely, unless the action be brought within that period of time: he has the benefit of that statutable limitation for whatever he may do in the execution of his office, although he may do something not authorised by law. This provision, therefore, is evidently intended for the benefit of persons who intend to act right, but by mistake act wrong. The section then proceeds to state, 'or against any constable, headborough, or other officer or person, *acting as aforesaid*.' And it has been argued that these latter words imply that the officer must be acting in obedience to the warrant to be entitled to the protection. But I am of opinion that they are to be taken as equivalent to those words of the 6th section, 'acting by his order and in his aid,' in which case they are coupled with the antecedent word 'person' alone. I have already assigned the reasons which induce me to think that this provision cannot be confined to cases within the protection of the 6th section. It may, perhaps, be too much to say that it will apply in all cases where the officer may have acted in what he may have supposed to have been the due execution of his duty. It is, however, unnecessary to decide that point here. Nor is it necessary to pronounce any opinion upon the case of *Postlethwaite* v. *Gibson* (to be found in 3 *Esp. Rep.* 226), where Lord *Kenyon* thought

Object and purport of statute of 24 Geo. 2, c. 44.

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that unless the officer had a warrant, he was not protected by the 8th section. If it were necessary to determine whether a constable, who without a warrant acts in the execution of his office, and in the discharge of his ordinary duty, be entitled to the protection of this statute, I should wish for further time to consider of it. But in *Postlethwaite* v. *Gibson* the constable was not acting in the execution of his ordinary duty; for it is no part of that duty to arrest a man for felony upon the order of a private individual. Any person who is not a constable may equally do it; but both do it at their peril. If it turn out that the party arrested has committed a felony, then they are justified. Here, however, the constable had a warrant, directing him to take the goods of *William Parton*. He went to the house where he really supposed those goods were to be found; and it occupied a jury a very considerable time to decide whether he was mistaken or not: he meant, therefore, to obey the warrant, and, as far as he was concerned, he was acting *bonâ fide* in obedience to it. It afterwards, however, turned out that the goods belonged to the plaintiff, and, therefore, he was not obeying the warrant of the justice so as to make the justice responsible. As I consider, however, that the 8th section was intended to give a benefit in addition to that given by the 6th section, it appears to me that this case falls within it. And I think also that the officer, as far as regards himself, and as far as regards the law which protected him, may be considered as having acted *bonâ fide* in obedience to the warrant which he had received. This action ought, therefore, to have been brought within the period of six months." (And see *Kay* v. *Grover and another*, 7 *Bingh.* 312; 2 *M. & R.* 634, S. C.; *Beechey* v. *Sides*, 9 *B. & Cres.* 806; 4 *M. & Ry.* 634, S. C.; Vol. III. p. 1033.)

Demand of warrant.

When constable is protected by the act.

DEMAND OF WARRANT. *When necessary, and when the Constable is protected by the 6th section of the* 24 *Geo. II. c.* 44.]—The object of this section of the act was the protection of those officers who are charged with the execution of magistrate's warrants, issued beyond their jurisdiction, the officers being before that time subject to indictment if they did not execute the warrants directed to them, or to vexatious actions if they did. (See *per Lawrence*, J., 5 *East*, 448.) In fact the object of the enactment is to make the magistrate alone liable where he has exceeded his jurisdiction. When, therefore, the constable has done an act in *obedience* to the warrant of a magistrate, *he* cannot be sued, but only the magistrate who has exceeded his jurisdiction, provided the constable give a copy of his warrant after the demand in pursuance of the 24 Geo. III. c. 44, s. 6. But where a constable has no warrant at all, or has acted beyond his authority, then he is liable, and no demand of the copy of the warrant is necessary.

Thus if the warrant direct the officer to seize "stolen goods," and he seizes goods which fall within the description contained in the warrant in other respects, although they turn out not to be stolen, he is still under the protection of the statute, and it is immaterial whether the warrant be legal or not. (*Price* v. *Messenger*, 2 *Bos. & Pul.* 158; 3 *Esp.* 96, S. C.)

And a constable who assists a parish officer in levying a distress for poor's rates, under a warrant of magistrates directed to such officers, is not liable to an action of trespass, although a demand was duly made on such constable in pursuance of the 24 Geo. II., because the demand ought to be made of the parish officer. (*Clarke* v. *Devey*, 4 *Moore*, 465.)

Where magistrates acting under the 50 Geo. III. c. 49, examine overseers' accounts, declare a balance, and make an order for the payment of that balance, and then issue a warrant to levy the amount by distress, they cannot, merely on the ground of a doubt whether they have correctly ascertained the balance, withdraw the warrant, and so render the constable liable as a trespasser. And in such a case there must be a demand of a copy of the warrant before any action brought against the constable. (*Barrons* v. *Luscombe*, 3 *Ad. & Ell.* 589.)

So where the defendant, a constable, justified the assault and imprisonment of the plaintiff, under a magistrate's warrant of commitment, it was objected to this warrant, that it erroneously recited, that the plaintiff was then present

to hear the complaint in another county; and that on the indorsement of it for execution by a magistrate of the county where the plaintiff was, it did not appear that the handwriting of the committing magistrate had been proved according to 24 Geo. II. c. 55, s. 1. But it was held, that if these objections were tenable, they showed "defect of jurisdiction" in the magistrates, but did not deprive the constable of the protection given him by the warrant, under 24 Geo. II. c. 44, s. 6. (*Atkins* v. *Kilby*, 4 *Per. & D.* 145; 11 *Ad. & E.* 777, S. C.)

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A constable appointed under the Municipal Corporation Act, 4 & 5 Will. IV. c. 76, s. 76, when discharging the duty of a constable at common law, is entitled to the protection of 7 Jac. I. c. 5. (*Maberley* v. *Titterton*, 7 *M. & W.* 540.)

In another case, where a local act of parliament for lighting and watching the town of Staleybridge, empowered the commissioners therein named to appoint constables for keeping the peace in the said town, and for executing all such warrants, &c. as the justices of Cheshire or Lancashire should direct to them to be executed within the town, and another section enacted that no plaintiff should recover in any action against any party for anything done in pursuance of the act, without twenty-one days' notice of action having been given; it was held, that a constable appointed under the act, who was sued in trespass for breaking and entering the plaintiff's house in the town of Staleybridge, in the execution of a warrant granted by a justice of Cheshire, to search for goods alleged to have been clandestinely removed there to avoid a distress under the 11 Geo. II. c. 19, s. 7, was not entitled to notice of action. But such a constable would be entitled to all the general privileges of other constables. (*Shatwell* v. *Hall*, 10 *M. & W.* 523.)

When he is not protected.

On the other hand, the constable is not protected from an illegal act if he had no warrant at all; (*Postlethwaite* v. *Gibson*, 3 *Esp.* 226;) or if he acted beyond the limits of the authority given him by the warrant, although he acted *bonâ fide*. (*Money* v. *Leach*, 3 *Burr.* 1768; *Prestidge* v. *Woodman*, 1 *B. & C.* 13; 2 *D. & R.* 43, S. C.)

And, generally speaking, he is not protected from an illegal act, done under a warrant, unless the magistrate is liable, and in such cases a demand of the warrant is not necessary. (*Sly* v. *Stevenson*, 2 *C. & P.* 464; *Bell* v. *Oakley*, 2 *M. & Sel.* 260; *Sturch* v. *Clarke*, 1 *Nev. & M.* 671; 4 *B. & Adol.* 113; *Cotton* v. *Kadwell*, 2 *Nev. & M.* 299.)

Therefore where a constable, having a warrant to search for certain *specific* goods, alleged to have been stolen, found and took away those goods and certain others, also supposed to have been stolen, but which were not mentioned in the warrant, and were not likely to be of use in substantiating the charge of stealing the goods mentioned in the warrant; it was held, the constable was liable to an action of trespass, without any demand of the warrant. (*Crozier* v. *Cundy*, 6 *B. & Cres.* 232; 9 *D. & R.* 224, S. C.)

Where a constable, acting under a warrant to take the goods of A., took the goods of B., believing them to belong to A.; the Court of Queen's Bench were clearly of opinion that he was liable, without any demand of the warrant. (*Parton* v. *Williams*, 3 *B. & Ald.* 330, *ante*, 912.)

In an action by A. against B., a constable, for false imprisonment, B. cannot defend himself under a magistrate's warrant against C., although A. was charged with felony before the magistrate, and was the person against whom the warrant was intended to issue, and a demand of a perusal and copy of the warrant is in such case unnecessary. (*Hoye* v. *Bush*, 2 *Scott, N. R.* 86; 1 *Man. & G.* 775, S. C.)

And it was so held, where under a warrant against the goods of A., the defendant, an overseer, took goods already in the hands of the bailiff of A.'s landlord as a distress for rent. (*Kay* v. *Grover and another*, 7 *Bing.* 312; 3 *M. & P.* 643, S. C.)

Neither is such a demand necessary, if, under a warrant to take up a disorderly person, the constable take up one that is not so; or, under a warrant to take up the author, printer, or publisher of a libel, he take up one who was neither author, printer, or publisher. (*Money* v. *Leach*, 3 *Burr.* 1768.)

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Nor if, in order to levy a poor's rate under a warrant of distress granted by two magistrates, he break and enter the party's house, and break the windows, &c. (*Bell* v. *Oakley*, 2 *M. & Sel.* 259; fully noticed "*Poor*," Vol. IV.)

Nor if, under a warrant of distress, he make an excessive distress. (*Sturch* v. *Clarke*, 1 *Nev. & M.* 671; 4 *B. & Adol.* 113, S. C.)

Nor where he executes the warrant out of the jurisdiction of the magistrate without being expressly authorised by the warrant so to do. (*Milton* v. *Green*, 5 *East*, 233; 1 *Smith*, 402, S. C.) In that case goods were taken by constables under a warrant of distress, granted by a justice of the peace for the county of Kent, directed, "To the constables of the lower half hundred of C. and G. in the county of Kent;" which warrant recited, that the plaintiff, (whose goods were distrained), of the parish of G. in the said county, was balloted for the militia of the said county, and having refused to serve, &c. was convicted in a certain penalty, for levying which the warrant was granted. The Court of King's Bench held, that if the warrant turned out to have been executed within a certain part of the parish of G. *within the jurisdiction of the cinque ports*, and *not within the county of Kent*, the constables were not within the protection of stat. 24 Geo. II. c. 44, s. 6, and might be sued in trespass without the magistrate being made a defendant.

The demand is only necessary where the constable acts within his jurisdiction in obedience to the warrant. Therefore where a bench warrant, issued by a judge of the Q. B., was executed by a constable, to whom it was not directed, out of his own district, it was held, in an action of trespass against the constable, that the plaintiff was not bound to demand a perusal and copy of the warrant. (*Gladwell* v. *Blake*, 1 *C. M. & Ros.* 636, *ante*.)

What actions the 24 Geo. 2, extends to.

The act extends only to actions of *tort*, as trespass or trover. (*Lyms* v. *Goldery*, 3 *C. & P.* 586.) It does not extend to actions of replevin; (*Fletcher* v. *Wilkins*, 6 *East*, 283; *per Bayley*, J., in *Waterhouse* v. *Keen*, 4 *B. & C.* 211; 6 *D. & R.* 257, S. C.;) nor to actions of *assumpsit*. (*Id.*; *B. N. P.* 246; *sed vide Irving* v. *Wilson*, 4 *T. R.* 487; *Greenway* v. *Hurd*, *id.* 553; *Wallace* v. *Smith*, 5 *East*, 115; and see title "*Justices*," Vol. III. p. 1035.)

When justices to be joined in the action.

Where the collector of land-tax had distrained under the warrant of the commissioners, and a copy of the warrant had been demanded and given, it was held the plaintiff was not bound to join as defendants the commissioners who issued the warrant, the 24 Geo. II. c. 44, s. 6, not being applicable, though the commissioners were also acting magistrates for the division. (*Charlton* v. *Alway*, 11 *Ad. & Ell.* 993.)

Nature of the demand, &c.

Nature, &c. of the Demand, and Refusal of Warrant, &c.] The 6th section of the 24 Geo. II. (*ante*, 911,) points out the mode in which the demand should be made. The signature of the attorney to the demand, on behalf of the party demanding, is sufficient. (*Jory* v. *Orchard*, 2 *B. & P.* 42.) On the trial, if there be two copies, the one served and the other kept, the production of the latter is sufficient, without giving notice to produce the former. (*Id.*)

Where the defendant, a constable, who had taken the plaintiff to gaol under a magistrate's warrant, was called upon, under 24 Geo. II. c. 44, s. 6, for a copy of the warrant and perusal of the original, the defendant gave the plaintiff a copy, but was unable to grant a perusal of the original, because it was retained by the gaoler for his own protection. The plaintiff, on information of this circumstance, made no objection to its non-production: it was held, that he had dispensed with the production of the original, and that this was a sufficient compliance with the demand. (*Atkins* v. *Kilby*, 11 *Ad. & Ell.* 777.)

If the constable deliver a copy before the commencement of the action, although after the expiration of six days from the demand, it is sufficient. (*Jones* v. *Vaughan*, 5 *East*, 445; 2 *Smith*, 5, S. C.)

Where a demand for the perusal of a copy of a magistrate's warrant, in pursuance of the 24 Geo. II. c. 44, s. 6, required the perusal and copy to be given within three days; it was held, as the demand need not specify any

terms, that this was a sufficient demand to entitle the party to sue, although the statute says, that no action should be brought until the perusal and copy shall have been refused for six days after demand. (*Collins* v. *Rose*, 5 *Mee. & W.* 194.)

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The constable is in no case required to return the warrant to the justice, or to part with the warrant out of his own possession, for that is his justification. (1 *East's P. C.* 319.) He should either make a copy himself, or allow the party applying to take one, either from such party's reading it, or else from his own reading. He must however certify to the justice what he hath done in execution of the warrant.

Constable not to return warrant, or part with it.

As to the duty of a constable, &c. showing his warrant when executing it, see "*Warrant*," Vol. VI.

Showing warrant.

Limitation of Actions against.]—The 8th section of the 24 Geo. II. c. 44, (*ante*, 912,) limits an action against a constable, for any thing done by him as such, to be brought in six calendar months after the act committed.

Limitation of actions against constables.

This section is more extensive in its protection than the 6th section; for by it a constable is protected from liability to be sued, after six months, for any act done by him *bonâ fide* in his character of officer, and under a belief that he is discharging the duty with which he is invested, though it turn out to be not in obedience to a warrant. (*Smith* v. *Wiltshire*, 5 *Moore*, 322; 2 *B. & B.* 619, S. C.; *Theobald* v. *Crickmore*, 1 *B. & Ald.* 227; *Parton* v. *Williams*, 3 *B. & Ald* 330, *ante*, 912; *Oakley* v. *Kensington Canal Company*, 5 *B. & Adol.* 138.) And the circumstance of there having been no warrant is not of itself immaterial. (*Id.*) There must, however, be some reasonable ground for the belief that he was so acting, and the question whether he did so is mainly for a jury. See title "*Justices*," Vol. III. p. 1033.

Some constables, under a warrant to search a house for black cloths, which had been stolen, finding no black cloth, took cloth of other colours, and carried it before a magistrate, refusing at the same time to tell the owner of the house searched whether they had any warrant or not; held, that they were within the protection of stat. 24 Geo. II. c. 44, and that an action against them ought to have been commenced within six months after the grievance complained of. (*Smith* v. *Wiltshire*, 5 *Moore*, 322; 2 *B. & B.* 619, S. C.)

Where a constable, acting under a warrant commanding him to take the goods of A., takes the goods of B., believing them to belong to A., he is entitled to the protection of the 8th section of the act. (*Parton* v. *Williams*, 3 *B. & Ald.* 330.)

Where a constable, having a magistrate's warrant of distress to levy a church rate under the 53 Geo. III. c. 127, broke the door of and entered the plaintiff's dwelling-house, it was held, that although he thereby exceeded his authority, yet no action could be maintained after the expiration of three calendar months, the twelfth section of that act requiring the action "for any thing done in pursuance of that act" to be brought within that period. (*Theobald* v. *Crickmore*, 1 *B. & Ald.* 227.)

The action should be brought within the six calendar months exclusive, it should seem, of the day of committing the act. (*Lester* v. *Garland*, 15 *Ves.* 248; *Pellew* v. *Inhabitants of Wonford*, 9 *B. & Cres.* 134; 4 *M. & Ryl.* 130, S. C.; *Hardy* v. *Ryle*, 9 *B. & Cres.* 603; 4 *M. & Ryl.* 295, S. C.; *sed vide* "*Time.*") Where the cause of action is a continuing one, as an imprisonment of plaintiff, it is sufficient to show that the action was commenced within six months of the end of such imprisonment. (*Massey* v. *Johnson*, 12 *East*, 67; *B. N. P.* 24. See further as to the time for the commencement of the action, *post* "*Justices*," Vol. III. p. 1039, and title "*Time*," Vol. VI.)

Venue and Plea.]—We have seen (*ante*, 912), that the 7 Jac. I. c. 5, provides that the action against a constable shall be brought in the county where the act was committed, and that he might give the special matter of defence under the general issue. In construction of this act, it may be laid down that in an action against a constable or other officer, for an illegal act not done *bonâ fide* in the execution or under colour of his office, the venue

Venue and plea.

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may be laid in any county, but if he reasonably thought it was his duty to act, though he was mistaken, it is otherwise. (*Anon.* 1 *Stra.* 446; *Alcock* v. *Andrews*, 2 *Esp. R.* 542; *Straight* v. *Gee*, 2 *Stark.* 445; *Beechey* v. *Sides*, 9 *B. & Cres.* 806; 4 *Man. & R.* 634; and see *Cook* v. *Leonard*, 6 *B. & Cres.* 351; 9 *D. & R.* 339; *Morgan* v. *Palmer*, 4 *D. & R.* 283; 2 *B. & Cres.* 729; *Irving* v. *Wilson*, 4 *T. R.* 435.) *Per Pratt*, C. J., in *Anon.* 1 *Stra.* 446, "The 21 Jac. I. only applies where the action is for a matter relating to the execution of his office; but if after his authority is expired, he abuses the party, or if he meets a man, and knocks him down, he may be sued for it as all other people may." If he be in the execution or supposed execution of his duty, but were guilty of an excess, he might be within the act. (See *Butler* v. *Ford*, 1 *C. & M.* 662; and see *Greenway* v. *Hurd*, 4 *T. R.* 553.) But there must in all cases exist some colour of reason to lead him to a *bonâ fide* belief that he was acting in the execution of his office, and the question whether he so acted is mainly for a jury. (See "*Justices*," Vol. III. p. 1033.)

Trespass was brought against three defendants for an assault committed in Bristol, two of them were constables of Oxfordshire, and had come down and taken the plaintiff at Bristol (thus committing the assault), on suspicion of his having stolen a horse, belonging to the other defendant, in Oxfordshire; the declarations set out all the trespasses to have been done without reasonable or probable cause, the two constables pleaded not guilty only. It was held, that they might give the special matter in evidence in mitigation of damages, to show that there was reasonable and probable cause; but, *semble*, having acted out of their jurisdiction, they were not entitled as constables under 21 Jac. I. c. 12, s. 5, to give the special matter in evidence under the general issue, as a defence of the trespasses. (*Rowcliffe* v. *Murray*, 1 *Car. & M.* 513.)

The same act protects all who act in aid or by the command of such constable. But if a private person be the prime mover, and act as a principal in the transaction, he will not be entitled to its protection. (*Straight* v. *Gee*, 2 *Stark.* 445.) And with respect to the person who may be said to act *in aid* and by the command of the constable, it has been held, that if a person procures a warrant against another, and points out the latter to the constable, he is entitled to the protection of the act, and may plead the general issue, and give the special matter in evidence. (*Nathan* v. *Cohen*, 3 *Campb.* 257.)

The constable's deputy seems within the act. (*Moore*, 845; 2 *T. R.* 395; *Bac. Abr. Const.* (D.); *sed vide* 3 *B. & C.* 762; 5 *D. & R.* 654, S. C.)

But where a person is not an officer within the meaning of this or a similar act, though he may have supposed he was so, he is not within the protection of the act. (See *Copland* v. *Powell*, 8 *Moore*, 400; 1 *Bingh.* 369, S. C.; *Jones* v. *Williams*, 3 *B. & C.* 762; 5 *D. & R.* 654, S. C.)

Costs.

Costs.]—To have entitled a defendant to double costs under the 7 Jac. I. c. 5, (*ante*, 912,) there must be a certificate from the judge. (*Grindley* v. *Holloway*, *Dougl.* 307.) It might be granted either at the trial or after. (*Harper* v. *Carr*, 7 *T. R.* 448; *Johnson* v. *Stanton*, 2 *B. & C.* 621; 4 *D. & R.* 156, S. C.) But such certificate was not necessary if the fact appear on a special verdict. (*R* v. *Poland*, 1 *Stra.* 49; *Devenish* v. *Mertins*, 2 *Stra.* 974.)

Now the 5 & 6 Vict. c. 97, s. 3, enacts, that instead of double costs the parties shall receive such full and reasonable indemnity as to all costs, charges and expenses incurred in and about any action, suit, or other legal proceedings, as shall be taxed by the proper officer in that behalf, subject to be reviewed in like manner and by the same authority as any other taxation of costs by such officer.

As to the costs of a metropolitan police officer in an action against him for an act done by him as such, see the 10 Geo. IV. c. 44, s. 41, "*Police*," Vol. V. pp. 575, 576.

12. Expenses of.

12. *Expenses of.*

As to fees and allowances made to parish constables under the 5 & 6 Vict. c. 109, s. 17, see *ante*, 903.

Charges of making distress.

By stat. 27 Geo. II. c. 20, s. 2, "the officer making such distress shall and is hereby empowered to deduct the reasonable charges of taking, keeping and selling such distress, out of the money arising by such sale; and the overplus (if any), after such charges and also the said penalty or sum of money shall be fully satisfied and paid, shall be returned on demand to the owner of the goods and chattels so distrained; and the officer executing such warrant, if required, shall show the same to the person whose goods and chattels are distrained, and shall suffer a copy thereof to be taken."

Charges of conveying an offender to gaol to be paid by offender if able.

By stat. 3 Jac. I. c. 10, s 1, "all and every person and persons whatsoever, that from and after the end of this present session of parliament shall be committed to the common or usual gaol within any county or liberty within this realm, by any justice or justices of the peace, for any offence or misdemeanor, to any such gaol, that the said person or persons so to be committed as aforesaid, having means or ability thereunto, shall bear their own reasonable charges for so conveying or sending them to the said gaol, and the charges also of such as shall be appointed to guard them to such gaol, and shall so guard them thither: and if any such person or persons so to be committed as aforesaid shall refuse, at the time of their commitment and sending to the said gaol, to defray the said charges, or shall not then pay or bear the same, that then such justice or justices of the peace shall and may, by writing under his or their hand and seal, or hands and seals, give warrant to the constable or constables of the hundred, or constable or tithingman of the tithing or township, where such person or persons shall be dwelling and inhabit, or from whence he or they shall be committed as aforesaid, or where he or they shall have any goods within the county or liberty, to sell such and so much of the goods and chattels of the said persons so to be committed, as by the discretion of the said justice or justices of the peace shall satisfy and pay the charges of such his or their conveying and sending to the said gaol, the appraisement to be made by four of the honest inhabitants of the parish or tithing where such goods or chattels shall remain and be, and the overplus of the money which shall be made thereof to be delivered to the party to whom the said goods shall belong."

If not payable, to be paid out of county rate.

Except in Middlesex.

And by stat. 27 Geo. II. c. 3, s. 1—4, if he have not money nor goods within the county sufficient to bear the charges of himself and of those who convey him to the gaol or house of correction, the constable may make application to a justice, who may upon oath examine into and ascertain the reasonable expenses, and shall by his warrant (without fee) order the treasurer of the county to pay the same, (except in Middlesex,) where the same shall be paid by the overseers of the parish where the person was apprehended.

See these statutes of 3 Jac. I. and 27 Geo. II. in full, and the law, *ante*, "*Commitment*," p. 782.

Charges of conveying vagrants.

By the 5 Geo. IV. c. 83, s. 8, the expenses of carrying to gaol and maintaining an idle and disorderly person, rogue, vagabond, or incorrigible rogue, are to be paid out of the money found upon him, or arising from the sale of any property in his possession and use. (See "*Vagrant*," Vol. VI.; and *Rex* v. *The Inhabitants of Chelmsford*, *post*, 922.)

When special constables shall be appointed in England to execute warrants in cases of felony, two justices may order proper allowances to be made for their expenses and loss of time, which order shall be submitted to quarter sessions;

And by stat. 41 Geo. III. U. K. c. 78, s. 1, "it shall and may be lawful to and for any two justices of the peace for any county, city, division, riding or place, within that part of the United Kingdom called England, when any person or persons shall have been nominated or appointed a special constable or special constables, for the purpose of executing any warrant or warrants in any case or cases of felony, to order, by any writing or writings under their hands, such proper allowances to be made to such special constable or special constables, for his or their expenses, trouble and loss of time in executing or endeavouring to execute such warrant or warrants, as to him or them shall seem reasonable and necessary; which orders shall be afterwards laid before and submitted, on the oath of such special constable or constables, to the con-

12. *Expenses of.*

sideration of the justices assembled at the next general quarter sessions of the peace to be holden for such county, city, division, riding or place, as the case may be; and the justices so assembled at such general quarter sessions may allow or disallow the whole or any part or parts of such allowances so ordered by such justices issuing such warrant or warrants, and shall and may thereupon then order and direct the treasurer for such county, city, division, riding or place, to pay such sum or sums of money to such special constable or special constables, as to the said justices so assembled shall seem reasonable and necessary; and such treasurer shall, and he is hereby authorised and required forthwith to pay the sum and sums of money so ordered and directed to be paid to the person or persons empowered to receive the same; and such treasurer shall be allowed the same in his accounts."

See further as to allowances to special constables not acting under warrants, 1 & 2 Will. IV. c. 41, s. 13, *post*, 945.

and to high constables in case of riot, &c.

Sect. 2. "It shall and may be lawful to and for any two justices of the peace, within their respective jurisdictions, to order and direct by any writing or writings under their hands, such reasonable and necessary allowances to be made to any high constable or high constables for any county, city, division, riding, hundred or place, within that part of the United Kingdom called England, for any extraordinary expenses incurred by him or them in the execution of their respective duties, in any case or cases of tumult, riot or felony; and such orders shall be laid before and submitted, on the oath of such high constable or constables, to the consideration of the justices assembled at the next general quarter sessions of the peace to be holden for such county, city, division, riding or place, as the same may be; and the justices so assembled at such general quarter sessions may allow or disallow the whole or any part or parts of such allowance so ordered, and shall and may then order and direct the treasurer for such county, city, division, riding or place, to pay such sum or sums of money to such high constable or high constables as to the said justices so assembled shall seem reasonable; and such treasurer shall and he is hereby authorised and required forthwith to pay the sum or sums of money, so ordered and directed to be paid, to the person or persons empowered to receive the same, and such treasurer shall be allowed the same in his accounts."

In the case of *R.* v. *Justices of Leicester*, (9 *D. & R.* 772; 7 *B. & C.* 8), where the high constable of a borough, by the direction of the justices, employed and paid a number of special constables to suppress riots at an election, and the ordinary constables were also constantly employed by him during the same period in endeavouring to keep the peace, for which service he made them a compensation; it was held that the justices were warranted in considering the monies so expended as "extraordinary expenses," incurred by the high constable in case of riot, within the meaning of the 41 Geo. III. c. 78, s. 2, and in making an order upon the treasurer to reimburse him those expenses.

In actions against the hundred, &c.

By the 7 & 8 Geo. IV. c. 31, s. 7, if the high constable sued on this act shall produce and prove before two justices of the jurisdiction, residing in or acting for his hundred or district, an account of the just and necessary expenses which he shall have incurred in the prosecution of such action, they shall make an order for payment thereof to the treasurer of that jurisdiction; and if in such action judgment shall be given against the plaintiff, the high constable shall in like manner be reimbursed the just and necessary expenses incurred by him in consequence of such action, over and above the taxed costs to be paid by the plaintiff; and if it shall be proved to two such justices that the plaintiff is insolvent, so that the high constable can have no relief as to such taxed costs, they shall make a similar order for payment of the amount of such taxed costs. (See "*Hundred*," Vol. III.)

County rate.

By 55 Geo. III. c. 55, s. 16, the justices in general of quarter sessions, or at any adjournment thereof, may make allowances and compensations to the constables, &c. for collecting the county rate under this act.

Deserters. Militia.

As to the rewards for taking deserters, see "*Military Law*," Vol. V.; and for collecting the fines for not furnishing the complement of militia, see *id.*

12. *Expenses of.*

By stat. 18 Geo. III. c. 19, s. 4, after reciting that "constables, headboroughs and tithingmen, are or may be at great charge in doing the business of their parish, township or place, and in many cases are not sufficiently indemnified by the laws," enacts "that every constable, headborough or tithingman, shall every three months, and within fourteen days after he shall go out of such office, deliver to the overseers of the poor of the said parish, township or place, for the time being, a just account in writing, fairly entered in a book to be kept for that purpose, and signed by him, of all sums so by him expended on account of the said parish, township or place, in all cases not hitherto provided for by the laws heretofore made, or by this act, and also of all sums received by him on the account of the said parish, township or place; and the said overseers of the poor, or their successors, shall, within the next fourteen days after the said account or accounts shall be so delivered, lay the same before the inhabitants of the said parish, township or place; and in case the said account or accounts be approved of by the majority of such inhabitants, the overseers of the poor of the said parish, township or place, for the time being, are hereby authorised and required to pay out of the poor rates, made or to be made for such parish, township or place, such sum or sums of money as shall appear to be due on the said account or accounts; but in case the said account or accounts, or any part thereof, shall be disallowed, then the said overseers of the poor for the time being shall then deliver back to the said constable, headborough or tithingman, such book of acounts; and it shall and may be lawful to and for the said constable, headborough or tithingman, then to produce the said book before any one or more of his majesty's justices of the peace in and for the county, riding, division, city, town corporate, franchise or liberty, wherein such parish or township shall be situate, giving reasonable notice thereof to the overseers of the poor of the said parish, township or place, for the time being; which said justice or justices is and are hereby authorised to examine the same, and to hear and determine any objection or objections that shall be made to the said accounts, and to settle the sum which to him or them shall appear due on the said account, and to enter the same in the said account, and to sign his or their name or names thereto; and the overseers of the poor of the said parish, township or place, for the time being, are hereby authorised and required to pay the said sum out of the money which shall come to their hands by virtue of any rate or assessment made or to be made for the relief of the poor."

Charges in the business of the parish.

To deliver accounts to overseers every three months, and also within fourteen days after he shall go out of office.

Such accounts to be laid before a vestry within the next fourteen days.

If approved of, to pay the same out of the poor rates.

If any such account shall be disallowed, a justice may settle the same.

And the overseers to pay the balance.

Sect. 5. "In case the overseer or overseers of the poor of the said parish, township or place, for the time being, shall find that the said parish, township or place is aggrieved by any neglect, act or thing done or omitted by the said constable, headborough or tithingman, or by any of his majesty's justices of the peace, or shall have any material objection to such account, or any part thereof, or to such determination as aforesaid, it shall and may be lawful for such overseer or overseers, in any of the cases aforesaid, giving reasonable notice to the said justice, constable, headborough or tithingman, to appeal to the next general or quarter sessions of the peace for the county, riding, division, city, town corporate, franchise or liberty, where such parish, township or place lies; and the justices of the peace there assembled are hereby authorised and required to receive such appeal, and to hear and finally determine the same; but if it shall appear to the said justices that reasonable notice was not given, then they shall adjourn the said appeal to the next quarter sessions, and then and there finally hear and determine the same; and the said justices may award and order to the party, for whom such appeal shall be determined, reasonable costs, in the same manner that they are empowered to do in case of appeals concerning the settlement of poor persons, by an act made in the eighth and ninth years of King William the Third, intituled '*An Act for supplying some Defects in the Laws for the Relief of the Poor of this Kingdom.*'"

Appeal to quarter sessions.

Sect. 6. "In all corporations or liberties which have not four justices of the peace, it shall and may be lawful for the overseer or overseers of the poor of the parish, township or place, for the time being, where an appeal is given by this act, to appeal, if he or they shall think fit, to the next general or

Proviso relating to corporations, &c.

12. *Expenses of.*

quarter sessions of the peace for the county, riding or division wherein such corporation or liberty is situate."

Sessions may make regulations.

Sect 9. "It shall and may be lawful for his majesty's justices of the peace in and for any county, riding, division, city, town corporate, franchise or liberty, in quarter sessions assembled, to lay down or alter, from time to time, such rules and regulations as to any costs or charges thereafter to be allowed to any person whatsoever, by virtue of any part of this act, for the better carrying the intent of any part of this act into execution, and for the preventing any unnecessary expense, as to them shall seem most just and reasonable; which rules and regulations, having received the approbation and signature of one or more of his majesty's judges of oyer and terminer, or general gaol delivery, at the assizes for the county wherein such rules and regulations shall have been made, shall be binding, and not otherwise, on all persons whatsoever; and no person whatsoever shall be allowed any greater sum of money, by virtue of this act, than according to the said rules and regulations so approved of as aforesaid, any thing herein contained to the contrary thereof in anywise notwithstanding."

What are charges for parish business, &c.

Fees paid by a constable to a justice's clerk for warrants to apprehend vagrants in a parish, are money expended by him on account of the parish, within sect. 4 of the above act, and payable out of the poor rate, although the constable was not appointed by the parish, but one of the rural police force established by virtue of 2 & 3 Vict. c. 93, and 3 & 4 Vict. c. 88. (*Rex* v. *The Inhabitants of Chelmsford*, 12 *Law Journal*, *N. S. M. C.* 139.)

Though a constable be not entitled to the allowance of the expenses he has incurred in a prosecution arising within his precinct, yet if he have charged them in his accounts, and the item has been allowed under this statute of 18 Geo. III. by two justices, though after disallowance by the vestry, the sessions cannot give redress unless a majority of the churchwardens and overseers concur in the appeal. (*R.* v. *Justices of Lancashire*, 5 *B. & Ald.* 757; 1 *D. & Ry.* 454, S. C. *nom. R.* v. *Justices of Manchester*.)

But if the appeal be made by proper persons, although the justices in sessions should confirm the allowance of the two justices, made after the disallowance by the vestry, the Court of Queen's Bench will quash their order, unless in cases where it is the duty of a parish or township to prosecute such offenders, or the constable has previously to the prosecution received from the inhabitants some authority to proceed. (*R.* v. *Saville*, 5 *B. & Ald.* 182.)

Nor is the constable entitled to be allowed in his accounts the costs of a prosecution, although for an assault made on one of the overseers, and although the proceeding were directed by a justice, and approved by the Court which tried it; and if an overseer take upon him to pay such costs to the constable, he is not entitled to have it allowed by the parish in his account; and even if allowed by the vestry, afterwards by two justices, and that allowance by the sessions on appeal, the Court of Queen's Bench will quash the order. (*R.* v. *Bird*, 2 *B. & Ald.* 526.)

By 7 Geo. IV. c. 64, s. 23, (title "*Costs*," Vol. II.) the Court before whom an indictment for an assault, &c. is tried, may allow the expenses of the prosecution, if the prosecutor appears on a recognizance.

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13. Accounts of and Removal from Office.

Removal from office.

As to dismissing paid constables in parishes, see 5 & 6 Vict. c. 109, s. 19, *ante*, 902.

At common law, in such manner as constables were chosen, in the same manner, and by the like authority, were they to be removed; so as if there was cause to remove and put a high constable from his place, it hath not been thought fit that any one or two justices should do it upon their discretion, but that it should be done by the greater part of the justices of that division, and that for some just cause; or else that it be done at the sessions. (*Dalt.* c. 28.)

And it seems clear that the sheriff or steward of the leet, having power to place a constable in his office, has by consequence a power of removing him. (2 *Hawk.* c. 10, s. 38.) 13. *Accounts and Removal of.*

And also the justices of the peace have used, for good cause, to displace all such constables as have been chosen and sworn by them. (2 *Hawk.* c. 10, s. 38.)

By stat. 13 & 14 Car. II. c. 12, s. 15, if a constable shall continue above a year in his office, the sessions may discharge him, and put another in his place till the lord shall hold a leet. Constable continuing above a year.

And if the Court or other judge shall refuse to discharge a constable, the Queen's Bench may compel them by *mandamus.* (2 *Hawk.* c. 10, s. 47.)

The high constables shall at the general or quarter sessions, if thereunto required, account for the general county rate by them received, on pain of being committed to gaol until they shall account, and shall pay over the money in their hands, according to the order of the said Court, on the like pain. And all their accounts and vouchers shall, af[illegible] been passed at the sessions, be deposited with the clerk of the peac[illegible]pt amongst the records, and inspected by any justice without fee. (2 [illegible]eo. II. c. 29, s. 8; and see 55 Geo. III. c. 51, s. 12.) High constables to account at the sessions.

IV. County and District Constables.

1. *Interpretation of Acts*, 924.
2. *How and for what Districts appointed—Incorporated Boroughs exempted*, 924.
3. *Police Rate, how levied and collected*, 927.
4. *Chief Constables, Superintendents, and other Officers*, 930.
5. *Petty Constables, local Constables, and additional Constables at the Cost of Individuals*, 931.
6. *Rules for the Government of—Neglect of Duty—Resignation—Dismissal—Accoutrements—Station-houses—Returns*, 932.
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9. *Warrants of Commitment, how executed*, 936.
10. *Constables, how discontinued*, 937.
11. *Operation of Acts upon the Appointment of Constables in Boroughs—Of High Constables—Special Constables—Parochial Constables—Of Constables under the Watching and Lighting Act and Local Acts*, 937.
12. *Practical Instructions on the Duties of these Constables generally, and the Manner of executing them*, 939.

1. Interpretation of Acts.

By the 2 & 3 Vict. c. 93, s. 28, it is enacted, "That in construing this act the word 'county' shall be construed to mean county, riding, or division having a separate court of quarter sessions of the peace, or in which separate county rates are made; and that all things hereinbefore authorised to be done at quarter sessions may be done by the justices in general sessions assembled in those counties in which county rates are made in general sessions; and that nothing herein contained shall extend to any part of the metropolitan police district." Meaning of "county." General sessions. Not to extend to metropolitan police.

By the 3 & 4 Vict. c. 88, s. 34, after reciting the 2 & 3 Vict. c. 93, it is enacted, "That in construing this act the words 'county' and 'quarter sessions' shall be taken to be used in the same sense in which they are used in the first-recited act: provided always, that neither in the first-recited act nor in this act shall the word 'county' be taken to mean any liberty or franchise County.

1. *Interpretation of Acts.*

Not to extend to the Isle of Ely.

having a distinct commission of the peace separate from the commission of the peace of the county or riding in which it is situated: provided also, that nothing herein contained shall extend to affect the Isle of Ely, or the powers of the justices named in the commission of the peace thereof, or to give any power or authority within the Isle of Ely to the justices named in the commission of the peace of the county of Cambridge."

Act to be construed with act of last session. Local constables may vote and hold any office for gain.

Sect. 35. "That this act, and so much of the said act of the last session of parliament as is not inconsistent with this act, shall be construed together as one act: provided always, that no local constable appointed under this act shall thereby become incapable of giving his vote for the election of any member to serve in parliament, or be restrained from employing himself in any office or employment for hire or gain."

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2. How and for what Districts appointed—Incorporated Boroughs exempted.

By the 2 [illegible] c. 93, intituled "*An Act for the Establishment of County and Distr[illegible] Constables by the Authority of Justices of the Peace,*" (27th August, 1839,) after reciting that by an act passed in the second year of the reign of his late majesty, intituled "*An Act for amending the Laws relative to the Appointment of Special Constables, and for the better Preservation of the Peace,*" it was amongst other things enacted, that in all cases where it should be made to appear to any two or more justices of the peace of any county, riding, or division having a separate commission of the peace, or to any two or more justices of the peace of any liberty, franchise, city, or town in England or Wales, upon the oath of any credible witness, that any tumult, riot, or felony had taken place or might be reasonably apprehended in any parish, township, or place situate within the division or limits for which the said respective justices usually act, and such justices should be of opinion that the ordinary officers appointed for preserving the peace are not sufficient for the protection of the inhabitants and the security of the property in any such parish, township, or place as aforesaid, then and in every such case such justices, or any two or more justices acting for the same division or limits, were thereby authorised to nominate and appoint, by precept in writing under their hands, so many as they should think fit of the householders or other persons (not legally exempt from serving the office of constable) residing in such parish, township, or place as aforesaid, or in the neighbourhood thereof, to act as special constables for such time and in such manner as to the said justices respectively should seem fit and necessary, for the preservation of the public peace, and for the protection of the inhabitants, and the security of the property in such parish, township, or place: and reciting that the powers of justices of the peace for making such appointments as aforesaid were enlarged by an act passed in the sixth year of the same reign, intituled "*An Act for enlarging the Powers of Magistrates in the Appointment of Special Constables:*" and that it was expedient that the powers of the said justices for appointing constables be further enlarged, and that powers be given for charging the expenses of paying such constables upon the several divisions in which they shall be appointed: it was therefore enacted, "That in all cases where it shall be made to appear to the justices of the peace of any county in England or Wales in general or quarter sessions assembled, or at any adjournment thereof, that the ordinary officers appointed for preserving the peace are not sufficient for the preservation of the peace, and for the protection of the inhabitants, and for the security of property within the county, it shall be lawful for them to set forth the same, by a report in writing under the hands of the majority of the justices there present, and to declare how many constables are needed in their opinion to be appointed within their county for the purposes aforesaid, and the rates of payment which it would be expedient to pay to the chief and other constables; and every such report shall be sent to one of her majesty's principal secretaries of state: provided always, that the number of constables shall not be more than one man for every thousand of the inhabitants according to the last parliamentary enumeration of the population for

1 & 2 Will. 4, c. 41. (*Post*, 942.)

5 & 6 Will. 4, c. 43.

Justices in quarter sessions may report to the secretary of state the necessity of an additional appointment of constables.

Limitation of numbers.

the time being, the population of the boroughs and towns hereinafter excepted from the operation of this act being deducted therefrom."

2. *How chosen and for what Districts, &c.*

Sect. 2. "That it shall be lawful for the justices assembled in general or quarter session, from time to time, with the consent of one of her Majesty's principal secretaries of state, to increase or diminish the number of constables first appointed under this act for their county."

Alteration of number of constables.

Sect. 5. "That with the notice of the time of holding any such general or quarter session, or adjournment thereof, as now required by law, notice shall be given of the day and hour at which any business relating to the adoption of this act, or the appointment or dismissal of any chief constable under this act, or the increase or diminution of the number of constables, will begin at such session; and the clerk of the peace of each county shall give such notice as last mentioned on the requisition of any five justices acting for such county."

Notice of proceedings under this act to be inserted in notices now required by law.

By the 3 & 4 Vict. c. 88, s. 30, it is enacted, "That with the notice of the time of holding any such general or quarter session, or adjournment thereof, as now required by law, notice shall be given of the day and hour at which any business relating to the adoption of the provisions of this act will be considered at such session."

Defining nature of notice.

By the 2 & 3 Vict. c. 93, s. 19, it is enacted, "That it shall be lawful for the justices of any county in general or quarter session assembled, in case they shall not resolve on appointing constables under this act for the whole of their county, to resolve, with the approval of the secretary of state, on appointing constables under this act for any division of the county for which special or petty sessions of the peace are holden, or for any number of such divisions of the county; and for that purpose they, or the greater number of them there assembled, not being less than two, shall have all the powers with regard to such division or divisions which they have with respect to the whole county under the provisions herein-before contained; and all the provisions herein-before contained with respect to the whole county shall be deemed to apply to such division or divisions as if it or they were the whole county; and the provisions relating to the chief constable shall be deemed to apply to the superintendent of each division: provided always, that if constables shall be appointed under this act in any number of adjoining divisions, a separate police establishment shall not be formed for each division, but the whole shall be consolidated into one police establishment for the whole of such adjoining divisions, and that if this act shall be afterwards adopted for the whole county the several divisional establishments of police shall be consolidated and form part of the general county police establishment."

Constables may be appointed for separate divisions.

By the 3 & 4 Vict. c. 88, s. 29, it is enacted, "That in case the justices of any county shall not resolve on appointing constables, under the said act of the last session, for the whole of their county, it shall be lawful for them, if they shall think fit, in general or quarter sessions assembled, to form any number of contiguous parishes, townships, or places into a division, so that such division contain not less than twenty-five thousand persons, according to the last census for the time being, and to appoint constables under the said act for every such division; and all provisions of the said act as amended by this act, and of this act, relating to the appointment of constables for any division or divisions for which special or petty sessions of the peace are holden, or relating to police districts, shall be deemed to apply to the police divisions so formed."

Justices may form any number of parishes, containing not less than 25,000 inhabitants, into a division for the purposes of this act.

Sect. 27. "And whereas the number of constables needed may be different in different parts of the same county, be it enacted, that it shall be lawful for the justices of the peace for any county in general or quarter sessions assembled, if they shall be of opinion that a distinction ought to be made in the number of constables appointed to keep the peace in different parts of the county, to divide the county or any part thereof into police districts, consisting of such parishes and places, or parts of parishes and places, as shall appear to them most convenient, and to declare the number of constables which ought to be appointed for each police district, and from time to time to alter the extent of such police districts, and the number of constables to be ap-

Formation of police districts.

2. *How chosen and for what Districts, &c.*

pointed for each; and a report of every such proposed division or alteration, and of the number of constables proposed for each police district, with an estimate of its extent and population, and of any other circumstances upon which the determination of the justices shall have been grounded, shall be sent to one of her Majesty's principal secretaries of state, and if approved by the secretary of state such division or alteration shall be deemed to be completed."

Each police district to pay for its own constables.

Sect. 28. "That if the secretary of state shall approve of such division of the county or any part thereof into police districts for the purposes aforesaid, the expense of putting the said act into execution in such county or part of such county shall be classed under two heads, of general expenditure and local expenditure; and the general expenditure shall be defrayed in common by all the districts, and the local expenditure, consisting of the expense of the salaries and clothing of the constables appointed for each district, and such other expenses as the justices, subject to the approval of the secretary of state, shall direct to be included under this head, shall be defrayed by each police district separately; and the police rates shall be assessed and levied in each police district accordingly: provided always, that notwithstanding the division of any county or part of any county into police districts, the constables of all such districts shall continue as part of the same force, and be subject to the same authority, and be liable, if required, to perform the same duty, in any part of the county or elsewhere, as if no such division into police districts had been made."

Constables subject to duty in any part of the county, as if no districts had been made.

Certain liberties, &c. considered as forming parts of counties for purposes of this act.

By the 2 & 3 Vict. c. 93, s. 27, it is enacted, "That for the purposes of this act all detached parts of counties, and also all liberties and franchises, (other than such incorporated boroughs as aforesaid,) shall be considered as forming part of that county by which they are surrounded, or if partly surrounded by two or more counties, then as forming part of that county with which they have the longest common boundary; and so much of every such detached part of any county, or of any liberty and franchise, which is not of itself an entire hundred, wapentake, ward, rape, lathe, or such other division of a county, shall be considered as forming part of that hundred, ward, wapentake, rape, lathe, or such other division whereby it shall be surrounded in the county of which it shall be considered a part for the purposes of this act, or if partly surrounded by two or more hundreds, wapentakes, wards, rapes, lathes, or such other divisions, then as forming part of that one with which it shall have the longest common boundary."

Outlying districts may be transferred from one county to another.

By the 3 & 4 Vict. c. 88, s. 2, reciting that "by the said act (2 & 3 Vict. c. 93,) it is provided that for the purposes of the said act all detached parts of counties shall be considered as part of that county by which they are wholly or partly surrounded; and that many populous towns are situated in more than one county, and also the boundary of many counties is so irregular that parts thereof, although not wholly separated from the main body of the county, may yet be more conveniently united, for the purposes of the said act, with some neighbouring county: it is enacted, that it shall be lawful for the justices of any two or more neighbouring counties, in their several general or quarter sessions assembled, from time to time to agree that such parts of their several counties as to them shall seem fit shall, for the purposes of the said act, be considered as forming part of any other of the said counties; and whenever any such district shall be so transferred, for the purposes of the said act, from one county to another, with the consent of the justices of both the last-mentioned counties, such district shall be considered, for the purposes of the said act, as if it were detached from the county to which it belongs, and wholly surrounded by the county to which it is so transferred; and all the provisions contained herein or in the said act, or in an act passed in the last session of parliament, intituled '*An Act for the better Administration of Justice in detached Parts of Counties*,' respecting detached parts of counties, shall be taken to apply to such transferred districts."

Ju... sess... port...

2 & 3 Vict. c. 82.

Exemption of borough towns.

By the 2 & 3 Vict. c. 93, s. 24, it is enacted, "That nothing in this act contained shall extend to authorise the justices of the peace of any county to appoint any constable within any borough incorporated under the provisions of an act

passed in the sixth year of the reign of his late majesty, intituled '*An Act to provide for the Regulation of Municipal Corporations in England and Wales*,' or under the provisions of any charter granted in pursuance of the said act; nor shall any such borough, for which a separate court of quarter sessions of the peace shall be holden, be liable to contribute to the expenses of this act, or to be charged with any part thereof in their account with the treasurer of such county."

2. *How chosen and for what Districts, &c.*

5 & 6 W. 4, c. 76.

Boroughs may agree to consolidate their police with county police.

But by the 3 & 4 Vict. c. 88, s. 14, it is enacted, "That it shall be lawful for the justices of any county in which constables shall have been appointed under the said act, and for the council of any incorporated borough situated in or adjoining to such county, to agree together for the consolidation of the county and borough police establishments; and in every such case all the constables appointed either for the county or the borough shall have all the powers, privileges, and duties throughout the county and the borough which constables appointed for any county have within that county under the said act, and all the provisions of the said act shall be taken to apply to the borough constables as well as to the county constables, except as is herein otherwise provided; and every such agreement which shall have been agreed to by the justices of the county in general or quarter session assembled, on the one hand, and by the mayor, aldermen, and burgesses of the borough, by their council, on the other hand, shall be binding on both parties, as soon as a memorandum of such agreement under the hands of two or more justices of the county, and countersigned by the clerk of the peace, shall be delivered to the council of the borough, and a counterpart thereof under the common seal of the borough shall be delivered to the justices; and when any such agreement shall have been made between any county and any borough, either party shall be empowered to put an end thereunto, without the consent of the other party, after six months notice in writing shall have been given to the other party; such notice, if given by the county, to be under the hands of two or more justices, and countersigned by the clerk of the peace, or if given by the borough, to be under the common seal of the borough: provided always, that no such notices shall be given by the justices, or by the borough, unless in either case such notice shall be agreed upon by a majority of three-fourths of the justices attending at any general or quarter session, or three-fourths of the council of the borough."

Government of consolidated police.

Sect. 15. "That in all cases where the establishment of county and borough constables shall be consolidated into one police establishment, the chief constable of the county shall have the general disposition and government of all such constables, subject to the provisions hereinafter contained, and at his pleasure may dismiss all or any of them; and whenever the chief constable shall dismiss one of the borough constables he shall report the fact, with his reasons for the dismissal, to the mayor of the borough, and the watch committee of the borough shall forthwith appoint another constable properly qualified, unless provision shall be made in such agreement that all constables shall be appointed by the chief constable; and no borough constable who shall have been dismissed by the chief constable shall be capable of being re-appointed for the same borough without the consent of the chief constable, and so much of the said act for regulating corporations as empowers the said committee or any two justices of the peace having jurisdiction within the borough to dismiss any constable, shall be suspended as to those boroughs whose establishment of constables is consolidated with the establishment of county constables, during the time that any agreement for such consolidation shall be in force."

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3. Police Rate, how levied and collected.

By the 2 & 3 Vict. c. 93, s. 20, it was enacted, "That all [illegible] expenses incurred in putting that act into execution should be paid by the [illegible] treasurer of the county out of the county rate." And sect. 21 enacted, "[illegible] where this act shall be adopted for any division or divisions, and not for the [illegible] whole county, it shall be lawful for the justices of the peace for the said [illegible] assembled at any quarter sessions of the peace, or any adjournment thereof, from time to

The rates to be made on each division where there are constables may be increased.

3. *Rates for.*

time to order the county rates made upon the said division or divisions to be increased, and for that purpose to rate every parish, township, and other place, whether parochial or extra-parochial, within such division or divisions, in the same manner as now authorised and practised by law for county rates, at such additional sum over and above the sum needed for the other purposes of the county rates as shall be needed for raising from such division or divisions respectively the sums needed for the purposes of this act within such division or divisions respectively, and the total amount of county rate, increased as aforesaid, to be levied upon every parish, township and place within any such division, shall be specified in the warrants issued for the purposes of the county rates by the justices to the high constables of every hundred or other such district within the county comprising any part of the said division, and the high constables shall issue their warrants accordingly to the overseers of the poor and others authorised in that behalf, in every parish, township and place within the said division or divisions."

Regulations as to county rate to apply to the increased rates levied hereby.

55 G. 3, c. 51.

Sect. 22. "That all the provisions of an act passed in the fifty-fifth year of the reign of his late majesty King George the Third, intituled '*An Act to amend an Act of his late Majesty King George the Second, for the more easy assessing, collecting, and levying of County Rates*,' or any other act in force touching the making, collecting, or recovering county rates, shall extend and apply to the making, collecting, and recovering the several increased rates hereby authorised to be made, as fully as if the same increased rates were made equally throughout the whole county."

Treasurer to keep separate accounts of the rates levied under this act.

Sect. 23. "That the treasurer of the said county shall keep a separate account of the several sums by him received and paid under this act, and if the act is not adopted for the whole county, separate accounts for every division, or set of adjoining divisions, having a separate establishment of constables under this act, and shall produce the same to the justices assembled at every quarter sessions of the peace for the said county, and the same shall be examined and audited by the said justices, and, being allowed and passed by them, shall be deposited with the clerk of the peace for the said county, to be kept among the records thereof, and that such allowance of the said justices shall be a sufficient release and discharge to such treasurer; and the said justices so assembled as aforesaid may from time to time order such allowance as they shall think reasonable to be paid out the general stock of the said county to the said treasurer for his trouble in the execution of this act.

So much of 2 & 3 Vict. c. 93, as directs the expenses to be paid out of the county rate, repealed; and justices in general or quarter sessions to make a police rate.

But now by the 3 & 4 Vict. c. 88, s. 3, it is enacted, "That so much of the first-recited act (2 & 3 Vict. c. 93) as provides that the expenses of putting the said act in execution shall be paid out of the county rate shall be repealed; and that, for the purposes of defraying the expenses of the said act in any county in which, or in any part of which, the said act shall be put in force, the justices of such county in general or quarter session assembled shall make a fair and equal police rate, and for that purpose shall assess and tax the whole district for which the constables are appointed rateably and equally, according to a certain pound rate of the full and fair annual value of all messuages, lands, tenements and hereditaments liable to the county rate, or which, if the whole of the said district were to all intents and purposes within their county, would be liable to the county rate therein, including all detached parts of other counties, and also all liberties and franchises (except as hereinafter excepted) which are locally situated in such county, or wholly or partly surrounded by such county, and declared by the said act to be considered as forming part of such county for the purposes of the said act, but excluding all detached parts of the said county, all parts of the county contributing to the police rates of any other county or to the metropolitan police rate, and all incorporated boroughs which are or shall be within the provisions of an act passed in the sixth year of the reign of his late majesty for regulating corporations, or of any charter granted in pursuance of the last-recited act, or of any act made for the amendment thereof, and all those towns and places for which constables or watchmen shall have been appointed under the act passed in the fourth year of his late majesty making provisions for the lighting and watching of parishes in England or Wales, or under any local act authorising the

3. *Rates for.*

appointment of constables or watchmen in any town or place, and authorising rates to be made for defraying the expenses of such constables or watchmen, and shall not be discontinued before the passing of this act until they shall be discontinued, or until the chief constable of the county within which, for the purposes of this and the said first-recited act, such parish, town or place, is situated, shall have notified, as he is hereinafter empowered to do, that he is ready to undertake the charge of such parish, town or place: Provided always, that all expenses of putting the said act in execution before the passing of this act shall be paid out of the county rate as if this act had not been made.

How property rateable is to be valued.

Sect. 4. "That the value of all property rateable for the purposes of the said act shall be computed by the said justices according to the last valuation for the time being acted upon in assessing the county rate or liberty rate, or rate in the nature of a county rate (if any), to which such property is rateable, unless, in the case of any liberty or franchise or detached part of any county, the justices of the county in which such liberty or franchise or detached part is situated shall be dissatisfied with such valuation.

Police rate to be levied with the county rate.

Sect. 5. "That every police rate which the justices shall have made as aforesaid shall be collected in their county from the persons who are liable to contribute thereunto with and as part of the county rate; and the warrants issued by the justices to the high constables, and by the high constables to the overseers and others required to collect the county rates, shall distinguish between the rates to be levied from those places which are liable to the police rate in that county and those which are not liable thereunto, and shall state how much is levied for the county rate, and how much for the police rate, and the said rates shall be levied accordingly."

Contributions on account of liberties and detached parts of counties.

Sect. 6. "That it shall be lawful for the justices of any county in general or quarter session assembled for the purpose of obtaining the sum which ought to be contributed from any detached part of any other county, or any liberty or franchise not contributing to the county rate of such first-mentioned county, towards any such police rate, from time to time to issue a warrant under the hands of two or more of them, by which warrant they shall require the treasurer of the county to which such detached part belongs, or the treasurer or other person (if any) having the receipt of any liberty rate, or rate in the nature of a county rate levied within such liberty, to pay to the treasurer of such first-mentioned county, out of the monies collected by way of county rate, liberty rate, or rate in the nature of a county rate, the amount mentioned in the warrant; and that the person to whom any such warrant shall be directed shall, within forty days from the delivery of such warrant to him, pay the amount to the treasurer of the county from which such warrant shall have issued, and shall be allowed for the same in his accounts with his county or liberty; and every such warrant shall specify the rate in the pound at which the sum mentioned therein shall be computed."

How treasurer of such other county or liberty shall be reimbursed.

Sect. 7. "That for the purpose of reimbursing the treasurer or other person by whom any such sum shall have been paid, the justices of the county to which such detached part belongs, or of the liberty or franchise, as the case may be, shall order a police rate to be made, at the rate mentioned in the warrant, upon such detached part of their county, or upon such liberty or franchise respectively, which shall be levied and collected thereon with and as part of the county rate, liberty rate, or rate in the nature of a liberty rate, to which such detached part of a county or such liberty or franchise is liable, in like manner as the police rate is levied and collected by order of the justices of any county for the expenses of the police of their own county."

In case of default, or other good cause, the amount may be levied on the inhabitants.

Sect. 8. "That if payment shall not be made within the said forty days, according to the exigency of the warrant, or if there shall be no person to whom such warrant can be directed, or no county rate, liberty rate, or rate in the nature of a county rate, to which the inhabitants of such liberty or detached part of another county contribute, or if the justices of the first-named county shall be dissatisfied with the valuation upon which such rate was assessed, or if, for any other reason, it shall seem more convenient to the justices of the first-mentioned county, it shall be lawful for them to levy

3. *Rates for.*

the full amount of the police rate upon any such detached part of another county or liberty or franchise in respect of which such amount is demandable; and for the purpose of levying and collecting such rates, the justices of such first-mentioned county shall have, within every such detached part of another county, and within every such liberty and franchise respectively, the same powers which they have for levying and collecting county rates within the limits of their own commission; and such rates may be levied and collected by the like methods, and subject to the same right of appeal, as if such detached parts of another county or such liberty or franchise respectively were part of such first-mentioned county, and within the hundred, wapentake, ward, rape, lathe or such other division of the county in which they are locally situated, or, if not wholly lying in one hundred, wapentake, ward, rape, lathe or such other division, in that one with which they have the longest common boundary respectively; and the high constable of every such hundred, wapentake, ward, rape, lathe or such other division, on the receipt of a warrant to that effect under the hands of two or more of the said justices, shall collect the said rates; and the overseer of the poor, or in default of overseers, or in case there shall be no separate rate for the relief of the poor in any portion of such detached part or liberty or franchise, such person or persons as the justices of the first-mentioned county in quarter session assembled shall appoint for that purpose in every parish and place to which such detached parts or liberty or franchise, or any part thereof, belong, upon receipt of a warrant to that effect from such high constable, shall pay the amount assessed upon their parish or place respectively, or upon that part of it which is liable thereunto, in like manner, and subject to the like penalties in case of default, as if such detached parts or liberty or franchise were part of such first-mentioned county, and within such hundred, wapentake, ward, rape, lathe, or other division as aforesaid respectively."

Right of inspecting county and liberty rates.

Sect. 9. "That the treasurer of any county, or any person having an order for that purpose under the hand of such treasurer, may inspect any county rate made or to be made for any other county or liberty or franchise, the inhabitants of any part of which shall be liable to be rated to the police rate in the first-named county, and may also inspect any returns concerning all or any of the parishes, townships, precincts and places, whether parochial or extra-parochial, the inhabitants of which are liable to be rated as aforesaid, which have been or are to be delivered in pursuance of any of the acts relating to county rates, and may take copies or extracts from any such rates or returns, without payment of any fee or reward; and if any person having the custody of any such rate or return shall wilfully neglect or refuse to permit any such treasurer or other person authorised as aforesaid to inspect the same, or to take copies or extracts from the same, within two days after such order shall have been produced and shown to him, or a copy thereof left at his usual place of abode, he shall, on conviction thereof before any two justices of the peace, forfeit and pay for every such offence such sum not exceeding 10*l.* as they shall think meet."

Penalty for refusing inspection.

Where two chief constables, rates may be levied separately.

Sect. 25. "That in any county in which two chief constables shall have been appointed under the authority of the said act, it shall be lawful for the justices of the said county, if they shall think fit, in general or quarter session assembled, to order that separate accounts shall be kept of the expenses of the force placed under the authority of each chief constable, and that the police rates shall be assessed and levied separately upon the districts of each chief constable, and applied separately to the expenses of the police force maintained therein."

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4. Chief Constables, Superintendents and other Officers.

One or more chief constables of the county to be appointed, who may serve for more than one county.

By the 2 & 3 Vict. c. 93, s. 4, it is enacted, "That as soon as any such rules, (see sect. 3, *post*, 932,) as finally settled, shall have been received from the secretary of state, the justices of the county in general or quarter session assembled, or at any adjournment thereof, shall, subject to the approval of the secretary of state, appoint a person duly qualified according to the rules

4. *Chief Constable, &c.*

to be chief constable of the county, and in every case of vacancy of the office shall, subject to the like approval, appoint another fit person in his room; and every chief constable so to be appointed may hold his office until dismissed by the justices in general or quarter session assembled, or at any adjournment thereof: Provided always, that when any county shall have been divided for the purpose of returning members to serve in parliament for each division, it shall be lawful to appoint two chief constables for such county, if the justices of such county shall think fit: Provided also, that it shall be lawful to appoint the same chief constable for two or more adjoining counties or parts of counties, if the justices of such counties in general or quarter session assembled shall mutually agree to join in such appointment."

Chief constable empowered to appoint a deputy, under certain restrictions.

Sect. 7. "That the chief constable shall, subject to the approval of the justices in general or quarter sessions assembled, or at any adjournment thereof, appoint one of the superintendents to act as his deputy in case of his being incapable, from illness or necessary absence from the county, to perform the duties of chief constable of the county; and the deputy so appointed shall in such case as aforesaid, and also in case of any vacancy of the office of chief constable by death or otherwise, have all the powers, privileges and duties of the chief constable: Provided always, that no deputy chief constable shall be capable of continuing to act with the powers of chief constable during any vacancy of the office for more than three calendar months after the vacancy has been occasioned."

Chief constable to attend at quarter sessions.

Sect. 17. "That every chief constable, unless prevented by sufficient cause, shall attend every general and quarter session of the justices of the county, and at every adjournment thereof, and shall make quarterly reports to the justices of all matters which they shall require of him concerning the police of the county, and shall obey all lawful orders and warrants of the said justices in the execution of his duty; and that the superintendents of divisions shall in like manner attend every session of the justices holden for their respective divisions, and shall make the like reports to the justices of such divisions."

By sect. 6, (*infra*,) the chief constable is empowered to appoint a superintendent to be at the head of the constables in each petty sessional division of the county.

Number of superintendents may be altered by the justices.

By the 3 & 4 Vict. c. 88, s. 26, reciting that it hath been found unnecessary that a superintendent be appointed for every petty sessional division of a county in which the first-recited act has been adopted, it is enacted, "That it shall be lawful for the justices in general or quarter session assembled, with the approval of one of her Majesty's principal secretaries of state, to direct how many of the constables shall be appointed superintendents, and to direct the appointment of inspectors and serjeants and other subordinate officers, with such gradations of rank and pay, and such variety of duties, as shall be found expedient; and it shall be lawful for the justices to make such orders as to them shall appear expedient touching the attendance of the superintendents, inspectors, serjeants or other subordinate officers among the said constables upon the justices at their several sessions."

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5. Petty Constables, Local Constables and additional Constables at the Cost of Individuals.

Chief constable to appoint the petty constables and superintendents.

By the 2 & 3 Vict. c. 93, s. 6, it is enacted, "That, subject to the approval of two or more of the justices of the county in petty sessions assembled, the chief constable shall appoint the other constables to be appointed for the county, and a superintendent to be at the head of the constables in each division of the county, and at his pleasure may dismiss all or any of them, and shall have the general disposition and government of all the constables so to be appointed, subject to such lawful orders as he may receive from the justices in general or quarter sessions assembled, or at any adjournment thereof, and to the rules established for the government of the force."

5. *Petty Constables, &c.*

Appointment of local constables.

By the 3 & 4 Vict. c. 88, s. 16, it is enacted, "That the chief constable shall make out, and cause to be laid before the justices acting in and for every petty sessional division of the county, at one of their special sessions holden for hearing appeals against the poor rates, a list, signed by him, of fit persons residing within every parish, township and place within the division, willing, in case of need, to serve as local constables during the year then next ensuing, for doing all things which belong to the office of constable within such parish, township or place; and the justices of each of such divisions, at any time, in petty sessions assembled, shall select from the persons named in such list so many local constables as they shall think fit to appoint for every such parish, township or place, and shall cause to be administered to them the following oath; (that is to say,)

Oath of local constable.

"*I, A. B. do swear, that I will well and truly serve our sovereign lady the Queen in the office of local constable for the parish* [or *township, &c.*] *of* [ ] *for the year ensuing, or until another shall be sworn in my stead, according to the best of my skill and knowledge.*

"*So help me God.*"

"All such local constables shall be subject to the authority of the chief constable, and to such regulations as shall be made for their government by one of her Majesty's principal secretaries of state, and shall have within the whole county, and also within all liberties and franchises and detached parts of other counties situated therein, and also in every county adjoining to the county in which they are appointed, all the powers, privileges and immunities, and shall be liable to all the duties and responsibilities, of a constable within his constablewick, but shall not be bound to act as a constable beyond the parish, township or place for which they are severally appointed and sworn; and the chief constable, from time to time, shall cause a list to be printed and published of the persons so appointed and sworn as local constables within each division, with the names of the places for which they are severally appointed."

Additional constables may be appointed at the cost of individuals.

Sect. 19. "That it shall be lawful for the chief constable of any county, with the approval of the justices of the county in general or quarter session assembled (if he shall think fit), on the application of any person or persons showing the necessity thereof, to appoint and cause to be sworn in any additional number of constables, at any place within the limits of his authority, at the charge of the person or persons by whom the application shall be made, but subject to the orders of the chief constable, and for such time as he shall think fit; and every such constable shall have all the powers, privileges and duties of other county constables: provided always, that it shall be lawful for the person or persons on whose application such appointment shall have been made, upon giving one calendar month's notice in writing to the chief constable, to require that the constable so appointed shall be discontinued, and thereupon the chief constable shall discontinue such additional constables."

Discontinuance thereof.

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6. Rules for the Government of—Neglect of Duty—Resignation—Dismissal—Accoutrements—Station Houses—Returns.

Rules for their government, pay, &c. to be made by the secretary of state.

By the 2 & 3 Vict. c. 93, s. 3 reciting that it is expedient that the rules for the government, pay, clothing, and accoutrements and necessaries of such constables as may be appointed under this act be uniform, as nearly as may be: it is enacted, "That such rules shall be from time to time made by one of her Majesty's principal secretaries of state, but not so as to increase the number of men proposed to be appointed; and the rules so made shall be sent to the clerk of the peace for each county in which or in any division of which this act shall be in operation; and it shall be lawful for the secretary of state, upon the representation of the justices of the county, setting forth any special reasons, to amend or add to such rules so as to make them applicable to the special circumstances of such county; and all such rules shall be binding on all persons whom they may concern; and copies of all such rules shall be laid before both houses of parliament within six weeks after the making

thereof, if parliament is then sitting, and if parliament is not then sitting then within six weeks after the next meeting of parliament."

6. *Rules for Government of, &c.*

Sect. 12. "That every constable appointed under this act who shall be guilty of any neglect or violation of duty in his office of constable, and shall be convicted thereof before any two justices of the peace for the county, shall be liable to a penalty not more than 10*l.*, the amount of which penalty may be deducted from any salary then due to such offender, or in the discretion of the justices by whom he shall be convicted may be imprisoned, with or without hard labour, for any time not more than one calendar month."

Penalty on constables for neglect of duty.

Sect. 13. "That no constable appointed under this act shall be at liberty to resign his office, or to withdraw himself from the duties thereof, unless expressly allowed so to do in writing by the chief constable or superintendent under whom he may be placed, or unless he shall give to such chief constable or superintendent one calendar month's notice of his intention; and every constable who shall so resign or withdraw himself without such leave or notice shall be liable, on being convicted thereof before any two justices of the peace for the county, to forfeit all arrears of pay then due to him, or to a penalty not more than 5*l.*"

Constables not to resign without leave or notice.

Sect. 14. "That every constable appointed under this act who shall be dismissed from or shall cease to hold and exercise his office, and who shall not forthwith deliver over all the clothing, accoutrements, appointments and other necessaries which may have been supplied to him for the execution of his duty to the chief constable or superintendent, or to such person and at such time and place as shall be directed by the said chief constable or superintendent, shall be liable, on being convicted thereof before any two justices of the peace for the county, to imprisonment, with or without hard labour, for any time not exceeding one calendar month; and it shall be lawful for any justice of the peace to issue his warrant to search for and seize to the use of the county police all the clothing, accoutrements, appointments and other necessaries which shall not be so delivered over, wherever the same may be found."

Constables dismissed to deliver up accoutrements, &c.

Sect. 15. "That every person, not being a constable appointed under this act, who shall have in his possession any article being part of the clothing, accoutrements or appointments supplied to any such constable, and who shall not be able satisfactorily to account for his possession thereof, or who shall put on the dress or take the name, designation or character of any person appointed as such constable, for the purpose of thereby obtaining admission into any house or other place, or of doing or procuring to be done any act which such person would not be entitled to do or procure to be done of his own authority, or for any other unlawful purpose, shall, in addition to any other punishment to which he may be liable for such offence, be liable, on being convicted thereof before any two justices of the peace for the county, to a penalty not more than 10*l.*"

Penalty on unlawful possession of accoutrements, and assuming dress of constables.

Sect. 16. "That if any victualler, or keeper of any house, shop, room or other place for the sale of any liquors, whether spirituous or otherwise, shall knowingly harbour or entertain any constable belonging to the said force, or permit such constable to abide or remain in his house, shop, room or other place, during any part of the time appointed for his being on duty, every such victualler or keeper as aforesaid, being convicted thereof before any two justices of the peace for the county, shall for every such offence forfeit and pay such sum, not exceeding 5*l.*, as they shall think meet."

Penalty on publicans harbouring constables during the hours of duty.

By the 3 & 4 Vict. c. 88, s. 12, it is enacted, "That it shall be lawful for the justices in general or quarter session assembled of any county in which or in any part of which constables shall be appointed under the first-recited act, if they think fit, to order that station houses and strong rooms, or either of them, for the temporary confinement of persons taken into custody by the constables, be provided in such places as the said justices shall think fit, and upon such plan as shall be approved by one of her Majesty's principal secretaries of state, and for that purpose to purchase and hold lands and tenements, or to appropriate to that purpose any lands or tenements belonging to the county which are not needed for the purpose to which they were applied or

Station houses and strong rooms to be provided.

6. *Rules for Government of, &c.*

intended to be applied before such appropriation; and the expense of building, hiring, or otherwise providing, repairing and furnishing such station houses and strong rooms shall be defrayed out of the police rates."

Money may be borrowed on credit of the police rates.

Sect. 13. "That it shall be lawful for the justices in general or quarter session assembled to borrow money for the purpose of purchasing any such lands and tenements, or of building any such station houses and strong rooms, and to charge the future police rates with the amount of the loan, and with interest thereon: provided always, that any money borrowed for such purpose shall be repaid by yearly instalments, not less than one-twentieth part of the sum borrowed, with interest on the same in any one year."

Chief constable to furnish to the clerk of the peace a monthly return of the disposition and number of the constabulary force.

Sect. 31. "That every chief constable shall on the first day of every month transmit to the clerk of the peace for the county for which or for some district whereof such constable shall act a return showing the actual disposition and number of the constabulary force of the county or district for which such constable shall act during the preceding month, which return shall specify the changes made from time to time in such force as well in number as by name, and shall distinguish by number and name the members of the police force of any other district serving within his district; and the clerk of the peace shall cause the said return to be laid before the justices at the next ensuing quarter sessions for examination."

Monthly returns of the force to be made.

Sect. 32. "That every superintendent appointed under this act shall on the first day of every month send to the chief constable a return showing the actual disposition and number of the constables of the county under his superintendence during the preceding month, which return shall specify the changes made from time to time therein, as well in number as by name; and the chief constable shall send a copy of all such returns to the clerk of the peace for the county, to be laid before the justices of the peace at their next general or quarter sessions of the peace."

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7. Authority of—Disabilities—Exemptions from Toll.

Constables to have the authority of special constables under 1 & 2 W. 4, c. 41. (*Post*, 942.)

By the 2 & 3 Vict. c. 93, s. 8, it is enacted, "That the chief constable and other persons so appointed shall be sworn as constables before a justice of the county, and shall have all the powers, privileges and duties throughout the county, and also in all liberties and franchises and detached parts of other counties locally situated within such county, and also in any county adjoining to the county for which they are appointed, which any constable duly appointed has within his constablewick by virtue of the common law, or of any statute made or to be made; and every provision of the first recited act shall be deemed to extend to the constables appointed under this act, except as to the manner of their appointment and dismissal, the time for which they shall serve, and the manner in which their allowances shall be paid, or as to any matter herein expressly otherwise provided."

Constables disqualified from voting at certain elections.

Sect. 9. "That no chief constable or other constable appointed by virtue of this act shall, during the time he shall continue to be such constable, or within six calendar months after he shall have ceased to be such constable, be capable of giving his vote for the election of a member to serve in parliament for the county in which he is so appointed, or for any county adjoining thereunto, or for any city or borough within any of the said counties; nor shall any such constable, by word, message, writing, or in any other manner, endeavour to persuade any elector to give, or dissuade any elector from giving, his vote for the choice of any person to be a member to serve in parliament for any such county, city or borough; and if any such constable shall offend therein, he shall forfeit the sum of twenty pounds, to be recovered by any person who will sue for the same by action of debt, to be commenced within six calendar months after the commission of the offence; and one moiety of the sum so recovered shall be paid to the informer, and the other moiety thereof to the treasurer of the county, to be by him applied for the purposes of the police under this act: provided always, that nothing in this enactment contained shall subject any constable to any penalty for any act done by him at or concerning any of the said elections in the discharge of his duty." [This

Penalty.

enactment does not extend to local constables appointed as *ante*, 932. See 3 & 4 Vict. c. 88, s. 35, *ante*, 924.]

7. *Authority of, &c.*

Sect. 10. "That all chief or other constables appointed under this act shall be restrained from employing themselves in any office or employment for hire or gain other than in the execution of their duties under this act, [this act does not apply to local constables, *ante*, 923,] and shall be exempt from being returned and from serving upon any juries or inquests whatsoever, or in the militia, nor shall they be inserted in any jury lists while they shall continue to be such constables."

Constables appointed under this act not to exercise any other employment, &c.

Sect. 11. "That no office or employment as a chief constable or constable under this act shall prevent the holder thereof from receiving any half pay to which, if he did not hold or have such office or employment, he might be or become entitled."

Not to prevent constables from receiving half-pay.

By the 3 & 4 Vict. c. 88, s. 1, it is enacted, "That no toll shall be demanded or taken on any turnpike road or bridge for any horse, or police van, carriage or cart, passing along such road or bridge, in the service of the police established under the provisions of the said act; provided that the constable in charge of such horse, van, carriage or cart, if not the chief constable, shall produce an order in writing under the hand of the chief constable, or shall have his dress according to the regulations of the police force at the time of claiming the exemption; and every person who shall fraudulently claim or take the benefit of the exemption from toll herein contained, not being lawfully entitled thereunto, shall for every such offence be liable to a penalty not more than 5*l.*; and in all such cases the proof of exemption shall be upon the person claiming the same."

Horses, &c. in the service of the police exempted from toll.

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8. Fees and Allowances—Superannuations.

By the 2 & 3 Vict. c. 93, s. 10, it is enacted, "That, in addition to the salary to be paid to the chief constable of the county, reasonable allowances shall be made to him for extraordinary expenses necessarily incurred by him, and by the constables under his orders, in the apprehension of offenders, and in the execution of his and their duty under this act; which allowances shall be examined and audited by the justices of the county in quarter sessions assembled."

Allowances for necessary expenses.

By the 3 & 4 Vict. c. 88, s. 17, it is enacted, "That the justices of the county in general or quarter session assembled shall from time to time, subject to the approval of one of her Majesty's principal secretaries of state, settle tables of fees and allawances for the service of summonses and execution of warrants, and for the performance of the other occasional duties which may be required of the said local constables; and whenever any duty for which any such fee or allowance shall have been settled shall be performed by one

Fees and allowances for special services. (*a*)

(*a*) Table of fees and allowances to be taken by the local constables appointed within the county of Essex, under the act of parliament 3 & 4 Vict. c. 88, for the service of summonses and execution of warrants, and for the performance of other occasional duties which may be required of the said constables, settled at the general quarter session of the peace holden at Chelmsford in and for the said county, on Tuesday, the 3rd day of January, 1843, and approved of by one of her Majesty's principal secretaries of state, in lieu of the table of fees and allowances settled at the general quarter session of the peace holden on the 20th day of October, 1840, and which was abolished at the said session holden on the 3rd day of January, 1843.

	£.	s.	d.
1. For service of each summons or order, and for returning same to the justice .	0	1	0
2. For executing each warrant against the person, and attending before the justice .	0	2	6
3. For every mile beyond three travelled in discharge of either of the foregoing duties, a further sum of	0	0	2
4. For every hour necessarily spent in executing any lawful order given by a justice, otherwise than by summons or warrant, if between 8 in the morning and 8 in the evening	0	0	4
If between 8 in the evening and 8 in the morning	0	0	6

8. *Fees, &c.*

of the constables appointed under the first recited act, the amount thereof shall be accounted for and paid to the treasurer of the county, or such other person as shall be appointed by the justices to receive the same, and shall be applied towards defraying the expenses of putting the said act in execution; and when such duty shall have been performed by one of the local constables appointed under this act, the amount of the fee or allowance shall be paid to such local constable, under such regulations as shall be made from time to time by the justices in general or quarter session assembled."

Accounts of allowances to be kept.

Sect. 18. "That the justices usually acting in and for every division shall take care that full, true and particular accounts be kept of all such fees and allowances within their division, and shall once in every quarter of a year cause an account, with all proper vouchers for verifyng the same, to be delivered to the treasurer of the county or other person appointed to receive the same."

Superannuation fund to be provided for constables.

Sect. 10. "That there shall be deducted from the pay of every constable belonging to the police force established in any county under the first-recited act a sum after such yearly rate as the justices of the county in general or quarter session assembled shall direct, not being a greater sum than two pounds ten shillings in a hundred pounds, which sum so deducted, and also the monies accruing from stoppages from any of the said constables during sickness, and fines imposed on any of the said constables for misconduct, and from any portion of the fines imposed by any justice of the peace upon drunken persons, or for assaults upon police constables, and from moieties of fines and penalties awarded to informers (being police constables) on summary convictions, as shall be directed by such justice to be paid for the benefit of this fund, and all monies arising from the sale of worn or cast clothing supplied for the use of the constables in any county, shall from time to time be invested in such manner as the justices in general or quarter session assembled shall direct; and the interest and dividends thereof, or so much of the same as shall not be required for the purposes hereinafter mentioned, shall be likewise invested in the like manner, and accumulate so as to form a superannuation fund, and shall be applied from time to time for payment of such superannuation or retiring allowances or gratuities as may be ordered by the justices in general or quarter session assembled, upon the recommendation of the chief constable, at any time, to any of the said constables, as hereinafter provided; and the justices shall gaurantee the security of the superannuation fund of their county, and make good out of the county stock any deficiency which may arise in such fund from the default of any treasurer or other person intrusted with the custody or management thereof."

Rates of allowance from the said fund.

Sect. 11. "That it shall be lawful for the justices, upon such recommendation, if they shall think fit, to order that any of the said constables may be superannuated, and receive thereupon out of the superannuation fund a yearly allowance, subject to the following conditions, and not exceeding the following proportions; (that is to say,) that if he shall have served with diligence and fidelity for fifteen years and less than twenty years, an annual sum not more than half his pay; if for twenty years or upwards, an annual sum not more than two-thirds of his pay; provided that if he shall be under sixty years of age it shall not be lawful to grant any such allowance unless upon the certificate of the chief constable that he is incapable, from infirmity of mind or body, to discharge the duties of his office; provided also, that if any constable shall be disabled from any wound or injury received in the actual execution of the duty of his office it shall be lawful to grant him any allowance not more than the whole of his pay; but nothing herein contained shall be construed to entitle any constable absolutely to any superannuation allowance, or to prevent him being dismissed without superannuation allowance."

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9. Warrants of Commitment, how executed.

How warrants of commitment may be executed.

By the 3 & 4 Vict. c. 88, s. 38, it is enacted, "That whenever a warrant of commitment of any person to any gaol or house of correction shall be directed and delivered to any constable in any county in which constables

shall have been appointed under the said act of the last session of parliament, (2 & 3 Vict. c. 93,) it shall be lawful for the justice or justices by whom such warrant shall be signed, if he or they shall think fit, in and by such warrant, to command the constable to whom the warrant is directed, and all other constables to whom the warrant shall be successively delivered as hereinafter provided, to convey and deliver the body of the person so committed, with the warrant, into the custody of the constable who shall be in attendance at the nearest or most convenient station house or strong room belonging to the said police force lying in the way towards the said gaol or house of correction, or to such other constable as shall be appointed by the regulations of the police force to take charge of persons so committed; and every constable into whose custody any such person shall be so successively delivered shall endorse upon the warrant a certificate in writing under his hand of the delivery of such person into his custody, and the time and place of such delivery, and such certificate shall discharge the constable so delivering over the body of such person from further execution of the warrant; and it shall be lawful for any constable into whose custody such persons shall have been so delivered to complete the execution of the warrant, by conveying and delivering the body of such person either to the said gaol or house of correction or into the custody of the constable in attendance at the next station house or strong room as aforesaid, or to such other constable as shall be appointed by the regulations of the police force to assist in taking charge of persons so committed; and every constable into whose custody any person shall be so delivered, and who shall have endorsed such certificate upon the warrant, shall have the same powers, privileges, and protections for and in the execution of such warrant as if the same had been originally directed to him by name."

9. Warrants, how executed.

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10. Constables, how discontinued.

By the 3 & 4 Vict. c. 88, s. 24, it is enacted, "That if the justices of the peace of any county in general or quarter sessions assembled shall be of opinion that the constables appointed under the first-recited act or under this act are no longer needed in their county, it shall be lawful for the justices assembled as aforesaid to report that opinion to one of her Majesty's principal secretaries of state, six months' notice of the intention to propose that such report be made having been first given as is by the said act provided with regard to any business relating to the adoption of the said act; and if three-fourths of the justices assembled at any such general or quarter sessions of the peace, after such notice given, shall resolve upon making such report, and such report shall be approved by one of her Majesty's principal secretaries of state, the said constables shall be discontinued at such time as shall be mentioned in the report; and any balance of monies which shall have been raised for the purposes of the said act, after payment of all expenses legally chargeable thereon, shall be carried to the account of the county rate."

Constables appointed under the first-recited act and this act to be discontinued when decided to be unnecessary.

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11. Operation of Acts upon the Appointment of Constables in Boroughs — Of High Constables — Special Constables — Parochial Constables — Of Constables under the Watching and Lighting Act, and Local Acts.

By the 2 & 3 Vict. c. 93, s. 25, it is enacted, "That upon the appointment of constables under this act in any county, or in any division or divisions of a county, the power to appoint and pay, and to make rates for paying, any constables, in any hundred, parish, township, or place within such county, division or divisions, except such boroughs as aforesaid, other than high constables, or other than special constables appointed under the provisions of the first-recited act, or of any act made for enlarging the powers of magistrates under the said act, or otherwise than under this act, and also all the powers and duties of all such constables, shall cease and determine; and all sums of money then already levied for the purpose of such other constables shall be

Discontinuance of constables under local and other acts where this act is in operation, except in boroughs, or high constables, special constables.

11. *Operation of Acts.*

Not to prevent the appointment of parochial constables, or of any constable, to act as returning officer.

Not to affect for two years any places where the population is more than 10,000.

applied, after defraying all charges to which the same are then liable, in and towards payment of the county rates levied upon such hundred, parish, township, or place: provided always, that all arrears of rates made for the purposes aforesaid shall be levied and collected as if this act had not been made: provided also, that nothing herein contained shall prevent or invalidate the appointment of parochial constables: provided also, that nothing herein contained shall prevent the appointment of any constable to act as returning officer in any election, whenever such appointment may be necessary."

Sect. 26. "Provided always, that, notwithstanding any thing herein contained, the power to appoint and pay, and to make and levy rates for paying constables, under any act of parliament made for watching any town, parish, or place, which by the last parliamentary enumeration of the population contained more than ten thousand inhabitants, and the powers and duties of all constables appointed by the commissioners for the execution of any such act, shall continue, as if this act had not been made, for two years after the passing of this act, and thence until the end of the then next session of parliament."

Power of 3 & 4 Will. 4, c. 90, and of local acts for levying rates to cease, except as hereby reserved for paying additional constables.

By the 3 & 4 Vict. c. 88, s. 20, after reciting that an act was passed in the fourth year of the reign of his late majesty, making provisions for the lighting and watching of parishes in England and Wales, and divers acts have been made authorising the appointment of constables and watchmen, by day or night, in sundry towns or places within the counties in which the first-named act may be put in force, and authorising rates to be made and levied for the purpose of defraying the expenses of such constables or watchmen; it is enacted, "That, notwithstanding any thing contained in the said act of the last session of parliament, the constables or watchmen appointed in and for any parish under the said act of the fourth year of the reign of his late majesty, or in and for any town or place under any such local act as last aforesaid, and not discontinued before the passing of this act, shall continue to act in their respective appointments, and shall be subject to the same authorities as heretofore; and all such acts shall continue in force until it shall be notified by the chief constable of the county in which such parish, town, or place is situated, to the inspectors, commissioners, or other persons having authority over such constables or watchmen as aforesaid, by writing under his hand, that he is ready to undertake the charge of such parish, town, or place on some day to be specified in the notice, which notice shall be published within such parish, town, or place, in such manner as shall seem fit to the chief constable, for the purpose of making the same to be generally known; and upon the day so named the watchmen or constables appointed within such parish, town, or place, under the said act of the fourth year of the reign of his late majesty, or under such local act, shall be discontinued as a separate force; and all powers for assessing and levying any rate in such parish, town, or place, the whole or any part of which shall be applicable to the payment of such watchmen or constables, or any expenses incident thereunto, shall cease, so far as such powers relate to any whole rate so applicable, or to that part of any rate which shall be so applicable, except for such purposes as are hereinafter mentioned: provided always, that, notwithstanding any thing in the first-named act contained, the powers of all such acts shall enure for the purpose of enabling the inspectors, commissioners, or other persons charged with the execution of any such act, to make such application as aforesaid to the chief constable of the county for the appointment in any such town or place of an additional number of constables, and to assess and levy such rates as are authorised by the said acts in each case for defraying the expenses of constables or watchmen, and to apply them in defraying the expense of so many additional constables in such town or place respectively as the chief constable, on their application, and with the approval of the justices as aforesaid, shall appoint there: provided also, that where any parish, town, or place in which constables have been appointed under any such local act shall be situated in more than one county, such notice shall not be given by the chief constables of either county to the commissioners or other persons having authority over the constables in such parish, town, or place, until after constables shall have been appointed under the first-recited act in each of such counties."

Proviso as to places situate in more than one county.

Sect. 21. "That upon the day mentioned in such notice as last aforesaid, all watchhouses and watchboxes in any such parish or place, and all arms, accoutrements and other necessaries provided at the public expense for the watchmen or constables therein, shall be given up to such persons as shall be named by the said chief constable, for the use and accommodation of the constables to be appointed under the first recited act; and in case any person having the charge, control or possession of any watchhouse, watchbox, arms, accoutrements or necessaries as aforesaid, shall neglect or refuse to give up the same as hereinbefore required, every such offender, being convicted thereof before any two justices of the peace, shall for every such offence forfeit and pay, over and above the value of the property not given up, such sum, not exceeding 5*l.*, as the said justices shall think meet; and where there shall be any building in any such parish or place as aforesaid, a part only of which building shall have been heretofore used as a watchhouse, such part shall be given up every day, from the hour of four in the afternoon until the hour of nine in the forenoon, for the use and accommodation of the constables to be appointed under the first recited act; and if any person, having the charge, control or possession of any such building, shall neglect or refuse to give up such part thereof for the purposes aforesaid, or to permit free access thereto or egress therefrom during any portion of the time above prescribed, every such offender, being convicted thereof before any two justices of the peace, shall for every such offence forfeit and pay such sum, not exceeding 5*l.*, as the said justices shall think meet."

11. *Operation of Acts.*

Watchboxes and accoutrements provided under local acts to be given up for use of the county police.

Sect. 22. "That any rate authorised by the said act of the fourth year of the reign of his late majesty, or by any such local act, for defraying the expenses of the constables or watchmen in any parish or place, made previous to the day on which the said chief constable shall undertake the charge thereof, shall be levied and collected in the same manner as if the first recited act or this act had not been passed; and that nothing herein contained shall be deemed to affect or alter any powers or authorities for assessing and levying any rate in any such parish or place, so far as such rate may relate to paving, lighting, cleansing or any other object, except the constables or watchmen, or any expenses incident thereto."

Rates already imposed to be collected.

Sect. 23. "And whereas there are certain parishes and places in which monies have been borrowed or advanced, and debts contracted, under some one or more of such acts as last aforesaid, for the building of watchhouses, and for various expenses connected with the constables or watchmen therein, and such monies and debts remain unpaid, and it is expedient that the same be discharged; be it enacted, that all such monies and debts in any parish or place of which the said chief constables shall undertake the charge shall, notwithstanding any thing hereinbefore contained, be chargeable upon the rates out of which such monies or debts have been heretofore in part paid, or would have been payable if the first recited act or this act had not been passed, and such rates shall be from time to time assessed and levied for the payment of such monies and debts until the same shall be entirely discharged and satisfied."

Provision for outstanding debts.

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12. Practical Directions.—The Criminal Duties of Constables generally, and the Manner of executing them.

The following instructions have been promulgated for the guidance of constables, whether appointed under the above act, or under the act 5 & 6 Vict. c. 109, for the appointing of parish constables:—

"The constable may arrest one whom he has just cause to suspect to be about to commit a felony. Thus, when a drunken person, or a man in a violent passion, threatens the life of another, the constable should interfere and arrest.

"He should arrest any person having in his possession any picklock-key, crow, jack, bit or other implement, with intent feloniously to break into any dwellinghouse, warehouse, coachhouse, stable or outbuilding, or any person

12. *Practical Directions.*

armed with any gun, pistol, hanger, cutlass, bludgeon or offensive weapon, or having upon him any instrument, with intent to commit any felonious act.

"Every person found in any dwellinghouse, warehouse, coachhouse, outhouse or stable, or in any enclosed yard, garden or area, and being there for any unlawful purpose, may be arrested.

"In each of these cases the constable must judge from the situation and behaviour of the party what his intention is. In some cases no doubt can exist; as when the party is a notorious thief, or acting with those who are thieves, or when the party is seen to try people's pockets in a crowd, or to attempt to break into a house, or to endeavour to take any property secretly from another. The constable will not act hastily, in case the intention is not clear, but content himself with watching closely the suspected party, that he may discover his design.

"The constable must arrest any one whom he sees in the act of committing a felony, (*a*) or any one whom another positively charges with having committed a felony, or whom another suspects of having committed a felony, if the suspicion appear to the constable to be well founded, and provided the person so suspecting go with the constable.

"Though no charge be made, yet if the constable suspect a person to have committed a felony, he should arrest him; and if he have reasonable grounds for his suspicion, he will be justified, even though it should afterwards appear that no felony was in fact committed; but the constable must be cautious in thus acting upon his own suspicions.

"Generally, if the arrest was made discreetly and fairly in pursuit of an offender, and not from any private malice or ill-will, the constable need not doubt that the law will protect him.

"If, after sunset and before sunrising, the constable shall see any one carrying a bundle or goods which he suspects were stolen, he should stop and examine the person, and detain him; but here also he should judge from circumstances, (such as appearance and manner of the party, his account of himself, and the like,) whether he has really got stolen goods, before he actually takes him into custody.

"The constable must make every exertion to effect the arrest; and the law gives him abundant power for the purpose. If the felon, or party accused of felony, fly, he may be immediately followed wherever he goes; and if he takes refuge in a house, the constable may break open the doors, if necessary, to get in, first stating who he is, and his business; but the breaking open outer doors is so dangerous a proceeding, that the constable should never resort to it except in extreme cases, and when an immediate arrest is necessary.

"There are some cases in which a constable may and ought to break into a house, although no felony has been committed, when the necessity of the case will not admit of delay, as when persons are fighting furiously in a house, or when a house has been entered by others with a felonious intent, and a felony will probably be committed unless the constable interfere, and there are no other means of entering; except in such cases it is better in general that the constable should wait till he has a warrant from a magistrate for the purpose.

"If a prisoner should escape, he may be retaken, and in immediate pursuit the constable may follow him into any place or any house.

"If a constable finds his exertions insufficient to effect the arrest, he ought to require all persons present to assist him, and they are bound to do so.

(*a*) The principal felonies are, murder and attempts to murder or maim, manslaughter; rape, robbery and attempts to rob; burglary, housebreaking; cattle, horse and sheep stealing, stealing from the dwellinghouse, the person, and theft generally; receiving stolen goods, embezzlement, &c.; also setting fire to any house, outbuilding, stacks or crops; and all cases of forging and coining. The minor offences are called misdemeanors, such as frauds, uttering counterfeit coin, riots, assaults, affrays, &c.

12. *Practical Directions.*

"In cases of actual breaches of the peace, as riots, affrays, assaults and the like, committed within the view of the constable, he should immediately interfere (first giving public notice of his office, if he be not already known), separate the combatants, and prevent others from joining in the affray. If the riot, &c. be of a serious nature, or if the offenders do not immediately desist, he should take them into custody, securing also the principal instigators of the tumult, and doing every thing in his power to restore quiet.

"A constable, in cases of assault which have not been committed in his presence, or within his view, is not authorised to arrest or assist in arresting the party charged, nor is he to receive a person so charged into his custody, unless the party has been arrested by some other constable who saw the assault committed.

"He may arrest any one assaulting or opposing him in the execution of his duty.

"If a person forcibly enter the house of another, the constable may, at the request of the owner, turn him out directly; if he have entered peaceably, but having no right to enter, and the owner request the constable to turn him out, the constable should first request him to go out, and unless he do so, he should turn him out, in either case using no more force than is necessary for the purpose

"When the offence has not yet been committed, but when a breach of the peace is likely to take place, as when persons are openly preparing to fight, the constable should take the parties concerned into custody; if they fly into a house, or are making preparations to fight within the house, the constable should enter the house to prevent them, and likewise take the parties into custody; and should the doors be closed, he may break them open, if admission be refused, after giving notice of his office and his object in entering.

"If a party threaten another with immediate personal violence, or offer to strike, the constable should interfere and prevent a breach of the peace; if one draw a weapon upon another attempting to strike, the constable should take him into custody If persons be merely quarrelling or insulting each other by words, the constable has no right to take them into custody, but should be ready to prevent a breach of the peace.

"The constable ought to arrest and take before a justice any person walking about the streets, and exposing to view in the street any obscene print or exhibition.

"If a party charged with a misdemeanor escape out of custody, he may be pursued immediately anywhere; and if he take refuge in a house, the doors may be broken open after demand of admission, and after notification by the constable of his office and object in coming.

"After arrest, the constable is in all cases to treat a prisoner properly, and impose only such constraint upon him as may be necessary for his safe custody.

"The constable is bound to follow the directions contained in a warrant, and to execute it with secrecy and despatch; the power given to him for the purpose of arresting has been already shown. If the warrant cannot be executed immediately, it should be executed as soon as possible afterwards.

"The constable must execute the warrant himself, or, when he calls in assistance, must be actually present. Upon all occasions he ought to state his authority if it be not generally known, and should show his warrant when required to do so; but he should never part with the possession of the warrant, as it may be wanted afterwards for his own justification.

"Upon the arrest being made, the prisoner is to be taken before the magistrate as soon as convenient. When the prisoner is brought to the justice, he still remains in custody of the constable until his discharge or committal, or until the officer receives the orders of the justice.

"The constable may enter a house to search for stolen goods, having first got a search warrant from a magistrate for that purpose. He should, when it is possible so to do, execute it in the day-time. If he find the goods mentioned, he is to take them to a magistrate, and, when the warrant so directs,

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he must take the person also in whose possession they are found. To avoid mistakes, the person who applies for the warrant ought to attend at the search to identify the goods.

"The constable has power to apprehend and carry before a justice of the peace every common prostitute wandering in the public streets, public highways, or in any place of public resort, behaving in a riotous or indecent manner; every person wandering abroad, or placing himself or herself in any public street or highway, court or passage, to beg or gather alms, or causing or procuring or encouraging any child so to do, all such being declared by the law to be idle and disorderly persons; every person wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or waggon, not having any visible means of subsistence, and not giving a good account of himself or herself; every person wandering abroad and endeavouring, by the exposure of wounds or deformities, to obtain or gather alms; every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind under any false or fraudulent pretence; every person playing or betting in any street, road, highway or other open or public place, at or with any table or instrument of gaming at any game or pretended game of chance.

"In the cases above mentioned the constable has by law power to arrest."

V. Special Constables.

1 & 2 Will. 4, c. 41.

The stat. 1 & 2 Will. IV. c. 41, intituled "*An Act for amending the Laws relative to the appointment of Special Constables, and for the better Preservation of the Peace,*" [15th October, 1831,] by section 20 repeals the 1 Geo. IV. c. 37, and by sect. 1, reciting that "it is expedient to amend the laws relative to the appointment of special constables, and to make other provisions for the better preservation of the public peace;" enacts, "That in all cases where it shall be made to appear to any two or more justices of the peace of any county, riding, or division having a separate commission of the peace, or to any two or more justices of the peace of any liberty, franchise, city or town in England or Wales, upon the oath of any credible witness, that any tumult, riot, or felony has taken place, or may reasonably be apprehended in any parish, township or place situate within the division or limits for which the said respective justices usually act, and such justices shall be of opinion that the ordinary officers appointed for preserving the peace was not sufficient for the preservation of the peace, and for the protection of the inhabitants and the security of the property in any such parish, township or place as aforesaid, then and in every such case such justices, or any two or more justices acting for the same division or limits, are hereby authorised to nominate and appoint, by precept in writing under their hands, so many as they shall think fit of the householders or other persons (not legally exempt from serving the office of constable) residing in such parish, township or place as aforesaid, or in the neighbourhood thereof, to act as special constables, for such time and in such manner as to the said justices respectively shall seem fit and necessary, for the preservation of the public peace, and for the protection of the inhabitants, and the security of the property in such parish, township or place; and the justices of the peace who shall appoint any special constables by virtue of this act, or any one of them, or any other justice of the peace acting for the same division or limits, are and is hereby authorised to administer to every person so appointed the following oath; that is to say,

Justices, on information on oath that disturbances exist or are apprehended, may appoint special constables.

Oath to be taken by special constables.

'*I A. B. do swear, that I will well and truly serve our sovereign lord the king in the office of special constable for the parish* [or *township,*] *of* , *without favour or affection, malice or ill-will; and that I will to the best of my power cause the peace to be kept and preserved, and prevent all offences against the persons and properties of his majesty's subjects; and that while I continue to hold the said office I will to the best of my skill and knowledge discharge all the duties thereof faithfully according to law. So help me God.*'

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Notice to be sent to secretary of state and to lieutenant of county.

Provided always, that whenever it shall be deemed necessary to nominate and appoint such special constables as aforesaid, notice of such nomination and appointment, and of the circumstances which have rendered such nomination and appointment expedient, shall be forthwith transmitted by the justices making such nomination and appointment to one of his majesty's principal secretaries of state, and to the lieutenant of the county."

Secretary of state, on representation of justices, may order persons to be sworn in, though exempt by law,

Sect. 2. "In any case in which any number of the householders, or other persons not legally exempt from serving the office of constable, shall have been appointed by the justices in manner aforesaid to act as special constables for any such parish, township or place as aforesaid, it shall be lawful for any one of his majesty's principal secretaries of state, on the representation of any two justices of the peace, to order that the persons exempt by law from serving as special constables in such parish, township or place, or the neighbourhood thereof, shall, notwithstanding such exemption, be appointed and sworn in to act as special constables as if they were not by law exempt, and such persons shall accordingly be appointed and sworn in manner aforesaid, and shall be liable to act for two calendar months only."

and may direct lord lieutenant to cause special constables to be sworn in, and no exemption allowed.

Sect 3. "It shall be lawful for any one of his majesty's principal secretaries of state to give direction to the lieutenant of any county to cause special constables to be appointed and sworn in manner aforesaid throughout the whole of such county or any portion thereof, whether a hundred or hundreds, parish or parishes, or any other known division or divisions, of whatever size or denomination, and to signify, if such secretary of state shall see fit, that no person shall be excused from being so appointed and sworn in by reason of any exemption: provided always, that the persons so appointed and sworn in, whether having cause of exemption or not, shall be only called upon to act for three calendar months."

Justices may make regulations respecting special constables, and may remove them for misconduct.

Sect. 4. "The justices of the peace who shall have appointed any special constables under this act, or any two of them, or the justices acting for the division or limits within which such special constables shall have been called out, at a special session of such last-mentioned justices, or the major part of such last-mentioned justices at such special sessions, shall have power to make such orders and regulations as may from time to time be necessary and expedient for rendering such special constables more efficient for the preservation of the public peace, and shall also have power to remove any such special constable from his office for any misconduct or neglect of duty therein."

Powers of special constables.

Sect. 5. "Every special constable appointed under this act shall, not only within the parish, township or place for which he shall have been appointed, but also throughout the entire jurisdiction of the justices so appointing him, have, exercise and enjoy all such powers, authorities, advantages and immunities, and be liable to all such duties and responsibilities, as any constable duly appointed now has within his constablewick by virtue of the common law of this realm, or of any statute or statutes."

Special constables may act in adjoining county in certain cases.

Sect. 6. "Where any special constables appointed under this act shall be serving within any county, and two or more justices of the peace of any adjoining county shall make it appear to the satisfaction of any two or more justices of the peace acting for the division or limits wherein such special constables are serving, that any extraordinary circumstances exist which would render it expedient that the said special constables should act in such adjoining county, then and in every such case the said last-mentioned justices are hereby authorised (if they shall think fit) to order all or any of the said special constables to act in such adjoining county in such manner as to the said last-mentioned justices shall seem meet; and every such special constable, during the time that he shall so act in such adjoining county, shall have, exercise and enjoy all such powers, authorities, advantages and immunities, and be liable to all such duties and responsibilities, as if he were acting within the parish, township or place for which he was originally appointed."

Refusing to take oath of office, &c.

Sect 7. "If any person, being appointed a special constable as aforesaid, shall refuse to take the oath herein-before mentioned, when thereunto re-

5. *Special Constables.*

1 & 2 Will. 4, c. 41.

Penalty for.

quired by the justices of the peace so appointing him, or by any two of them, or by any other two justices of the peace acting for the same division or limits, he shall be liable to be convicted thereof forthwith before the said justices so requiring him, and to forfeit and pay such sum of money, not exceeding five pounds, as to the said justices so requiring him shall seem meet; and if any person, being appointed a special constable as aforsesaid, shall neglect or refuse to appear at the time and place for which he shall be summoned, for the purpose of taking the said oath, he shall be liable to be convicted thereof forthwith before the justices so appointing him, or any two of them, or before any other two justices of the peace acting for the same division or limits, and to forfeit and pay such sum of money, not exceeding five pounds, as to the convicting justices shall seem meet, unless such person shall prove to the satisfaction of the said justices that he was prevented by sickness or such other unavoidable accident as shall in the judgment of the said justices be a sufficient excuse."

Refusing to serve, or disobeying orders.

Penalty for.

Sect. 8. "If any person, being appointed a special constable as aforesaid, and being called upon to serve, shall neglect or refuse to serve as such special constable, or to obey such lawful orders and directions as may be given to him for the performance of the duties of his office, every person so offending shall, on conviction thereof before any two justices of the peace, forfeit and pay for every such neglect or refusal such sum of money, not exceeding five pounds, as to the said justices shall seem meet, unless such person shall prove to the satisfaction of the said justices that he was prevented by sickness or such other unavoidable accident as shall in the judgment of the said justices be a sufficient excuse."

Or it seems, if persons, duly called upon by the magistrates to serve as special constables, refuse to do so, the magistrates may cause them to be indicted. (*Reg.* v. *Vincent*, 9 *Car. & P.* 91.)

Power to discontinue services of constables called out;

notifying same to secretary of state, &c.

Sect. 9. "The justices who shall have appointed any special constables under this act are hereby empowered, or the justices acting for the division or limits within which such special constables shall have been called out at a special session to be held for that purpose, or the major part of such last-mentioned justices at such special session, are hereby empowered to suspend or determine the services of any or all the special constables so called out, as to the said justices respectively shall seem meet; and notice of such suspension or determination of the services of any or all of the said special constables shall be forthwith transmitted by such respective justices to one of his majesty's principal secretaries of state, and also to the lieutenant of the county."

A special constable, duly appointed under this act, is appointed for an indefinite time, and remains a constable till his services are either determined or suspended, under this section of that statute; and, being so appointed under that statute, he has all the authority of an ordinary constable, until his services are either suspended or determined. (*Reg.* v. *Porter*, 9 *Car. & P.* 778.)

Special constables to deliver staves.

Penalty for omission.

Sect. 10. "Every such special constable shall, within one week after the expiration of his office, or after he shall cease to hold and exercise the same pursuant to this act, deliver over to his successor (if any such shall have been appointed), or otherwise to such person and at such time and place as may be directed by any justice of the peace acting for the division or limits within which such special constable may have been called out, every staff, weapon and other article which shall have been provided for such special constable under this act; and if any such special constable shall omit or refuse so to do, he shall, on conviction thereof before two justices of the peace, forfeit and pay for such offence such sum of money not exceeding two pounds as to the convicting justices shall seem meet."

Assaulting or resisting constables.

Sect. 11. "If any person shall assault or resist any constable appointed by virtue of this act, whilst in the execution of his office, or shall promote or encourage any other person so to do, every such person shall, on conviction thereof before two justices of the peace, forfeit and pay for such offence any sum not exceeding twenty pounds, or shall be liable to such other punish-

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ment, upon conviction on any indictment or information for such offence, as any persons are by law liable to for assaulting any constable in the execution of the duties of his office."

1 & 2 Will. 4, c. 41.

Penalty and punishment for.

Sect. 12. "No person who shall be appointed a special constable, or who shall act as such under the provisions of this act, shall by reason thereof acquire a legal settlement in any parish, township or place, any law or statute to the contrary notwithstanding; and that no such person shall by reason thereof be exempt from the ballot for or from serving in the militia."

Special constables not to gain settlement, nor be exempt from militia.

Special sessions may order allowances to special constables.

Sect. 13. "The justices of the peace acting for the division or limits within which any such special constables shall have been called out to serve at a special session to be held for that purpose, or the major part of the justices at such special session, are hereby empowered to order from time to time such reasonable allowances for their trouble, loss of time and expenses, to be paid to such special constables who shall have so served or be then serving, as to the said justices or such major part of them shall seem proper; and the said justices or such major part of them may also order the payment of such expenses as may have been incurred in providing staves or other necessary articles for such special constables; and the said justices so ordering, if justices for any county, riding or division having a separate commission of the peace, or if justices for any liberty, franchise, city or town which shall be contributory to the public rate for any county, riding or division, shall make every order for the payment of such allowances and expenses upon the treasurer of such county, riding or division, who is hereby required to pay the same out of any public money which shall then be in his hands, and the said treasurer shall be allowed all such payments in his accounts; and where the justices of the peace assembled at such special sessions are justices for any liberty, franchise, city or town which is not contributory to the public rate for any county, riding or division, but which raises a rate or other similar fund in the nature of a county rate, in every such case the said last-mentioned justices shall make every order for the payment of such allowances and expenses as aforesaid upon the treasurer or other officer having the collection or disbursement of such last-mentioned rate or fund, who shall forthwith pay every such order out of such rate or fund, and shall be allowed all such payments in his accounts." (See as to the expenses of special constables acting under warrants, stat. 41 Geo. III. c. 78, s. 1, *ante*, 919.)

Such allowances to be paid out of county rate.

Mode of payment in places not contributing to county rate.

Power to adjourn special session, &c.

Sect. 14. "The justices of the peace assembled at any special session for any of the purposes mentioned in this act shall have power to adjourn the same from time to time, as they shall think proper; and that every special session which shall have been actually holden for any of the purposes mentioned in this act shall be deemed and taken to have been legally holden, until the contrary shall be proved."

Time for prosecutions under act.

Application of penalties.

Sect. 15. "The prosecution for every offence punishable upon summary conviction by virtue of this act shall be commenced within two calendar months after the commission of the offence; and that every penalty and forfeiture for any offence against this act shall be paid to some one of the overseers of the poor, or to some other officer, (as the convicting justices may direct,) of the parish, township or place in which the offence shall have been committed, to be by such overseer or officer paid over to the use of the public rate for the county, riding or division to which such parish, township or place is contributory; or if such parish, township or place is situate within any liberty, franchise, city or town which is not contributory to the public rate for any county, riding or division, but which raises a rate or other similar fund in the nature of a county rate, then every such penalty or forfeiture shall be paid over in the manner aforesaid to the use of the said last-mentioned fund or rate; and no inhabitant of any county, riding, division, liberty, franchise, city or town shall by reason thereof, or by reason of the application of any such penalty or forfeiture as aforesaid, be deemed an incompetent witness in proof of any offence against this act."

Inhabitants competent witnesses.

Payment of penalties, and mode of levying same, &c.

Sect. 16. "The justices of the peace by whom any person shall be summarily convicted and adjudged to pay any sum of money for any offence against this act may adjudge that such person shall pay the same either imme-

5. *Special Constables.*

1 & 2 W. 4, c. 41.

Distress.

Commitment. (b)

diately or within such period as the said justices shall think fit; and in case such sum of money shall not be paid at the time so appointed, the same shall be levied by distress (a) and sale of the goods and chattels of the offender, together with the reasonable charges of such distress; and for want of sufficient distress such offender shall be imprisoned, with or without hard labour, in the common gaol or house of correction, as to the convicting justices shall seem meet, for any term not exceeding one calendar month where the sum to be paid shall not exceed five pounds, and for any term not exceeding two calendar months in any other case; the imprisonment to cease in each of the cases aforesaid upon payment of the sum due."

Form of conviction.

Sect. 17. "The justices of the peace before whom any person shall be summarily convicted of any offence against this act may cause the conviction to be drawn up in the following form of words, or to the like effect; that is to say,

"—— } *Be it remembered, that on the day of , in the year of our*
to wit. } *Lord , at , in the county of ,* [or *riding, &c.*] *A. O. is convicted before us, J. P. and J. J. P., two of his majesty's justices of the peace for the said county* [or *riding*, &c. or otherwise, as the case may require,] *for that he the said A. O. did* [here specify the offence, and the time and place when and where the same was committed, as the case may be,] *and we do adjudge that the said A. O. shall for the said offence forfeit the sum of , and shall pay the same immediately* [or *shall pay the same on or before the day of ,*] *to C. D. being one of the overseers of the poor of, &c. to be by him applied according to the directions of the statute in that case made and provided. Given under our hands the day and year first above mentioned.*

J. P. and J. J. P."

No certiorari, &c.

Sect. 18. "No conviction for any offence against this act shall be quashed for want of form, or be removed by certiorari or otherwise into any of his majesty's superior courts of record; and that no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that it is founded on a conviction, and there be a good and valid conviction to sustain the same; and that where any distress shall be made for levying any money by virtue of this act, the distress itself shall not be deemed unlawful, nor the party making the same be deemed a trespasser, on account of any defect or want of form in the summons, conviction, warrant of distress, or other proceedings relating thereto, nor shall the party distraining be deemed a trespasser *ab initio* on account of any irregularity afterwards committed by him, but the person aggrieved by such irregularity may recover full satisfaction for the special damage, if any, in an action upon the case."

Defects in form.

Party not a trespasser *ab initio.*

Venue in actions for thing done in pursuance of act. (a)

Notice of action. (c)

General issue, &c. (a)

Tender of amends. (c)

Costs. (c)

Sect. 19. And for the protection of persons acting in the execution of this act, it is enacted, "that all actions and prosecutions to be commenced against any person for any thing done in pursuance of this act shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact committed, and not otherwise; and notice in writing of such cause of action shall be given to the defendant one calendar month at least before the commencement of the action; and in any such action the defendant may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon; and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into Court, after such action brought, by or on behalf of the defendant; and if a verdict shall pass for the defendant, or the plaintiff shall become nonsuit or discontinue any such action after issue joined, or if, upon demurrer or otherwise, judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant hath by law in other cases; and though a verdict shall be given for the plaintiff in any such action,

Certificate of costs.

(a) See the 5 Geo. IV. c. 18, title "*Distress under Justices' Warrant,*" Vol. II.

(b) See *ante*, "*Commitment in Execution.*"

(c) As to enactments of this nature, see title "*Justices,*" Vol. III. p. 1033, and *ante*, 917, 918.

such plaintiff shall not have costs against the defendant unless the judge before whom the trial shall be shall certify his approbation of the action and of the verdict obtained thereupon."

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1 & 2 W. 4, c. 41.

Sect. 20. Repeals the 1 Geo. IV. c. 37.

Repeal of 1 G. 4, c. 37.

Sect. 21. The act is not to extend to Scotland or Ireland.

Not to extend to Scotland or Ireland

Sect. 22. "Nothing in this act contained shall be construed to abridge any powers for preserving the public peace, whether by appointing constables or otherwise, which any justice or justices of the peace had, by law, or by virtue of any statute or statutes, before the passing of the said act of the first year of the reign of King George the Fourth."

Not to abridge powers of Justices.

By stat. 5 & 6 Will. IV. c. 43, intituled "*An Act for enlarging the Powers of Magistrates in the Appointment of Special Constables,*" [31st August, 1835,] after reciting sect. 1 of 1 & 2 Will IV. c. 41 (*ante*, 942), and that "it is expedient that the power of appointing special constables given by the said act should be extended in manner hereinafter mentioned" it is enacted, "that all persons willing to act as special constables under the provisions of the said act shall be capable of being appointed and acting, and may be appointed and act, as such special constables, notwithstanding they may not be resident in such parish, township or place as aforesaid, or in the neighbourhood thereof; and every person appointed and acting as special constable under the provisions of this act shall have all the same powers, and be entitled to and enjoy all the same privileges and benefits, and be subject to all the same duties and liabilities, as the special constables appointed or to be appointed under the provisions of the said act."

5 & 6 W. 4, c. 43.

Persons may act as special constables in other parishes than those in which they reside.

By the 1 & 2 Vict. c. 80, intituled "*An Act for the Payment of Constables for keeping the Peace near Public Works,*" [10th August, 1838,] and reciting that great mischiefs have arisen by the outrageous and unlawful behaviour of labourers and others employed on railroads, canals, and other public works, by reason whereof the appointment of special constables is often necessary for keeping the peace, and for the protection of the inhabitants and security of the property in the neighbourhood of such public works, whereby great expenses have been cast upon the public rates of counties and other districts chargeable with such expenses: it is enacted, "that after the passing of this act, whenever any special constables shall be appointed under the authority of an act passed in the second year of the reign of his late majesty, intituled '*An Act for amending the Laws relative to the Appointment of Special Constables, and for the better Preservation of the Peace,*' or under the authority of an act passed in the sixth year of the reign of his late majesty, intituled '*An Act for enlarging the Powers of Magistrates in the Appointment of Special Constables,*' and it shall be made to appear to any two or more justices of the peace of any county, riding or division having a separate commission of the peace, or of any liberty, franchise, city, town or borough, in England or Wales, on the oath of three or more credible witnesses, that the appointment of such special constables has been occasioned by the behaviour, or by reasonable apprehension of the behaviour, of the persons employed upon any railway, canal or other public work made or carried on under the authority of parliament within the district or division for which such justices usually act, it shall be lawful for such justices as aforesaid, at any time not exceeding one calendar month next after such appointment, to make orders from time to time upon the treasurer or other officer who shall have the control or custody of the funds of any company making or carrying on such railroad, canal or other public work, for the payment of such reasonable allowances for their trouble, loss of time and expenses to such special constables who shall have so served or be then serving as to the said justices shall seem proper; and a copy of every such order shall be sent by the justices to one of her Majesty's principal secretaries of state, and such order, if allowed by the secretary of state, shall be binding on such company, and on every such treasurer and officer thereof: Provided always, that nothing herein contained shall empower any such justices to order any allowance for any such special constables at the

1 & 2 Vict. c. 80.

Whenever the appointment of special constables has been occasioned by the behaviour of persons employed upon public works, the expenses thereof shall be paid by the companies carrying on such works.

5. *Special Constables.*

rate of more than five shillings daily to be paid to each special constable employed for the purposes aforesaid."

1 & 2 Vict. c. 80.

Secretary of state may reduce excessive orders.

Sect. 2. "That if it shall appear to the secretary of state that there was no need for the appointment of such special constables, or that a greater number of special constables was appointed than was needed by reason of the behaviour, or reasonable apprehension of the behaviour, of the persons employed on such railroad, canal, or other public work as aforesaid, the secretary of state shall have power to disallow any such order, or to reduce the amount ordered to be paid by any such order, in such manner as to him shall seem just according to the circumstances of each case; and in such case the order shall be of no force, or shall be of force for such reduced amount only, as the case may be; and the whole of such expenses in case the whole shall be disallowed, or so much thereof as shall exceed such reduced amount if a part shall be allowed, shall be defrayed out of the public rates of such county, riding or division, liberty, franchise, city, town or borough, as if this act had not been made."

Amount ordered and allowed may be recovered by distress.

Sect. 3. "That in all cases where such treasurer or other officer as aforesaid shall refuse or neglect, during three weeks next after demand thereof, to pay such sum of money as shall have been ordered by such justices, and allowed by the secretary of state as aforesaid, it shall be lawful for such justices to cause the same to be levied by distress upon the goods and chattels belonging to such company."

VI. Constables in Boroughs.

In boroughs.

See as to these, title "*Corporations,*" Vol. II.

VII. Constables on Canals and Navigable Rivers.

3 & 4 Vict. c. 50.

By the 3 & 4 Vict. c. 50, intituled "*An Act to provide for keeping the Peace on Canals and Navigable Rivers,*" [4th August, 1840,] and reciting that robberies and other outrages are frequently committed on canals and navigable rivers throughout England and Wales, and it is expedient that power be given to appoint constables for better keeping the peace, and for the prevention and detection of crime, along the line of such canals and rivers, and in the neighbourhood thereof; it is enacted, "That it shall be lawful for any two justices of the peace, and for the watch committee of any incorporated borough, within their several jurisdictions, on the application of the committee or board of directors acting in the management of the affairs of the company of proprietors of any canal or navigable river, or of any clerk or agent of any such company, duly authorised by such committee or board of directors, to appoint so many persons as they shall think fit from among those who shall be recommended to them for that purpose by such company of proprietors, clerk or agent, to act as constables on and along such canal or river; and every person so appointed shall take an oath or make a solemn declaration in the form or to the effect following; (that is to say,)

Appointment of constables for canals and rivers;

who shall take the following oath.

Oath of constables.

'*I A. B. having been appointed a constable to act upon and along the* [name the canal or navigable river], *under the provisions of* [here insert the title of this act], *do swear that I will well and truly serve our sovereign lady the Queen in the said office of constable, without favour or affection, malice or ill will; and that I will, to the best of my power, cause the peace to be kept, and prevent all offences against the peace; and that while I continue to hold the said office, I will, to the best of my skill and knowledge, discharge the duties thereof faithfully according to law.*

So help me God.'

Powers of constables.

Such oath or declaration to be administered by any one such justice; and every person so appointed, and having taken such oath or made such declaration as aforesaid, shall have full power to act as constable for the preservation of the peace, and for the security of persons and property against felonies and other unlawful acts, on such canal or river, and the towing paths and works belonging thereto, and on and within any railways, tramroads, wharfs, quays,

locks, docks, landing places, warehouses, lands, and premises belonging to any such company, and in all places not more than one quarter of a mile distant from either bank of such canal or river, or from such railways, and shall have all such powers, protections, and privileges for the apprehending of offenders, as well by night as by day, and for doing all things for the prevention, discovery, and prosecution of felonies and other offences, and for keeping the peace, which any constable duly appointed has within his constablewick: provided always, that such power shall not extend to authorise any such person to act as such constable within the metropolitan police district, or the city of London and the liberties thereof, or in any places beyond the banks, towing-paths, and other the premises belonging to such company, as may be situate within any other city or any incorporated borough, any thing in this act contained to the contrary notwithstanding."

7. *On Canals and Rivers.*

3 & 4 Vict. c. 50.

Sect. 2. "That it shall be lawful for any two justices, or the watch committee of any incorporated borough, to dismiss any such constable who shall act within their several jurisdictions, or for the company of proprietors of any such canal or river for which any such constable shall be appointed, or for any clerk or agent of such company duly authorised by the committee or board of directors of such companies, to dismiss any such constable from his office of constable; and upon every such dismissal all powers, protections, and privileges belonging to any such person by reason of such appointment shall wholly cease; and no person so dismissed shall be capable of being again appointed or acting as a constable for the same canal or river without the consent of the authority by which he was dismissed."

Dismissal of constables.

Sect. 3. "That it shall be lawful for every such company of proprietors to pay to every such constable, out of the monies and effects of the company, such salary or allowances, and at such times and in such manner, as the company shall think fit."

Constables how paid.

Sect. 4. "That every constable who shall be guilty of any neglect or breach of duty in his office of constable shall be liable to a penalty not more than 10*l.*, the amount of which penalty may be deducted from any salary due to such offender, or, in the discretion of the magistrate before whom such offender shall have been convicted, such offender may be imprisoned in the gaol or house of correction for the county or place in which such offence shall have been committed, with or without hard labour, for any time not more than one calendar month."

Penalty on constables for neglect of duty.

Sect. 5. "That every constable who shall be dismissed from or shall cease to hold his office, and who shall not forthwith deliver over all the clothing, accoutrements, appointments, and all other necessaries which have been supplied to him for the execution of his duty, to such person and at such time and place as shall be directed by the company on whose recommendation he shall have been appointed, or by any clerk or agent of such company duly authorised by the company to recieve the same, shall be liable to be imprisoned in any gaol or house of correction as aforesaid, with or without hard labour, for any time not exceeding one calendar month; and it shall be lawful for any justice of the peace to issue his warrant to search for and seize, to the use of such company, all the clothing, accoutrements, appointments, and other necessaries which shall not be so delivered over, wherever the same may be found."

Constables dismissed to deliver up accoutrements.

Sect. 6. "That every person who shall assault or resist any constable appointed as aforesaid in the execution of his duty, or who shall aid or incite any person so to assault or resist, shall for every such offence be liable to a penalty not more than 10*l.* or, in the discretion of the magistrate before whom he shall be convicted, may be imprisoned in any gaol or house of correction as aforesaid, with or without hard labour, for any time not more than two calendar months."

Penalty for assaults on constables.

Sect. 7. "That every person who shall be found upon any such canal or river, or in or upon any lock, dock, warehouse, wharf, quay, or bank thereof, or on board of any boat or vessel lying or being in any such canal or river, or in any lock or dock thereunto belonging, having in his possession or under his control any tube or other instrument for the purpose of unlawfully obtain-

Possessing instruments for unlawfully procuring and carrying away liquors.

7. *On Canals and Rivers.*

3 & 4 Vict. c. 50.

ing any wine, spirits, or other liquors or goods, or having in his possession any skin, bladder, or other utensil for the purpose of unlawfully secreting or carrying away any such wine, spirits, or other liquors or goods, and any person who shall attempt unlawfully to obtain any such wine, spirit, or other liquors or goods, shall for every such offence be liable to a penalty not more than 5*l.*, or, in the discretion of the magistrate before whom he shall be convicted, may be imprisoned as aforesaid, with or without hard labour, for any time not more than one calendar month."

Unlawfully injuring the contents of packages.

Sect. 8. "That every person who shall bore, pierce, break, cut open, or otherwise injure any cask, box, or package containing wine, spirits, or other liquors, or any case, box, sack, wrapper, package, or roll of goods, on board of any boat, vessel, or waggon, or in or upon any warehouse, wharf, quay, or bank of or belonging to any such canal or river, with intent feloniously to steal or otherwise unlawfully obtain or to injure the contents or any part thereof, or who shall unlawfully drink or wilfully spill or allow to run to waste any such liquors or any part thereof, shall for every such offence be liable to a penalty not more than 5*l.* over and above the value of the goods or liquors so taken or destroyed, or, in the discretion of the magistrate before whom he shall be convicted, may be imprisoned as aforesaid, with or without hard labour, for any time not more than one calendar month."

Constable, &c. having just cause to suspect felony, may enter on board vessels and take up suspected persons.

Sect. 9. "That it shall be lawful for every constable appointed as aforesaid, having just cause to suspect that any felony, or any other offence contrary to the provisions of this act, has been or is about to be committed in or on board of any boat or other vessel lying in any such canal or river, or any lock or dock thereunto belonging, to enter at all times, as well by night as by day, into and upon every such boat or other vessel, and therein to take all necessary measures for the prevention or detection of all felonies or other offences which he has just cause to suspect to have been or to be about to be committed, and to take into custody all persons suspected of being concerned in such felonies or other offences, and also to take charge of all property so suspected to be stolen or embezzled."

Constable may apprehend without warrant in certain cases.

Sect. 10. "That it shall be lawful for any such constable to take into custody, without a warrant, any loose, idle, and disorderly person whom he shall find disturbing the public peace, or whom he shall have good cause to suspect of having committed or being about to commit any felony, misdemeanor, or breach of the peace, or other offence contrary to the provisions of this act, and every person whom he shall find, between sunset and the hour of eight in the morning, lying or loitering in or upon any towing path, or in or upon any wharf, bridge, railway, quay, landing place, lock, dock, or upon the bank of any such canal or river, and not giving a satisfactory account of himself."

Power to constables and persons aggrieved to apprehend certain offenders.

Sect. 11. "That any person found committing any offence punishable upon summary conviction by virtue of this act may be taken into custody, without a warrant, by any constable, or may be apprehended by the owner of the property with respect to which the offence shall be committed, or by his servant, or any person authorised by him, and may be detained until he can be delivered into the custody of a constable, to be dealt with according to law; and every such constable may also stop, search, and detain any vessel, boat, cart, or carriage in or upon which there shall be reason to suspect that any thing stolen or unlawfully obtained may be found, and also any person who may be reasonably suspected of having or conveying in any manner any thing stolen or unlawfully obtained."

Stolen property offered in pawn may be detained.

Sect. 12. "That any person to whom any property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence has been committed with respect to such property, or that the same or any part thereof has been stolen or unlawfully obtained, is hereby authorised, and if in his power is required, to apprehend and detain, and as soon as may be to deliver such offender into the custody of a constable, together with such property, to be dealt with according to law."

Not to repeal local acts containing penalties.

Sect. 13. "That nothing herein contained shall be construed to prevent any person from being indicted for any indictable offence made punishable on summary conviction by this act, or to prevent any person from being liable

under any other act or acts to any other higher penalty or punishment than is provided for such offence by this act, so nevertheless that no person be punished twice for the same offence."

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Sect. 14. "That any two justices of the peace within their several jurisdictions shall be empowered summarily to convict any person charged with any offence against this act, on the oath of one or more witnesses, or by confession of such person, and to award the penalty or punishment herein provided for such offence."

Offences how to be tried and penalties how enforced.

Sect. 15. "That in every case of the adjudication of a pecuniary penalty under this act, and nonpayment thereof, it shall be lawful for the justices before whom any offender shall have been convicted to commit such offender to any gaol or house of correction within his jurisdiction for a term not more than one calendar month, where the sum to be paid shall not exceed 5*l.*, and in any case not more than two calendar months, the imprisonment to cease on payment of the penalty and the costs for the recovery thereof; or instead of imprisonment it shall be lawful for the justices, by warrant under their hands and seals, to order such penalty, with the reasonable costs and charges of the conviction, to be levied by distress and sale of the goods and chattels of the offender; and all such convictions and warrants shall be taken to be within the provisions of the 5 Geo. IV. c. 18." (*a*)

If penalty is not paid the offender may be committed, or the penalty levied by distress.

Sect. 16. "That any justice of the peace before whom any person shall be summarily convicted for any offence against this act may cause the conviction to be drawn up on paper or parchment in the following form of words, or to the like effect; that is to say,

Form of conviction.

"*County, City, or Borough of* } *to wit.* } *BE it remembered, that on the day of in the year of our Lord in the county of A. E. is convicted before us J. P., and J. J. P., two of her Majesty's justices of the peace for the said county, for that he the said A. E. did* [here specify the offence, and the time and place when and where the same was committed, as the case may be], *and we do adjudge that the said A. E. shall for the said offence forfeit the sum of and shall pay the same immediately* [or *shall pay the same on or before the day of*] *to C. D., to be by him applied according to the directions of the statute in that case made and provided. Given under our hands the day and year first above mentioned.* *J. P. and J. J. P.*"

Sect. 17. "That no conviction for any offence against this act shall be quashed for want of form, or be removed by *certiorari* or otherwise into any of her Majesty's superior courts of record; and that no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that it is founded on a conviction, and there be a good and valid conviction to sustain the same; and that where any distress shall be made for levying any money by virtue of this act the distress itself shall not be deemed unlawful, nor the party making the same be deemed a trespasser, on account of any defect or want of form in the summons, conviction, warrant of distress or other proceedings relating thereto, nor shall the party distraining be deemed a trespasser from the beginning on account of any irregularity afterwards committed by him, but the person aggrieved by such irregularity may recover full satisfaction for the special damage (if any) in an action upon the case."

Convictions not to be quashed for want of form.

Sect. 18. "And for the protection of persons acting in the execution of this act, be it enacted, that all actions and prosecutions to be commenced against any person for any thing done in pursuance of this act shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact committed, and not otherwise; and notice in writing of such cause of action shall be given to the defendant one calendar month at the least before the commencement of the action; and in any such action the defendant may plead the general issue, and give this act and the special matter in evidence, at any trial to be had thereupon; and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court after such action brought

Venue.

Limitation of actions.

General issue.

Tender of amends.

(*a*) See title "*Distress under Justices' Warrant,*" Vol. II.

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3 & 4 Vict. c. 50.

by or on behalf of the defendant; and if a verdict shall pass for the defendant, or the plaintiff shall become non-suit, or discontinue any such action after issue joined, or if upon demurrer or otherwise judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant hath by law in other cases; and though a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the judge before whom the trial is had shall certify his approbation of the action and of the verdict obtained thereupon." (*a*)

Appeal to quarter sessions.

Sect. 19. "That in every case of summary conviction before any justices of the peace under this act, in which the penalty adjudged to be paid shall be more than 3*l.*, any person who shall think himself aggrieved by the conviction may appeal to the justices of the peace at the next general or quarter sessions of the peace to be holden for the county, riding or division wherein the cause of complaint shall have arisen; provided that such person, at the time of the conviction or within forty-eight hours thereafter, shall enter into a recognizance, with two sufficient sureties, conditioned personally to appear at the said sessions to try such appeal, and to abide the further judgment of the justices at such sessions assembled, and to pay such costs as shall be by the last-mentioned justices awarded; and it shall be lawful for the justices by whom such conviction shall have been made to bind over the witnesses who shall have been examined in sufficient recognizances to attend and be examined at the hearing of such appeal; and that every such witness, on producing a certificate of his being so bound under the hand of the justices, shall be allowed compensation for his time, trouble and expenses in attending the appeal, which compensation shall be paid in the first instance by the treasurer of the county or riding, in like manner as in cases of misdemeanor, under the provisions of an act passed in the seventh year of the reign of King George the Fourth, intituled '*An Act for improving the Administration of Criminal Justice in England;*' and in case the appeal shall be dismissed, and the order or conviction affirmed, the reasonable expenses of all such witnesses attending as aforesaid, to be ascertained by the Court, shall be repaid to the treasurer of the county or riding by the appellant."

7 Geo. 4, c. 64.

Powers of companies to be exercised by directors.

Sect. 20. "That all the powers hereby vested in any company of proprietors of any such canal or navigable river may be exercised by the directors or committee of management, or other body of persons, under whatever style or name they may be known, duly authorised according to the constitution of such company to manage the affairs of such company respectively; and if there shall be no such body, or more than one such body, so that it may be doubtful by whom the said powers ought to be exercised, then by such body of persons as shall be appointed for that purpose by the proprietors at any general or special meeting of the proprietors convened for that purpose, with the like forms and notices as are required by law in each case respectively with regard to such meetings."

VIII. Forms.

(1.) Appointment of special petty sessions for naming parish constables.

County of } *AT a petty sessions of her Majesty's justices of the peace for the said*
to wit. } *county of , holden at on the day of* A. D. 18—, *in and for the division of in the said county: We, the justices present at the said petty sessions, do hereby appoint the day of , at the hour of of the clock in the forenoon of that day, at for the justices of the peace for the said county usually acting for the said division of , to hold a special petty session of the peace in and for the said division of for the appointment of constables for the parishes and places in the said division, pursuant to the provisions of an act of parliament made and passed in the sixth year of the reign of her Majesty Queen Victoria, intituled* "An Act for the Appointment and Payment of Parish Constables." *Given under our hands and seals, at in the said county, this day of* 18—.

(*a*) As to enactments of this nature, see title "*Justices*," Vol. III. 1033; *ante*, 917, 918.

8. *Forms.*

(2.) Justices' precept to overseers, under 5 & 6 Vict. c. 109, s. 2, (*ante*, 898.)

County of } *To the overseers of the poor of the parish of* , *in the county*
to wit. } *of* .

IN pursuance of an act of parliament made and passed in the sixth year of the reign of her Majesty Queen Victoria, intituled "An Act for the Appointment and Payment of Parish Constables," *We* *and* , *two of her Majesty's justices of the peace in and for the said county, acting in and for the* *division of* *in the said county, do hereby require you to make out and return before the twenty-fourth day of March next ensuing the date hereof, a list in writing of* [20] (*a*) *men, being a competent number within your parish qualified and liable to serve as constables for the same. And we do hereby also give you notice that a special petty sessions of the peace will be holden by the justices of the peace acting in and for the said division, on the* *day of* *next, at* , *for the appointment of parochial constables; when you are required to attend and verify the said list so to be returned by you, and to answer on oath such questions touching the same as shall be put to you or either of you by the justices then present. Given under our hands the* *day of February*, A. D. 18—.

} *Justices, &c.*

(3.) Order of special session for the union of parishes or extra-parochial places. (5 & 6 Vict. c. 109, s. 4, *ante*, 898.)

County of } *AT a special petty session of the peace of her Majesty's justices of the*
to wit. } *peace in and for the county of* , *acting in and for the*
division of *in the said county; holden at* *in and for the said division*
on the *day of* *in the year* 18—, *and then and there duly convened for the purpose of making an order, if thought expedient, for uniting the parish of* *to the parish of* *adjoining thereto* [or *for annexing the extra-parochial place of* *to the parish of* *adjoining thereto*], *for the purposes and in pursuance of an act made and passed in the sixth year of the reign of her Majesty Queen Victoria, intituled &c.: We the undersigned justices, convened as aforesaid at the said special petty sessions of the peace holden for the purpose aforesaid, (of which due notice has been given to every justice usually acting within the said division,) thinking it expedient that the parish of* *should be united to the parish of* *adjoining thereto, for the purposes of the said act, do in pursuance of the power and authority vested in us by the said act hereby order, that the parish of* *in the said division* *shall be united to the parish of* *adjoining thereto, for the purposes of the act made and passed in the sixth year of the reign of her Majesty Queen Victoria, intituled* "An Act for the Appointment and Payment of Parish Constables." *Given under our hands and seals at the said special session, the day and year above written.*

} *Justices, &c.*

(4.) Choice of parish constables, (*ante*, 896.)

County of } *AT a special petty session of her Majesty's justices of the peace in*
to wit. } *and for the county of* , *acting in and for the* *division of* *in the said county, holden at* *in and for the said division* *on the* *day of* A. D. 18—, *for the appointment of parochial constables, of which special petty session due notice has been given to every justice usually acting in the said division: We the undersigned justices present at the said special petty session, in pursuance of an act of parliament made and passed in the sixth year of the reign of her Majesty Queen Victoria, intituled* "An Act, &c.," *do choose from the list of persons returned to us by the overseers of the poor of the parish of* *in the said division* , *and by us duly allowed, the following persons to act as constables within the said parish during the year now next following, and until other constables shall be chosen and sworn to act in their stead as constables for such parish, such number of persons being deemed by us the said justices necessary (having regard to the extent and population of the said parish) to act as constables as aforesaid: that is to say—*

Name.	*Residence.*	*Calling.*

Given under our hands and seals at the special petty session aforesaid, on the day and year above written.

} *Justices, &c.*

(*a*) It would seem from sect. 3 (*ante*, 898), that the justices must fix the number of men in their precept.

8. *Forms.*

(5.) Summons to constable to be sworn in.

County of } *To* , *of the parish of* *in the county of*
to wit. }

WHEREAS at a special petty session of her Majesty's justices of the peace in and for the county of , acting in and for the division of , held this day at , in and for the said division, for the appointment of parochial constables, you the said , resident within the parish of , in the said county, and in other respects duly qualified, were duly chosen to act as a constable for the said parish of during the year now next following, and until another person shall be chosen and sworn to act in your stead as a constable for such parish: This is therefore to require you personally to appear before us at , in the said division, on the day of A.D. 18—, *at the hour of in the forenoon, in order that we may cause to be administered to you the oath required by the statute in such case made and provided to be taken by you for the due execution of your said office as constable. And herein fail not. Given under our hands and seals at the special petty session aforesaid, this day of* 18—.

} *Justices, &c.*

(6.) Constable's oath. (5 & 6 Vict. c. 109, s. 12, *ante*, 901.)

I, A. B. of C., do swear that I will well and truly serve our Sovereign Lady the Queen in the office of constable for the parish of , for the year now next following, or until another be sworn in my stead, according to the best of my skill and knowledge. So help me God.

As to the oath taken by local constables, see *ante*, 932.

(7.) Information against constable refusing to be sworn, (*ante*, 901.)

County of } *BE it remembered, that on the day of* A.D. 18—, *at*
to wit. } *the parish of , in the county of , A. B., of the parish of , in the county of , in his proper person cometh before me , Esquire, one of her Majesty's justices of the peace in and for the said county, and giveth me the said justice to understand and be informed, that of being a person qualified and liable to serve as constable for the said parish, and who had been chosen by the justices at a special petty session holden for that purpose on at , in the said county, to serve the office of constable for the said parish of for the year then next following, and having been duly summoned to be sworn and to take upon him the said office, did refuse* [or, *without reasonable cause allowed by the justices, neglect*] *to attend and to be sworn as constable of the said parish of , or to find a qualified substitute to be sworn in his stead, contrary to the form of the statute in that case made and provided; whereby and by force of the said statute the said has become liable, upon conviction of the said offence before two justices, to forfeit and pay a sum of money not more than ten pounds, to be applied according to the said statute. The said A. B. therefore prayeth that the said may be summoned to answer the said information and make his defence thereto.*

Exhibited before me, the day and year above written, } *J. P.*

(8.) Justices' orders for fees and allowances to constables, (*ante*, 901.)

County of } *AT the petty session of the peace of her Majesty's justices of the*
division. } *peace for the county of holden at , on the day of* A.D. 18—, *in and for the division of in the said county: We, the justices present at the said petty session, do hereby order the overseers of the parish of , in the said division, to pay out of any monies in their hands collected for the relief of the poor to , one of the constables appointed for the said parish under the provisions of an act, &c., the sum of being the amount of fees and allowances for the performance by him of the duties hereunder specified, and payable in respect of the said parish, according to the table of fees and allowances duly settled by the justices of the said county, at on the day of , then and there assembled in quarter sessions, and allowed by one of her Majesty's principal secretaries of state, and for which duties the payment is not by law charged upon the county rates.*

Duties performed.	*Fees.*

Given under our hands and seals at , in the said county, this day of 18—.

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(9.) Appointment of paid constables, (ante, 902.)

County of } AT the special petty session of the peace of her Majesty's justices
to wit } of the peace for the county of , holden at , on the day of , A. D. 18—, in and for the division of , in the said county, for the appointment of constables under a certain act of parliament made and passed, &c.: Whereas by a resolution of the inhabitants in vestry of the parish of , in the said county and division, assembled on the day of , for the purpose of making a return of men qualified and liable to serve as constables for the said parish of , for the year then next following, and which resolution hath been duly sent unto us, together with the said return, it appears that the said vestry have resolved that paid constables shall be appointed for their parish, and have resolved and agreed that the salary of shall be paid to every such constable: Now we, the justices present at the said special petty session of the peace, being satisfied with the amount of salary so agreed to be paid, do hereby appoint the men whose names are inserted in the schedule hereunder written, being the number agreed to by the said resolution, to act as constables for the said parish of , until they respectively shall resign, or be dismissed for misconduct by the justices of the said division in petty session assembled, or until the vestry of the said parish shall rescind the resolution for their appointment at any meeting of such vestry holden for making return of men qualified and liable to serve as constables in the parish of as aforesaid.

The Schedule of paid Constables.

Name.	*Residence.*	*Calling.*

Given under our hands and seals, at , in the said county, this day of , A. D. 18—.

(10.) Dismissal of paid constable.

County of } AT a petty session of the peace of her Majesty's justices of the peace
to wit. } for the county of , holden on the day of , at A.D. 18—, in and for the division of , in the said county: Whereas A. B. of , in the parish of , in the said county, hath at a special petty session of the peace holden at [as in the previous form], *been duly appointed a paid constable to act for the said parish: And whereas* [here state the nature of the misconduct, and the evidence in support of it.] *Now we, the justices present at the said petty session, having examined into the facts hereinbefore mentioned, and the evidence in support of them, do hereby adjudge the said to be guilty of the misconduct in his said office, so alleged against him, and do hereby dismiss the said from the office of paid constable for the parish of , in the said division, for such misconduct. Given under our hands and seals, at , in the said county, this day of , A. D. 18—.*

(11.) Indictment against a petty constable for not taking the office after being chosen at a court leet.

——[venue.] *THE jurors for our Lady the Queen, upon their oath present, that A. O. late of , in the township of , in the said county, yeoman, on the day of , in the year of the reign of our Lady the now Queen Victoria, and long before, and always after until the day of taking this inquisition, was and still is an inhabitant and residing within the township of aforesaid, in the county aforesaid, and a fit and able person to serve the office of constable for the said township; and he the said A. O. on the day and year aforesaid, in the township and county aforesaid, at the court leet of G. H. lord of the manor of aforesaid, holden before I. K. gentleman, steward of the said court, was elected and chosen, according to the ancient custom of choosing constables for the said township, for one year from thence next following, to do and execute all and singular those things which belong to the office of constable* [or otherwise according to the custom for choosing constables]; *and that the said A. O. afterwards, to wit, on the day and year aforesaid, at the township and county aforesaid, had due notice given to him by A. B. bailiff of the aforesaid manor, of his being so elected and chosen constable as aforesaid, and then and there was by him the said A. B. required to appear before J. P. esquire, then and there and yet being one of her Majesty's justices assigned to keep the peace*

8. *Forms.*

in and for the said county, and also to hear and determine divers felonies, trespasses and other misdemeanors in the said county committed, on the said day of , in the year aforesaid, to take his oath for the due execution of the said office of constable for the said township, according to the duty of that office; nevertheless the said A. O., not regarding his duty in that behalf, but contriving and intending wholly to neglect to serve the said office of constable, after the said A. O. was so elected and chosen into the said office as aforesaid, to wit, on the day and year last aforesaid, and continually afterwards until the day of taking this inquisition, at the township aforesaid, in the county aforesaid, unlawfully and contemptuously did neglect and refuse, and still doth neglect and refuse, to take his said oath for the due executing the said office of constable, and in anywise to execute the same office, to the great hindrance of justice, in contempt of our said Lady the Queen, and to the evil example of all others, and against the peace of our said Lady the Queen, her crown and dignity.

(12.) The like, where defendant was elected at a vestry.

—— [venue.] *THE jurors for our Lady the Queen upon their oath present, that C. D. late of the parish of , in the county of , labourer, on the day of , in the year of the reign of our Lady the now Queen Victoria, and long before, was and still is an inhabitant and resiant within the parish aforesaid, in the county aforesaid, and a fit and able person to execute the office of constable for the said parish; and that the said C. D. on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, at a vestry then and there duly holden in and for the said parish, at the vestry room of and in the parish church of the said parish there situate, lawfully, in due manner and form, and according to the custom of the said parish, was elected and chosen by the men inhabiting and resiant within the same parish, to be one of the constables of and for the said parish, for one year from thence next following, to do and execute all and singular those things which belong to the office of constable; and that the said C. D. afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, had due notice thereof, and then and there was required to appear before A. B. esquire, then and yet being one of the justices of our said Lady the Queen in and for the county aforesaid, and also to hear and determine divers felonies, trespasses and other misdeeds committed in the said county, on, &c. in the year aforesaid, to take his oath for the due execution of the said office of constable for the said parish, according to the duty of that office: Nevertheless, the said C. D., not regarding his duty in that behalf, but contriving and intending the due execution of justice to hinder and prevent, afterwards, to wit, on the day and year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully, wilfully, obstinately and contemptuously did refuse, and from thence continually until the day of taking this inquisition, unlawfully, wilfully, obstinately and contemptuously hath refused, and still doth refuse, to take his said oath for the due execution of the said office of constable, or in anywise to take upon himself or execute the said office; contrary to his duty in that behalf, in manifest contempt of our said Lady the Queen and her laws, and against the peace of our Lady the Queen, her crown and dignity.*

(13.) Warrant from high constable to petty constable, &c. to make presentments at the assizes, (see *ante*, 909.)

County of , hundred of , or ward, &c. } *To the constable of , in the said county.*

THESE are to require you, the said constable, in her Majesty's name, to make out a presentment in writing of all treasons, misprisions of treasons, insurrections, rebellions, counterfeitings, clippings, washings, false coinings and other falsities of the money of Great Britain, and of other kingdoms and dominions whatsoever; and of all the murders, felonies, manslaughters, killings, burglaries, rapes of women, unlawful meetings and conventicles, unlawful uttering of words, assemblies, misprisions, confederacies, false allegations, trespasses, riots, routs, retentions, escapes, contempts, falsities, negligences, concealments, maintenance, oppressions, champerty, deceits and all other evil doings, offences and injuries whatsoever, and also the accessaries of them; by whomsoever and in what manner soever done, committed or perpetrated within your constablewick. Which said presentment so made in writing as aforesaid, and signed by you, you are to deliver to me at , in the said county, on the day of , at the hour of in the forenoon of the same day, that I may have the said presentment ready to be delivered to her Majesty's justices of oyer and terminer and general

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gaol delivery at the next assizes to be holden for the said county. Herein fail you not, as you will answer the contrary at your peril. Given under my hand, the day of , in the year of our Lord .

J. B. high constable.

(14.) Constable's presentment pursuant to the above warrant, (see *ante* 968.)

County of , hundred of . } At a special sessions held at , in the said county, the day of , one thousand eight hundred and .

THE presentment of J. C. constable of the parish [or *township*] *of , in the said county, for the next general assizes* [or *general quarter sessions of the peace*, as the case may be,] *to be holden at , in and for the said county, made upon oath before me, one of her Majesty's justices of the peace acting in and for the said hundred and county, the day of , one thousand eight hundred and .*

I, the above named J. C. do make oath and declare, that I have none of those things given me in charge to present within my constablewick. [If any matter presentable, state the facts and circumstances]

Taken and sworn the day and year above written, before me, J. P. *J. C. constable.*

Construction of Statutes, see "*Statutes*," Vol. V. p. 1167.

Constructive Possession, &c. in Larceny, see "*Larceny*," Vol. III. p. 1087.

Consul, *Certificate of, not Evidence*, see "*Evidence*," Vol. II. p. 406.

Contempt, see *ante*, "*Attachment*;" "*Order*," Vol. V.

As to the power of justices to commit for, see "*Examination*," Vol. II. p. 470; "*Justices*," Vol. III. p. 1046.

As to the power of sessions to commit for, see "*Sessions*," Vol. V. p. 974.

Continuances, *not amendable*, *ante*, 149.

Conviction.

UNDER this title will be considered only those convictions which take place before magistrates in a summary way, and without the intervention of a jury.

Observations on Justice's power to convict.

The power of a justice of the peace to convict an offender in a summary way without a trial by jury is in restraint of the common law, and in abundance of instances a tacit repeal of that famous clause in the Great Charter, that a man shall be tried by his equals, which also was the common law of the land long before the great charter, even from time immemorial, beyond the date of histories and record. Therefore generally nothing shall be presumed in favour of this branch of the office of a justice of the peace; but the intendment will be against it. For which reason, where this special power is given to a justice of the peace by act of parliament, it must appear that he hath strictly pursued it; otherwise the common law will break in upon him, and level all his proceedings. So that where a trial by jury is dispensed withal, yet he must proceed, nevertheless, according to the course of the common law in trials by juries, and consider himself only as constituted in the place both of judge and jury.

Summary of the course of proceeding.

Therefore there must be an information or charge against a person; then he must be summoned or have notice of such charge, and have an opportunity to make his defence; and the evidence against him must be such as the common law approves of, unless the statute specially directeth otherwise; then if the person be found guilty, there must be a conviction, judgment, and execution, all according to the course of the common law, directed and influenced by the special authority given by statute; and in the conclusion, there must be a *record* of the whole proceedings, wherein the justice must set forth the particular manner and circumstances, so as if he shall be called to account for the same by a superior court, it may appear that he hath conformed to the law, and not exceeded the bounds prescribed to his jurisdiction.

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I. The Information before Conviction.

The information before conviction.

We have already stated, *ante*, 958, that there must be an information or charge against an offender before he be convicted, and such information or charge is the first step to be taken. Upon this the magistrate grants a sum-

mons or warrant requiring the defendant to appear before him, which is in general requisite, unless the defendant appear without it. In this way the charge is brought on for hearing.

1. *The Information before Conviction.*

Division of subject.

We will consider the law and practice as regards the information:—1st, As to where an Information is necessary;—2d, The Time when it is to be made;—3d, Who is to be the Informer;—4th, Before whom Information to be laid;—5th, Against whom to be laid;—6th, The joinder of several Offences;—and 7th, Its form.

1. When necessary.

1. When necessary.]—It is absolutely essential in all proceedings to convict a party of an offence created or prohibited under a penal statute, that there should be some information or complaint previously laid before the convicting or some other justices. (*Brookshaw* v. *Hopkins*, *Lofft*, 240; *R.* v. *Fuller*, 1 *Ld. Raym.* 510; *R.* v. *Birnie*, 5 *Car. & P.* 206; 1 *Moo. & R.* 160, S. C.; *Stevens* v. *Clark*, 1 *Car. & Marsh*, 509.) If a magistrate issued a warrant of apprehension against a party without a proper information, and the party were apprehended under it, the magistrate would be liable to an action for false imprisonment. (*Stevens* v. *Clark*, *supra*; 1 *Saund.* 262, *n.*)

Such information is indeed dispensed with where a justice is authorised to convict on *view* of the offence; as by the 8 Hen. VI. c. 9, for forcible detainers; the 19 Geo. III. c. 21, s. 2, for profane swearing; by the Vagrant Act, 5 Geo. IV. c. 83; or by the General Turnpike Act, 3 Geo. IV. c. 126, s. 132; or by the General Highway Act, 5 & 6 Will. IV. c. 50, s. 78. (See *Jones* v. *Owen*, 2 *D. & R.* 600; 1 *D. & R. Mag. Ca.* 290, S. C.)

2. When to be laid.

2. When to be laid.]—In general the penal statute on which the information is founded *limits* the time as to when the conviction must take place, and the information must be laid accordingly within that time.

Some statutes appoint an interval which must elapse *before* any prosecution; as the 19 Geo. III. c. 50, s. 2, &c.

By stat. 31 Eliz. c. 5, s. 5, 6, all actions, suits, bills, indictments, or *informations* on any *penal statute*, whereby the forfeiture is limited to the Queen only, shall be brought within two years after the offence committed; if limited to the Queen and *to any other* who shall prosecute, then within one year; and in default of such prosecution, then to be brought for the Queen in two years after that year ended. Provided, that if they are or shall be limited by statute to be brought within shorter time, then they shall be brought within such time limited (*a*). (See "*Information*," Vol. III.) The party *grieved* is not a common informer within the restraint of this statute, but he may sue in the same manner as before. (2 *Hawk.* c. 26, s. 47.) It will be observed that it applies to all actions and informations for penalties.

Where a landlord, during the existence of a tenancy, charged his tenant under the 3 Vict. c. 71, s. 38, (the Police Court Act, *post*, title "*Police*," Vol. V.) with having three months before wilfully damaged his premises, it was held that the magistrates had no jurisdiction, and that the charge should have been laid within one month. (*Dowell* v. *Beningfield*, 1 *Car. & Marsh.* 9.)

If a statute says that the offender shall be *convicted* in a limited time, the *conviction* must take place within that time, and the laying the information will not suffice. (See *R.* v. *Bellamy*, 1 *B. & Cres.* 500; 2 *D. & R.* 727, S. C.) And it makes no difference that the conviction was prevented from being made by an adjournment even at the defendant's own request; for after the time limited for making the conviction, there is no jurisdiction in the magistrate to make it. (*R.* v. *Tolley*, 3 *East*, 467.) But if the statute says "that the offence shall be prosecuted," or "that the party be prosecuted for the offence within a limited time;" it suffices to lay the information

(*a*) The statutes of 18 Eliz. c. 5, s. 1, requiring the time of the information to be entered, &c. and the 21 Jac. I. c. 4, s. 3, requiring an oath to be made at the time of exhibiting the information, do not apply to informations before justices out of sessions.

1. *The Information before Conviction.*

in that time, though the conviction be not made within it. (*R.* v. *Barrett*, 1 *Salk.* 383.)

As regards the computation of the time limited by penal statutes, see as to the construction of time in general, title "*Time*," Vol. VI. If the time be expressed by the *year*, or any aliquot part thereof, as a half or quarter, &c. of a year, the computation is by *calendar* months of twelve months to the year. But if *months* are mentioned, and not the year, they are always computed by *lunar* months of four weeks to the month. (See title "*Time*," Vol. VI. pp. 257, 258.) Where the time is dated from the offence, or from the day of committing it, the day on which it was committed is not to be reckoned as one. (See *Pellew* v. *Inhabitants of Wonford*, 9 *B. & Cres.* 135; 4 *Man. & R.* 130, S. C.; title "*Time*," Vol. VI. p. 259 (*a*).) If goods are found, subjecting the party having them in his possession to a forfeiture for receiving them illegally, the day on which they are found will be presumed to be the day whereon such forfeiture was incurred. (*R.* v. *Bass*, 5 *T. R.* 251.)

3. Who to be informer.

3. Who to be the Informer.]—Generally speaking, any person may be the informer; (see *Esp. Penal Statutes*, 11;) but sometimes the statute giving the penalty allows only particular persons to be informers.

Where the informer is entitled to any part of the penalty, he is not in general a competent witness to support the conviction. (See *R.* v. *Stone*, 2 *Ld. Raym.* 1545; 1 *Sess. Cas.* 378, S. C.; "*Evidence*," Vol. II. p. 435.) Sometimes the statute makes him competent.

Where the information is for the recovery of a penalty or compensation given to the party grieved, and his dissent is essential to the offence, he must be the informer; or else it must appear that the information is laid at his instance. (See *R.* v. *Daman*, 2 *B. & Ald.* 378; 1 *Chit. Rep.* 147, S. C.; *R.* v. *Harpur*, 1 *D. & R.* 222; 1 *D. & R. Mag. Ca.* 67, S. C.; *R.* v. *Corden*, 4 *Burr.* 2279.)

4. Before whom to be laid.

4. Before whom Information to be laid.]—The information must be laid before a justice having jurisdiction to hear it and determine as to the offence. The penal statute frequently points out before whom the conviction is to take place. (See further as to this, *post*, "*Justices*," Vol. III. pp. 1000, 1006; and *Sharpe* v. *Aspinall*, 10 *B. & Cres.* 47, title "*Friendly Societies*," Vol. III. p. 179.)

One justice may receive the information, &c. where two or more justices, &c. are empowered to convict.

One justice may receive the information and grant a summons or warrant upon it in all cases: even in those in which the conviction must be by two or more justices. This is enacted by the 3 Geo. IV. c. 23, s. 2, in the following words: "That in all cases where two or more justices, deputy lieutenants, or others, are authorised and required to hear and determine any complaint, one justice, deputy lieutenant, or such other person shall be competent to receive the original information or complaint, and to issue the summons or warrant requiring the parties to appear before two or more justices of the peace, deputy lieutenants, or others, as the case may require; and after examination upon oath into the merits of the said complaint, and the adjudication thereupon, by any such two justices, deputy lieutenants, or other persons, being made, all and every the subsequent proceedings to enforce obedience thereto or otherwise, whether respecting the penalty, fine, imprisonment, costs, or other matter or thing now enacted, or to be hereafter enacted, may be enforced by either of the said justices, deputy lieutenants, or other persons, or any other justice of the peace or deputy lieutenant for the same county, riding or place, in such and the like manner as if done by the same two justices, deputy lieutenants, or other persons who so heard and adjudged the said complaint; and where the original complaint or informa-

Adjudication may be enforced by either of the county justices or any other justice for the same county.

(*a*) It would appear from the case of *R.* v. *Adderley*, *Douglas*, 465, and *R.* v. *Green*, 10 *Mod.* 212, that where the time is limited from an act done, the day is inclusive; but where it is from the day of doing the act, it is exclusive. But it will be seen from the more recent cases to be found under title "*Time*," Vol. VI. p. 259, that there is no ground for this distinction.

tion shall be made to any justice or justices of the peace, deputy lieutenant or deputy lieutenants, or other person or persons different from him or them before whom the same shall be heard and determined, the form of conviction shall be made conformable and according to the fact."

1. *The Information before Conviction.*

Magistrate refusing to receive information.

A justice cannot properly refuse to receive an information regularly laid before him within his jurisdiction, and upon refusal in some cases a *mandamus*, and in others a criminal information, might be awarded against him. (See *Stra.* 413; *R.* v. *Newton, id.* 530; *R.* v. *Benn*, 6 *T. R.* 198; *Paley*, 17, 18; "*Justices*," Vol. III. p. 1025.) Some statutes inflict a penalty on his refusal. (See *Smith* v. *Langham*, 2 *Stra.* 234.) Where, however, a justice has a reasonable ground for doubting his jurisdiction, the Court of Queen's Bench will not enforce him to hear the information. (*R.* v. *Bucks, Justices*, 2 *D. & R.* 689; 1 *B. & Cres.* 485, S. C.; see "*Justices*," Vol. III. p. 1025.)

5. Against whom it may be laid.

5. Against whom it may be laid.]—The party against whom the information may be laid must depend on the words of the penal statute, and the facts constituting the offence within it. See the various titles of offences under penal statutes throughout this work.

A feme covert may be convicted on a penal statute. (See *R.* v. *Crofts*, 2 *Stra.* 1120; *Foster's case*, 11 *Rep.* 61; "*Wife*," Vol. VI.) So may an infant. (4 *Blu. Com.* 308; *Marshall* v. *Rutton*, 8 *T. R.* 545; see *ante*, title "*Children*.")

In some cases a man may be responsible for the act of his servants and of those he employs, even where the act is done without his privity or knowledge. (See *Mitchell* v. *Torup, Parker's Rep.* 227; 1 *Vent.* 190, 238; "*Servants*," Vol. V. p. 854.)

As to who may be joined as defendants in the same conviction, see "*Indictment*," Vol. III. p. 860; *post*, 984. Where the act is such that several may join in it, all the offenders may be included in the same information and conviction (see *post*, 984.)

6. Several offences.

6. What Offences may be joined.]—There does not seem any objection to the joining and stating of several offences, in a distinct manner, in the same information and conviction. (See *R.* v. *Swallow*, 8 *T. R.* 286; and *R.* v. *Matthews*, 10 *Mod.* 26; *R.* v. *Lovett*, 7 *T. R.* 1030; *Newman* v. *Bendyshe*, 10 *Ad. & Ell.* 11; see also "*Indictment*," Vol. III. p. 862; and see *post*, 984.)

7. Oath to support information.

7. Oath to support Information.]—The information need not be upon *oath*, if not expressly required by the statute authorising the conviction. (*R.* v. *Willis, Bosc.* 16; *Basten* v. *Carew*, 5 *D. & R.* 558; 2 *D. & R. M. C.* 563; 3 *B. & Cres.* 649, S. C.; see *R.* v. *Rawlins*, 8 *C. & P.* 441.) If the statute requires such oath, it must be administered and taken before the magistrate receives the material part of the information. (See *R.* v. *Kiddy*, 4 *D. & R.* 734; 2 *D. & R. Mag. Ca.* 364.)

Sometimes the statute, though it does not require the information to be on the oath of the informer, requires that the charge contained in it shall be deposed to on the oath of some other person, being a credible witness, as the 6 & 7 Will. IV. c. 65, s. 9, relating to game; and in such case there should be a deposition accordingly. (See *R.* v. *Scotton*, 13 *Law J. N. S. Mag. Ca.* 58, *infra*.)

8. Form of information. When must be in writing.

8. Form of the Information.]—When the information is required by statute to be in *writing*, that form must be observed, and this is usually directed where power is given to apprehend the offender in the first instance; but unless expressly so directed, it does not seem necessary that it should be in writing. (*R.* v. *Willis, Bosc.* 16; *Paley*, 32; see *R.* v. *Rawlins*, 8 *C. & P.* 441.)

In practice the magistrate always requires an information in writing, drawn up in regular form, to be lodged with him before he will grant a summons against an offender on a *penal* statute. In other cases the magistrate

1. *The Information before Conviction.*

usually requires no more than a mere verbal statement of the case by the prosecutor before the summons is granted, or a statement of it upon oath before he grants a warrant.

Sometimes the statute expressly dispenses with a written information; as for instance, the General Highway Act, 5 & 6 Will. IV. c. 50, s. 101; also the General Turnpike Act, 4 Geo. IV. c. 95, s. 83.

When the statute requires the information to be in writing, the conviction should state it was so. (*R.* v. *Willis*, *Bosc.* 16; see also *Basten* v. *Carew*, *infra*.) In the general form of conviction given by the 3 Geo. IV. c. 23, it is not stated that the information was in writing.

Statement of oath.

Statement of the Oath.]—The information, when required to be on oath, should state that it was so. (See *Exp. Aldridge*, 4 *D. & R.* 83; 2 *B. & Cres.* 600, S. C.; *Wilkins* v. *Wright*, 2 *C. & M.* 191; see 1 *Saund.* 262, n.) In the general form of conviction given by the 3 Geo. IV. c. 23, it is not stated that the information was laid on oath.

Where the statute requires the charge contained in the information to be deposed to on the oath of another party than the informer, this deposition should appear on the face of the proceedings. By sect. 9 of 6 & 7 Will. IV. c. 65 (relating to trespasses by entering upon land in pursuit of game), it is enacted, "That upon any information made or exhibited before a justice of the peace of any such offence as aforesaid, it shall not be necessary that the charge contained in such information should be made on the oath of the informer or prosecutor in such case; provided, that before any proceeding shall be had or taken upon such information, either for summoning the party accused or compelling his appearance to answer the same, the charge contained in such information shall be deposed to on the oath of some other person or persons, being a credible witness or credible witnesses." An information under this section was as follows:—"Staffordshire, to wit. Be it remembered, that on &c., at &c., Sir O M., of &c., a credible witness, in his proper person, cometh before me, W. F. C., one of the justices &c., and giveth me, the said justice, to understand and be informed, that R. R., of &c, did, on &c., at &c., unlawfully commit a certain trespass, by entering, in the daytime of the same day, upon a certain close of land, in the possession and occupation of J. W. there situate, in pursuit of game, contrary to the statute, &c., whereby, and by force of the statute, R. R. has forfeited a sum of money not exceeding 2*l.* &c.; and the said information having been also verified upon the oath of W. A., of &c., another credible witness, before me the said justice; whereupon the said Sir O. M. prays that the said R. R. may be forthwith summoned to appear before one of the said justices, to answer the said information, and make his defence thereto. O. M., W. A. Exhibited by Sir O. M., and sworn before me, the day and year first above written, W. F. C." There was no other document deposing to the charge contained in the information—held, that this information alone was not a sufficient compliance with the above section to give two magistrates jurisdiction to entertain the charge. (*R.* v. *Scotton*, 13 *Law J. N. S. Mag. Ca.* 58.)

Statement of time of laying information.

Statement of Time of laying it.]—The day and year on which it is exhibited must be stated therein, as well that it may appear to be subsequent to the offence and prior to all the other proceedings, as in order to ascertain that the prosecution is within the time limited by the particular statute on which it is founded. (*R.* v. *Kent*, 2 *Ld. Raym.* 1546; *R.* v. *Fuller*, 1 *Id.* 510; *Paley*, 81.) In *R.* v. *Kent* (2 *Ld. Raym.* 1546), the conviction was quashed because the information was set out to be exhibited on 2d *Nov.* 1 Geo. II. and the conviction was laid to be on 2d *Oct.* 1 Geo. II. (See *R.* v. *Picton*, 2 *East*, 196.)

Statement of place where laid.

Statement of Place where laid.]—The *place* also where the information is stated to be received must be stated in it, in order to show that the magistrate at the time was acting *within* his jurisdiction. (*Bosc.* 24; and see *Kite and Lane's case*, 1 *B. & C.* 101; 2 *D. & R.* 212, S. C.; and title "*Justices*," Vol. III. 1000, 1006.)

1. *The Information before Conviction.*

Name of informer.

Name of Informer, &c.]—The name of the *informer* should, it seems, be set forth in all cases, that the person convicted may know *who* is his accuser. (*Sed vide Paley on Conv.* 82, n.) It is absolutely necessary that it should be set forth where any part of the penalty is given by the statute to the informer, in order that the conviction may appear to be founded upon other evidence than that of the informer himself, who is in such cases an incompetent witness. (*R.* v. *Stone*, 2 *Ld. Raym.* 1545.) And where a statute directs that certain things shall be forfeited to the person seizing the same, the information must show that the person to whom the thing is adjudged is *the person who seized it*, and it is not enough that this is stated in the adjudication. (*R.* v. *Smith*, 5 *M. & Sel.* 133.)

But it is not necessary (as in penal actions) to allege that the informer sues *as well for himself* as for the other parties. (*R.* v. *Lovet*, 7 *T. R.* 152.)

It does not seem necessary, though perhaps advisable and proper, to state the informer's abode and addition.

Where information laid by or at instance of third party.

Where the penalty is given as a compensation to a party aggrieved by the offence, it must appear either that he is the informer, or that the information is laid at his instance. (*R.* v. *Corden*, 2 *Burr.* 2279; *R.* v. *Daman*, 2 *B. & Ald.* 278; 1 *Chit. Rep.* 117, S. C.)

But in a conviction under the Pilot Act, (6 Geo. IV. c. 125,) for continuing in charge of a ship after a licensed pilot had offered to take charge, it is not necessary to state the consent of the corporation of the Trinity House, or of the lord warden of the cinque ports, to the prosecution; such consent, though required by the statute, not being alluded to in the form of conviction thereby provided. (*Chaney* v. *Payne*, 1 *Ad. & Ell. N. S.* 712.)

Name and authority of the magistrate.

Name, &c. of Magistrate.]—Summary convictions before magistrates being by virtue of a circumscribed and extraordinary power, the name and style of the justice or justices, before whom the information is lodged, must be set forth in the statement of the information, from which it must appear that he or they had authority to take such information. (See 2 *Salk.* 473; *R.* v. *Johnson*, 1 *Stra.* 261; *Ex parte Kite*, 2 *D. & R.* 212; S. C. *nom. Kite and Lane's case*, 1 *B. & C.* 101; *Paley*, 81.)

It is not sufficient, therefore, to describe him as a justice *in* the county, without saying *of* or *for* the county. (See *R.* v. *Dobbyn*, 2 *Salk.* 473.) It is, however, no objection that he is described as *being* a justice, &c., without the word "*there* being a justice, &c." for that is implied. (*R.* v. *Chipps*, 1 *Stra.* 711.)

If the statute give cognizance of the offence to the *next* justice of the county, the convicting magistrate should be so described, for no other but the *next* has any jurisdiction. (*Sanders's case*, 1 *Saund.* 263; *Dalt.* c. 6.) But if the act only mentions justices *in or near* the place, it is but directory, and they need not be so described; (2 *Keb.* 559;) nor if the statute speaks of justices *acting for the division* need they be so alleged, for any justice of the county comes within that condition. (*R.* v. *Price*, *Cald.* 305; 3 *Bac. Ab.* 793; and see title "*Justices*," Vol. III. p. 1006.)

The omission of the word *assigned* in the description of the style of a magistrate has been once held to be fatal. (*Sanders's case*, 1 *Saund.* 263.) Such an omission, however, does not now seem material. (2 *Barnard.* 383; 1 *Saund.* 263, n. 5; *Paley*, 79. And see the form given by the 3 Geo. IV. c. 23, *post*, 989.)

By 26 Geo. II. c. 27, no order or adjudication of justices is invalid, because it does not express that either justice is of the *quorum*. (And see 4 Geo. IV. c. 27, title "*Justices*," Vol. III. p. 1006.)

Name and description of offender.

Name, &c. of Offender.]—The name of the offender should be correctly stated, otherwise the proceedings would be unavailable if he did not appear. If there be several offenders, each must be named. A conviction against "*Messrs. Harrison and Company*," was considered bad, and this although none of the parties even objected to the conviction on that ground. (*R.* v. *Harrison*, 8 *T. R.* 508.)

1. *The Information before Conviction.*

The addition of the offender is not material, and need not be stated, though it is usual. (See *R.* v. *Burnaby*, 2 *Ld. Raym.* 900; 1 *Salk.* 181, S. C.)

The General Turnpike Act allows proceedings against a driver misbehaving himself to be carried on against him without describing his name, if he refuse to disclose it. (See 3 Geo. IV. c. 126, s. 132.) There is also a similar clause in the General Highway Act, 6 & 7 Will. IV. c. 50, s. 78.

Statement of time of committing offence.

Statement of Time of Offence.]—The time of committing the offence should be stated, it would seem, in the information, and at all events it must be so in the conviction, in order that the magistrate may appear to have proceeded in the first instance upon a legal charge, and also that it may appear the information has been commenced within the limited time; (*R.* v. *Pullen*, 1 *Salk.* 369;) and also, as has been said, that the party may be enabled to defend himself against a second charge. (*R.* v. *Catheral*, 2 *Stra.* 900; 14 *East*, 272; *Paley*, 84.)

The *precise day*, however, it seems, need not be named, if the offence be alleged to have been committed *between* such a day and such a day, provided the first of the days be between the time limited by the statute. (2 *Hawk.* c. 25, s. 82; *R.* v. *Chandler*, 1 *Salk.* 378; 1 *Ld. Raym.* 581; *Carth.* 502; 5 *Mod.* 446, S. C.; *R.* v. *Simpson*, 10 *Mod.* 248.) It is more regular, however, to fix the charge to a *certain* day, where it can be done. (*Paley*, 87.)

Where an information appeared to be exhibited on the 29th May, 1805, and the offence was charged to have been committed "*within three months*, to wit, on the 12th *May now last past*:" it was held, that the words *last past* might refer to the *day* of the month and not to the *month* itself, so as to obviate the objection of the information being out of time, by supposing it to refer to *May*, 1804. (*R.* v. *Crisp*, 7 *East*, 389.) Stating the offence to have been on the "20th day June," omitting the word "of," would not, it seems, be bad. (*R.* v. *Huggins*, 3 *C. & P.* 602.)

As to the mode of stating time in an indictment, see "*Indictment*," Vol. III. p. 889.

Variance not material.

In all cases, notwithstanding the necessity to state a time, it is not essential that it should be stated truly. If there afterwards appear to be a variance in this respect between the information and the evidence, it will be immaterial, if it appear from the evidence that the prosecution was actually commenced in due time.

Statement of place where offence committed.

Statement of Venue.]—The place, viz. the parish, &c. and the county wherein the offence was committed, should be stated in the information, in order that the offence may appear to have been committed in the place over which the magistrate's jurisdiction extends. (*Paley*, 87.) And this, though the conviction pursues the form given by the statute, which does not expressly require that the place where it was committed should be shown. (*R.* v. *Hazell*, 13 *East*, 139; *Kite and Lane's case*, 1 *B. & C.* 101; S. C. *nom. Ex parte Kite*, 2 *D. & R.* 212.)

The mention of the county in the margin does not supply the want of an allegation of the fact being committed in the county; for the insertion of it in the margin is only to show in what county the conviction was made. (*R.* v. *Austin*, 8 *Mod.* 309.) But where a place has been once named, as "at B. in the county of H.," it is enough afterwards to say, "at B. aforesaid," without saying, "in the county aforesaid," for it will not be presumed to lie in two counties. (*R.* v. *Burnaby*, 2 *Ld. Raym.* 901.)

Where a conviction omitted to state in the previous part of it the precise place *where* the offence was committed, but in awarding the distribution of the penalty awarded it "to the overseers of D., in the said county, where the said offence was committed," this was held to be sufficient. (*R.* v. *Weale*, 5 *C. & P.* 135. See further, title "*Indictment*," Vol. III. p. 875.)

If a particular locality be an ingredient in the offence charged, the information must define the requisite locality by express allegations. (See *Deybel's case*, 4 *B. & Ald.* 246, 248; *Souden's case*, *id.* 294; *R.* v. *Fletcher*, 13 *Law J. N. S. Mag. Ca.* 16; and see title "*Game*," Vol. III.)

Courts and magistrates are, indeed, bound *ex officio* to take notice of the known divisions of the kingdom, as, whether such a place is within or without the bills of mortality; (*R.* v. *Vasey*, *Bosc.* 138;) but not so of the local situations and distances of different places in the counties from each other. (*Deybel's case*, 4 *B. & Ald.* 243.)

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Notwithstanding a place must be stated, it is not in general essential, unless perhaps in averments of local situation, to prove the offence was committed at the place stated; and it suffices to show that it was committed within the jurisdiction of the magistrate. (See "*Indictment*," Vol. III. p. 878.) If indeed it be an information for an offence where the statute creating it gives a part of the penalty to the poor of the parish in which it is committed, a material variance between the parish laid and that proved would be fatal.

Statement of the offence.

Statement of the Offence itself.]—All acts which subject men to new and other trials than those by which they ought to be tried by the common law, ought to be taken strictly. The information must therefore contain an exact *description of the offence*; which, in order to give the justice a jurisdiction, must appear to be within both the letter and spirit of the statute that creates it, and which must be exactly described, that the defendant may know what charge he is to answer, and that he may be enabled to defend himself against a second charge for the same offence. (*Bosc.* 25.) The statement of the offence should be with as much certainty as the nature of the case will admit of. It ought to be certain to every intent. It must have as much certainty in it as in an indictment. (See *R.* v. *Pain*, 7 *D. & R.* 678; 5 *B. & Cres.* 251; 3 *D. & R. M. C.* 517, S. C.)

Requisite certainty.

Statement must be direct and positive.

A *direct and positive* charge must be stated against the defendant; it does not suffice to state merely facts amounting to a presumption of guilt, however sufficient such facts may be as *primâ facie* evidence against him. Thus where the charge in an information (under the 8 Ann. c. 18, s. 3, *for selling bread under the assize*) was that the bread wanted so much weight, &c. was bought *in the shop* of the defendant: it was held, that the charge ought to have been more direct, *viz.* of the sale of so much bread *by the defendant*, for though the fact of a servant selling in his master's shop is good evidence against the master, still it is but evidence, and what is evidence merely is not enough to be laid in the information. (*R.* v. *Bradley*, 10 *Mod.* 155.)

Mere statement of evidence bad.

Facts must not be gathered therefrom by inference.

All the facts necessary to support the proceeding must be expressly alleged, and not left to be gathered by inference or intendment. Thus in a conviction for having concealed brewing utensils, the deposition, which appeared to be taken on a day subsequent to the information, only made the witness state that the defendant *now has* two concealed vessels, &c., and the conviction was quashed, because it should have appeared that the defendant had them at the time of the information, for though the words might be made to imply as much, yet Lord C. J. *Holt* said, "a conviction must be certain and not taken by collection." (*R.* v. *Fuller*, 1 *Ld. Raym.* 509.)

The precise offence must not be left in doubt.

Nor must the precise offence be in any way left in doubt. A conviction upon an information, on 3 & 4 Will. IV. c. 53, against a foreigner, for being on board a vessel liable to forfeiture, charged the offence as being committed within a part of the united kingdom, *and within one league of the coast*; but it appearing that, as to the latter, the penalty was done away with: it was held that the conviction could not be supported, as it did not distinctly show to the defendant which offence was insisted on against him. (*R.* v. *Pereira*, 2 *Adol. & E.* 375.)

So if a statute specifies the grounds of forfeiture, the conviction must show specifically the particular fact which forms the ground of forfeiture; in order that the Court may see that the penalty has been properly imposed, and be quite sure that the convicting justice has not mistaken the law. This is exemplified in the following case.—A conviction on the 45 Geo. III. c. 121, s. 7, (now repealed by 6 Geo. IV. c. 105; but 6 Geo. IV. c. 108, s. 3, makes provision for the offence,) for carrying and conveying foreign spirits, stated, "That on, &c. at, &c. J. S. had been duly convicted before, &c. of having,

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on, &c. at, &c. (he, the said J. S., then and now being a subject of his present majesty, and being a seaman or seafaring man,) been found carrying and conveying, and assisting in the carrying away and conveying, contrary to the form of the statute in that case made and provided, divers, to wit, seven gallons of foreign brandy, in two casks, called half-ankers, then and there liable to forfeiture, the said offence being by him, the said J. S., committed against the provisions of the acts of parliament made and passed for the prevention of smuggling; which offence had been duly proved before the justices, on the oath of one credible witness;" concluding with judgment, that the said J. S. had, for such offence, forfeited the sum of 100*l.*, pursuant to the 3 Geo. IV. c. 110, &c. It was moved to quash this conviction for insufficiency, in not describing any offence for which the defendant was liable to punishment, and the conviction was quashed accordingly. *Abbott*, C. J. said, "I am of opinion that this conviction is bad in form, and must be quashed. The general rule as to convictions is, that the specific fact which forms the ground of forfeiture should be stated, in order that the Court may see that the penalty has been properly imposed, and be quite sure that the convicting justice has not mistaken the law. If the conviction had stated the circumstances under which the brandy was imported,—that it was imported, in a certain manner, in casks of a certain size, which was contrary to law,— we should then know that the carriage of it on land, in such casks, would render it liable to forfeiture; but carrying and conveying brandy on land may render it liable to forfeiture for various reasons; and, therefore, it was necessary to show, on the face of this conviction, why the brandy in question was forfeitable. It is stated, certainly, as a fact, that the brandy was contained in two casks, called 'half-ankers,' but it is not said how it was imported,—that it was imported in those casks. It might have been imported in casks of an hundred gallons, and, having paid the duty, found its way into half-ankers. No fact is given which plainly imports that the brandy was liable to forfeiture. The general rule I have mentioned is a sound one, and ought not to be departed from." (*Ex parte Smith*, 3 *Dowl. & Ry.* 460; *Paley*, 89.)

Statement must not be by way of recital;

A statement of the offence by way of *recital* will not do. (*R.* v. *Catherall*, 2 *Stra.* 900; *Sess. Ca.* 159; *R.* v. *Crowhurst*, 2 *Ld. Raym.* 1363.)

or in disjunctive,

It must not be stated in the alternative or the disjunctive. (See 2 *Hawk.* c. 25, s. 58; *R.* v. *Middlehurst*, 1 *Burr.* 399; *R.* v. *North*, 6 *D. & R.* 143; 3 *D. & R. M. C.* 38, S. C.; *R.* v. *Sadler*, 2 *Chit. Rep.* 519.) A conviction on the 6 Geo. IV. c. 108, s. 49, for being on board a boat liable to forfeiture by sect. 3, and having casks attached thereto "of the description used or intended to be used for the smuggling of spirits," was held bad. *R.* v. *Pain*, 7 *D. & R.* 768; 5 *B. & Cres.* 251, S. C.)

or argumentatively.

Or in an argumentative way. (1 *Salk.* 373.)

Duplicity.

The information must not charge more than one offence on the same count, otherwise it will be bad for duplicity. Thus a conviction under 11 Geo. IV. & 1 Will. IV. c. 64, and 4 & 5 Will. IV. c. 85, for keeping a house open for the sale of beer, and selling beer, and suffering it to be drunk on the premises, (see now the 3 & 4 Vict. c. 61, s. 15,) at a time of day prohibited by an order of justices, and fining the party charged in a single penalty for "the offence," was held bad, as charging more than one distinct offence. (*Newman* v. *Bendyshe*, 10 *Ad. & Ell.* 11; *ante*, "*Alehouse*," p. 72; and see further as to duplicity, "*Indictment*," Vol. III. p. 866.)

Must not state a mere conclusion of law.

The information must state the facts which constitute the offence, and not the mere legal result of them. Where the act of 9 & 10 Will. III. c. 27, required a license to be taken out by every hawker, pedlar, &c. *going from town to town* to sell goods; and a conviction under that act only described the defendant as a hawker and pedlar and offering to sell goods, but said nothing about his *going from town to town;* the conviction was quashed. For though it was stated that the defendant was found trading as a hawker and pedlar, yet this (being a conclusion of law) was held too general a description to bring the defendant within the terms of the act; and it was also agreed, that the defect was not helped by the defendant's confession, which went only

to the offence as charged in the information. (*R.* v. *Little*, 1 *Burr.* 613; *Paley*, 90.)

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A conviction for profane cursing and swearing set forth the charge, that the defendant did profanely swear fifty-four oaths, and profanely curse one hundred curses against the form of the statute, and it was held bad by reason of the oaths and curses not being set forth. (See *R.* v. *Sparling*, 1 *Stra.* 497; *R.* v. *Popplewell*, 1 *Stra.* 686; *R.* v. *Cheveney*, 2 *Ld. Raym.* 1368; and *R.* v. *Daman*, 1 *Chit. Rep.* 147. See further as to the statement of mere conclusions of law, title "*Indictment*," Vol. III. 867.)

Every ingredient, to constitute the offence, must be stated.

The description of the charge must include in *express terms* every ingredient required by the statute to constitute the offence; for nothing must be left to intendment, or inference, or argument, for helping out the description. (See *R.* v. *Denman*, 1 *Chit. Rep.* 152; *R.* v. *Jukes*, 8 *T. R.* 536; *R.* v. *Fuller*, 1 *Ld. Raym.* 509; *R.* v. *Trelawney*, 1 *T. R.* 22.)

The evidence subsequently stated in the conviction can only support the *original charge*, but can by no means extend or supply what is wanting in the information. (*Paley*, 86; *Reg.* v. *Barnes*, 2 *Salk.* 680; 2 *Rd. Raym.* 1268; S. C.; *R.* v. *Wheatman*, *Dougl.* 232; *R.* v. *Denman*, 1 *Chit. Rep.* 155.)

A conviction on 3 W. & M. c. 10, s. 2, (now repealed by 1 & 2 Will. IV. c. 32,) for *killing deer*, was quashed for not describing the place where they were killed as being *inclosed*, according to the terms of that statute. (*R.* v. *Moore*, 2 *Ld. Raym.* 791; *R.* v. *Sadler*, 2 *Chit. Rep.* 519.) And the like where the defendant was convicted under the 33 Hen. VIII. c. 6, (now repealed by the 1 & 2 Will. IV. c. 32,) merely for "*having*" a hand gun in his house, the words of that statute being "*use to keep* in his house." (*R.* v. *Llewellyn*, 1 *Show.* 48)

Convictions on the game laws, prior to the 1 & 2 Will. IV. c. 32, for keeping and using a *dog* to destroy game or for using a *hound*, have been set aside, neither of these denominations being contained in those statutes. (*Reason* v. *Lisle*, *Com.* 567; *Hooke* v. *Wilks*, 2 *Stra.* 1126) But "*a dog called a greyhound*" was held sufficient. (*R.* v. *Hartley*, *Cald.* 175.)

So a conviction on stat. 22 & 23 Car. II. c. 25, s. 7, (now repealed by 7 & 8 Geo. IV. c. 27,) against *unlawfully killing and taking fish in any river, &c. without the license or consent of the lord or owner of the water*, was quashed, because it did not describe the offence in the words of the statute, or say that the defendant *stole* the fish, or took and killed the fish of *another person*, or *in another person's pond*. (*R.* v. *Mallinson*, 2 *Burr.* 682.)

So in *R.* v. *Trelawny* (1 *T. R.* 222), the conviction (which was on stat. 22 Geo. III. c. 47, s. 13, against insuring tickets in any state lottery to be authorised by act of parliament,) was quashed, because the information did not express that the ticket insured was a ticket in the state lottery, though the lottery was described as being authorised by stat. 25 Geo. III. c. 59.

So in *R.* v. *Walsh* (1 *Ad. & Ell.* 481; 3 *Nev. & M.* 632), a conviction under stat. 3 & 4 Will. IV. c. 55, s. 27, stated that the defendant refused to deliver up a certificate of registry to his *majesty's officers of customs*, and it was held that this was bad, as not bringing the offence within the words of the section, "shall deliver up to the *proper* officers of his majesty's customs." The conviction did not state for what purpose the certificate was required, and it was held by Lord *Denman*, C. J., and *Williams*, J., that this omission also made the conviction bad, as not satisfying the words of the same section, "to deliver up for the purpose of such ship or vessel as occasion shall require." It was also held that these were defects in substance, and not cured by the 3 Geo. IV. c. 23, s. 3, *post*, 1000.

So where the 45 Geo. III. c. 121, s. 7, (repealed by 6 Geo. IV. c. 105), made all *British subjects* liable to arrest on being found on board any ship liable to forfeiture under the *smuggling acts*, and a conviction under that act did not allege that the party was a *British subject*, the conviction was quashed, though it pursued the general form given by the 3 Geo. IV. c. 110 (repealed by 6 Geo. IV. c. 105). *Exp. Hawkins*, 2 *B. & C.* 31; 3 *D. & R.* 209, S. C.)

So it was held in *Wilkins* v. *Wright* (3 *Tyrw.* 824; 2 *C. & M.* 191), that a warrant of commitment for neglecting to pay a sum awarded by an order

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of maintenance under the 49 Geo. III. c. 63, s. 8, was not merely a warrant of commitment but a conviction; and therefore that it was requisite that it should appear on the face of it that the magistrate had jurisdiction, and that he had good grounds for convicting. And therefore that such commitment was bad where it omitted to state that there was complaint on oath by one of the overseers of the parish liable to maintain the child; an adjudication by the magistrate that a sum was due and unpaid; that the party charged was called upon for his defence, and that he did not show any reasonable or sufficient cause for not paying.

Precise words of the act need not be used.

The statement of the charge in the information need not be always expressed in the *precise and technical words* of the act, but it is sufficient if the words used in the one are synonymous with and equivalent to the words contained in the other. Thus the statute 39 & 40 Geo. III. c. 106, s. 4, enacts, that all persons who shall attend any meeting had or held "for the purpose" of making or entering into any contract, &c. by that act declared to be illegal, or of entering into, &c. any combination for any purpose declared by that act to be illegal, &c.: it was held, that a conviction for attending a meeting "for the purpose" of carrying on a combination "for the purpose" of obtaining an advance of wages, correctly described the offence by the words "for the purpose," though the description of the offence referred to in the fourth section was described in the third section to "any combination to obtain," the words "for the purpose" and "to obtain" being synonymous. (*Rex* v. *Ridgway*, 1 *D. & R.* 132; 5 *B. & A.* 527, S. C.; and see 1 *Chit. C. L.* 283, and cases there cited; *sed vide R.* v. *Seward*, 1 *Ad. & E.* 706; 3 *N. & M.* 557.)

But best to follow them.

It is, however, always safest to follow the words of the act as nearly as possible, and we have already seen instances in which a departure from this may render the proceedings fatal.

Sometimes a more particular description necessary.

It generally suffices to state the offence in the words of the statute, *per Holt*, C. J. (*R.* v. *Speed*, 1 *Ld. Raym.* 583; and see *Davis* v. *Nest*, 6 *C. & P.* 167); but sometimes a circumstance plainly implied, though not expressly contained in the act, forms a necessary ingredient in the offence, and must be stated. (*Paley*, 104, 95.)

Thus where the 24 Geo. III. c. 47, s. 1, prohibited vessels from hovering on the coasts of the kingdom with certain goods on board, and a conviction under this act merely stated that a vessel was found hovering, &c., but omitted to add, *without any lawful excuse*, or words to that effect; the conviction was held bad, though it pursued the general form given by the 3 Geo. IV. c. 110 (repealed by 6 Geo. IV. c. 105), for a vessel may be hovering for an innocent purpose, as for a pilot or by distress of weather, and the hovering contemplated by the act is hovering with power to proceed on the voyage and without any sufficient cause for not doing so. (*Ex parte Hawkins*, 2 *B. & C.* 31; 3 *D. & R.* 209, S. C.; and see 2 *Hawk.* c. 25, s. 11.)

In *R.* v. *Jarvis* (1 *Burr.* 154; 1 *East*, 647, n.) Mr. *J. Denison* said, "that it is not always sufficient to pursue the words of the statute; it may be necessary to go farther." It was so determined in *R.* v. *Chapman*, (*Say.* 203,) upon a conviction of a person *for robbing an orchard;* which the Court held not sufficient, but it ought to have appeared of what, and how the orchard was robbed, that they might judge whether it were a robbery within the meaning of stat. 43 Eliz. c. 7.

And when a statute, in describing an offence, makes use of general terms which will include a variety of circumstances, it is not enough that the information should follow the very words of the statute, but it is necessary to state what particular fact prohibited has been committed, or what particular fact enjoined has been omitted. (*Paley*, 102; *R.* v. *James*, *Cald.* 458, there cited; *R.* v. *Perrott*, 3 *M. & Sel.* 379.)

It would seem that a conviction under the 9 Geo. IV. c. 69, s. 1, ought to state that the defendant entered or was in the close for the purpose of taking game *there*, and it is not sufficient to follow the words of the statute. (*Re Fletcher*, 13 *Law J. N. S. Mag. Ca.* 16.)

When sufficient to follow the words of statute alone.

But in cases where the quality of the offence is not of a complicated nature, but consists of a simple fact, it is sufficient to use the words of the statute. Thus one objection to the manner of stating the offence in *R.* v. *Speed*, cited

Carth. 502, for killing deer, in 3 & 4 W. & M. c. 10 (repealed by 16 Geo. III. c. 30), was, that it was too generally laid in the circumstance of killing; for it was only said *unam damam, Anglicè*, one fallow deer, without saying buck, doe or fawn; *quod illicitè occidit*, without showing how, whether by gun, bow or net, &c. The objection, however, was overruled. The manner of killing, it was held, need not be specially shown, because according to *Holt*, C. J., the killing or not is the material part. (*Paley*, 78.)

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So where the statute 6 Geo. IV. c. 103, s. 3 (now repealed by 3 & 4 Will. IV. c. 50), enacted that vessels of a certain description found in certain situations, having "in any manner attached thereto" casks of a certain description, should be forfeited, and the persons found on board should be subject to be convicted in certain penalties, a conviction stated that A. B. was convicted of having been found on board a vessel liable to forfeiture; "for that it was found, &c., having in a *certain manner* attached thereto divers, to wit, twenty casks, &c." And it was held that this averment was good, for the statute spoke of casks *in any manner* attached to the vessel; so that the manner of attaching them formed no part of the offence. (*Ex parte Pain*, 5 *B. & Cres.* 251; 7 *D. & R.* 678, S. C.)

Again, where a conviction following the very words of the 17 Geo. II. c. 5 (repealed by stat. 3 & 4 Will. IV. c. 40), stated that a party having been brought before a magistrate on an information charging him with having unlawfully returned without a certificate to a parish from which he had been removed, and that upon that occasion he confessed himself guilty; it was held that this conviction was good on the face of it, and that it was not necessary to state in it expressly being an act of vagrancy, it being for the party convicted to show in his defence that he did not return in a state of pauperism. (*Mann* v. *Davers*, 3 *B. & Ald.* 103.)

So a conviction on the statute of 17 Geo. III. c. 56, stated that A. B. was convicted before the magistrates, upon the oath of T. J., a credible witness, of having in his possession in his dwelling-house certain materials used in the woollen manufacture, suspected to be embezzled and purloined, to wit, &c., he not producing the party from whom he bought the same, or giving a satisfactory account, and then going on to adjudicate, was good. (*Davis* v. *Nest*, 6 *Carr. & P.* 167.)

Scienter.

If the *knowledge* of the party is mentioned by the statute as an ingredient of the offence, nothing short of a direct averment to that effect is sufficient, unless indeed equivalent words are used. The words "unlawfully, fraudulently, and *against the form of the statute*," are not equivalent to "knowingly." (*R.* v. *Jukes*, 8 *T. R.* 536; *Paley*, 88.) In a case, however, upon a conviction against a carrier for having game in his possession contrary to the 5 Anne, c. 14, s. 2, (now repealed by the 1 & 2 Will. IV. c. 32,) it was considered the *scienter* need not be alleged, the word "knowingly" not being used in the statute. (*R.* v. *Marsh*, 4 *D. & R.* 260; 2 *D. & R. M. C.* 182; 2 *B. & Cres.* 720, S. C.)

It was there said, that if the word "knowingly" had been in the statute, undoubtedly "knowledge" must have been averred in the information, and some evidence must have been given on the part of the informer to show that the act complained of was committed with the defendant's privity. But in the case before the court no averment or evidence to that effect was necessary. It was quite enough for the informer to prove that the defendant, being a carrier, had, in the language of the act, "in his custody or possession" the things prohibited. After such proof, it was for the defendant to show such a degree of ignorance as would excuse him, but that was to come by way of defence.

A conviction under the Pilot Act (6 Geo. IV. c. 125,) for continuing in charge of a ship after a licensed pilot had offered to take charge, must show on the face of it that the offer was made to, or in the presence of, or came to the knowledge of, the party convicted; and that he was the person in charge of the vessel when the offer was made. (*Chaney* v. *Payne*, 1 *A. & E. N. S.* 712.)

A conviction under the 11 Geo. II. c. 19, s. 4, for aiding and assisting a tenant in fraudulently conveying away goods to avoid a distress for rent,

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must expressly allege the offence to have been committed "wilfully and knowingly." (*Reg.* v. *Radnorshire JJ.* 9 *Dowl.* 90.)

By 4 & 5 Will. IV. c. 76, s. 97, "if any overseer, &c. shall purloin, embezzle, or wilfully waste or misapply any of the monies, &c. belonging to any parish, &c., every such offender shall, upon conviction before any two justices, forfeit for every such offence any sum not exceeding 20*l.*" &c.: it was held, that an information against a parish officer under this statute for "misapplying," without the word "wilfully," was bad. (*Carpenter* v. *Mason*, 4 *Per. & D.* 439; 12 *Ad. & Ell.* 629, S. C.)

Negativing exceptions in statute.

Negativing Exceptions in Statute.]—It has been said, "that a conviction on a penal statute ought expressly to show that the defendant is not within any of its provisoes; for," continues the author, "since no plea can be admitted to such a conviction, and the defendant can have no remedy against it, but from an exception to some defect appearing in the face of it, and all the proceedings are in a summary manner, it is but reasonable that such a conviction should have the highest certainty, and satisfy the Court that the defendant had no such matter in his favour as the statute itself allows him to plead." (2 *Hawk.* c. 25, s. 113.) But this is to be understood with the following limitation, that where the enacting clause of a statute constitutes an act to be an offence under certain circumstances, and not under others, there, as the act is an offence only *sub modo*, the particular exceptions must be expressly specified and negatived; but where a statute constitutes an act to be an offence generally, and in a subsequent clause makes a proviso or exception in favour of particular cases, or in the same clause, but not in the enacting part of it, by words of reference or otherwise, makes such proviso or exception, there the proviso is a matter of defence or excuse, which need not be noticed in the information. (See *R.* v. *Ford*, 1 *Stra.* 555; *R.* v. *Bryan*, 2 *Id.* 1101; *R.* v. *Jukes*, 8 *T. R.* 542; *Speires* v. *Parker*, 1 *T. R.* 144, 145; *Steel* v. *Smith*, 1 *B. & Ald.* 94; *R.* v. *Smith*, 5 *M. & Sel.* 103; *Cathcart* v. *Hardy*, 2 *M. & Sel.* 539.)

So where negatives are descriptive of the offence, they must be set forth: for what comes by way of proviso in a statute must be insisted on by way of defence by the party accused; but where exceptions are in the enacting part of a law, it must appear in the charge that the defendant does not fall within any of them. (*R.* v. *Jarvis*, 1 *East*, 646, 647, n.)

Thus the case of *R.* v. *Clarke* (1 *Cowp.* 35), was a conviction on stat. 23 Hen. VIII. c. 9, s. 16, against playing at bowls; and the Court quashed the conviction, because it was not alleged in the information that the playing at bowls was *out of the defendant's own orchard*, and it is only unlawful *sub modo*.

So in the case of informations on the now repealed stat. 5 Ann. c. 14, s. 4, for killing game, in which it was necessary to state and negative all the qualifications enumerated in stat. 22 & 23 Car. II. c. 25. (See *R.* v. *Marriott*, 1 *Stra.* 66; *R.* v. *Hill*, 2 *Ld. Raym.* 1415; *R.* v. *James*, 1 *Burr.* 148; *Hebden* v. *Bluff*, 1 *Chit. Rep.* 607, n.) And this was so necessary, that if the qualifications mentioned in stat. 22 & 23 Car. II. c. 25, were not set out and negatived in these informations, their being negatived by the evidence would not supply the defect. (*R.* v. *Wheatman*, *Dougl.* 346.)

On the other hand the exception in 12 Geo. III. c. 61, s. 11, of mills then used for making gunpowder, &c. does not apply to the limits first mentioned in that clause, but only "to the other parts of Great Britain" not within those limits; and therefore an information charging the keeping more than the allowed quantity of gunpowder within the specified limits, need not negative this exception; and to negative the exception would be impertinent; and where it relates only to another part of Great Britain within which the gunpowder was not kept, would be repugnant and contradictory. (*R.* v. *Matters*, 1 *B. & Ald.* 362; and see *R.* v. *Arnold*, 5 *T. R.* 358; *Nolan*, 282.)

If a subsequent statute make any exception to a former one, it is incumbent on the defendant to show by way of defence that he comes within such exception; and when the prosecutor is not obliged to negative the exceptions in

a statute, and he negatives some of them only, that part of the information will be rejected as surplusage. (*R.* v. *Hall*, 1 *T. R.* 320.)

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The omitting to negative the exception when necessary is not aided by a proviso in the statute, that "no conviction for any offence in the act shall be set aside for want of form, or through the mistake of any fact, circumstance, or other matter, provided the material facts alleged were proved;" for this in effect requires all *material* facts to be alleged; and it is a material fact that the defendant did not come within the exception in the enacting clause. The defect is not of form but of substance. (See R. v. *Jukes*, 8 T. *R.* 542.)

Statement of statute itself.

Statement of Statute itself.]—There is no necessity to state any public statute, the justices being bound *ex officio* to notice it. But a *private* statute must be set out in its parts relating to the offence. If the statute be described, a substantial variance in the statement of it would be fatal. (See 2 *Hawk.* c. 26, s. 10, 104.)

A statute passed in a session of parliament begun in the second and continued in the third year of a king's reign, must not be stated as passed in the *2d & 3rd years of the reign.* (*R.* v. *Biers*, 1 *Ad. & Ell.* 327.)

The description of an act in a conviction as having passed in the 25th year of the king's reign, when in fact the parliament in which the act was passed was continued by protogation from the 24th to the 25th year of the reign, is not a misdescription, or ground of objection. (*R.* v. *Windsor*, 2 *Chit. Rep.* 513.) A conviction is not vitiated by the omission of the word "part" before the words "of Great Britain" in the title of a statute, as directed in the form given by the act. (*Nixon* v. *Nanney*, 1 *Gale & D.* 370)

See further as to the statement of statutes, title "*Indictment*," Vol III. p. 891.

Presumptions of law.

Facts *ex officio* noticed.

Matters of defence.

Matters which need not be stated.]—Presumptions of law need not in general be stated; nor need facts *ex officio* taken notice of by all courts and justices. (See "*Indictment*," Vol. III. p. 866.)

Matters of defence, or facts more peculiarly in the defendant's own knowledge, need not in general be stated. (*Id.* 411; *Fawcett* v. *Fowlis*, 7 *B. & Cres.* 394; 1 *Man. & R.* 102.)

Conclusions of law.

Conclusions of law, resulting from the facts, need not be stated, and are best omitted. Indeed, if stated alone without the facts, the information would be bad. (See "*Indictment*," Vol. III p. 867.)

Matters of evidence.

Mere matters of evidence need not be stated. (*Id.* 867.)

Technical words.

Technical Words, &c.]—Words and matters of form must be as strictly observed in informations and convictions as in indictments. (See *per Cur. Ex parte Pain*, 5 *B. & Cres.* 251, 7 *D. & R.* 678, S. C.) But there is no rule that other words shall be employed in the conviction than such as are in ordinary use. And many of the technical phrases which may be requisite in indictments are not so in convictions, although it has been said that more particularity is required in convictions than in indictments. (See *R.* v. *Chandler*, 1 *Ld. Raym.* 581; *R.* v. *Green*, 1 *Cald.* 391.) The fact need not be charged "against the peace of the queen." (*R.* v. *Chandler*, 1 *Ld. Raym.* 581.) Neither is the omission of the word "unlawfully" (*R.* v. *Chipp*, 11 *Stra.* 711), or "knowingly" (*R.* v. *Marsh*, 4 *D. & R.* 260; 2 *B. & C.* 717; 3 *D. & R. M. C.* 182, S. C.), any objection, unless used in the act as part of the description of the offence, in which case they must be used. (*Id.*; *Carpenter* v. *Mason*, *ante*, 969; *R.* v. *Speed*, 1 *Ld. Raym.* 538. See "*Indictment*," Vol. III. p 896.)

General epithets, as "*duly*," &c.

General Epithets.]—If the charge falls short of the necessary legal description of the offence, the omission is not cured by any allegations of its being done "*unlawfully*," or "*fraudulently*," or the like, or by stating that it was against the form of the statute (*R.* v. *Jukes*, 8 *T. R.* 536; *R.* v. *Jarvis*, 1 *Burr.* 148); for the last allegation is no more than a legal inference, which must be supported by the previous allegation. (*Anon. Dyer*, 363; *Colborne*

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v. *Stockdale*, 1 *Stra.* 493; and see *Exparte Aldridge*, 4 *D. & R.* 84; 2 *B. & C.* 600, S. C.) So the word "*duly*" is of no avail. (See somes case collected 1 *Chit. Pl.* 4th edit. 216, 233; and *post*, "*Indictment*," Vol. III. p. 896.)

Written instruments.

Written Instruments.]—The mode of stating written instruments will be found pointed out under title "*Indictment*," Vol. III. p. 893.) See the case of *R.* v. *Meld*, 6 *East*, 417, where the conviction was quashed for not setting out a written agreement.)

Chattels, monies, &c.

Chattels, Monies, &c.]—Personal chattels should be described specifically by the names usually appropriated to them. As to the mode of such description, see "*Indictment*," Vol. III. p. 894. If an article has obtained, in common parlance, a particular name of its own, it would be wrong to describe it by the name of the material of which it is composed; thus, it would be a misdescription to describe cloth as so many pounds weight of wool, or sovereigns as so many ounces of gold. (*Reg.* v. *Mansfield*, 1 *Car. & M.* 140.) A conviction for hawking goods without a license must specify the goods that were sold. (*R.* v. *Selway*, 2 *Chit. Rep.* 522; and see *Chance* v. *Adams*, 1 *Ld. Raym.* 77; *R.* v. *Gibbs*, 1 *Stra.* 497; *R.* v. *Gilbert*, 1 *East*, 583.) But where the description of goods is not in any way material to the offence, they need not be specified. Thus in *R.* v. *Rabbits* (6 *D. & R.* 341; 3 *D. & R. M. C.* 269), it was held, that an order and adjudication on the 11 Geo. II. c. 19, s. 4, for fraudulently and clandestinely removing goods to avoid a distress need not specify the goods.

Quantity and value.

Quantity, Value, &c.]—The information should specify a particular value or quantity where any thing turns upon.

The value or quantity of the chattels, &c. is more especially necessary to be shown in cases where it is the measure of the penalty or damages to be given by the justice. Thus a conviction upon stat. 43 Eliz. c. 7, s. 1, (now repealed by 7 & 8 Geo. IV. c. 27), against cutting of trees, &c., was questioned for not mentioning the number of trees cut, being the measure of the damages to be given in that case. (*Q.* v. *Burnaby*, 2 *Ld. Raym.* 900; 1 *Salk.* 181, S. C.)

In an information on the 5 Geo. III. c. 14 (repealed by 7 & 8 Geo. IV. c. 27, s.1), for taking and destroying fish, it should have stated the number or quantity of fish taken, killed, or destroyed. (*R.* v. *Marshall*, 2 *Keb.* 594. See the 34th section of the 7 & 8 Geo. IV. c. 27; and *post*, "*Fish*," Vol. III. p. 51.)

But it is sufficient if the conviction be for swearing 150 oaths in these words, viz. (specifying the words once) without repeating each 150 times. (*R.* v. *Roberts*, 1 *Stra.* 608.) Thus in the case of swearing, before the legislature, by stat. 19 Geo. II. c. 21, had directed a summary form of words for the conviction, it was required not only to set forth that the person had cursed or sworn in general, but the particular oaths and curses were to be set forth, that the court might judge thereupon whether they were indeed oaths and curses or not. (*R.* v. *Sparling*, 1 *Stra.* 497; *R.* v. *Popplewell*, 1 *Stra.* 686; *R.* v. *Chaveney*, 2 *Ld. Raym.* 1368.)

A conviction for buying a certain quantity of wheat, to wit, 15 bushels of wheat (contrary to 22 & 23 Car. II. c. 12) has been held sufficiently certain. (*R.* v. *Arnold*, 5 *T. R.* 353.)

Although it may be essential to specify the number, quality, and value of chattels, &c. it does not appear absolutely requisite to prove the precise number and quantity stated.

See further, "*Indictment*," Vol. III. p. 894.

Statement of offence being against the statute.

Conclusion against Statute.]—In analogy to indictments for offences created by statute, it is, it should seem, absolutely requisite that the information and conviction should state that the offence was against the form of the statute, which is usually done after stating the offence by the following words, "against the form of the statute in such case made and provided." (See the

cases and law fully collected, "*Indictment*," Vol. III. p. 838; *sed vide* R. v. *Swallow*, 8 *T. R.* 284; *Chit. C. L.* 2d. edit. 196.) 1. *The Information before Conviction.*

Where one statute is relative to another, as where one creates the offence and the other the penalty, the information and conviction should conclude against the form of the *statutes*. (See *id.*)

Construction of, in general.]—As to the general rules for construing the information, see *post*, 986, 987. Construction of information.

Defects in.]—If the information be incorrect in any of the above particulars, the magistrate may dismiss the complaint, and should do so. Defects in information.

The misstatement or omission of any material averment in the *information* is not cured by any statement in the *evidence* specified in the conviction, for the defendant can be convicted *only of the charge in the information*; and *that* must be sufficient to support the conviction, the evidence being held to *prove* only, and not *supply* the defects in the information. (*R.* v. *Wheatmain*, *Dougl.* 232.) In *R.* v. *Denman* (1 *Chit. Rep.* 155), *Holroyd*, J. said, "it is a rule with respect to summary proceedings before justices in penal statutes, that after a conviction nothing can be intended so as to get rid of any defect in point of form. Every thing necessary to support the conviction must appear on the face of the proceedings, and must be established by regular proof, or by the admission of the party of that which is proved."

See further as to what defects in information and conviction are cured, *post*, 1000.

The 7 Geo. IV. c. 64, s. 20 (see title "*Indictment*," Vol. III. p. 900), does not, it seems, apply to informations before justices out of sessions. (See *Davies* v. *Bint*, 5 *D. & R.* 353; 3 *B. & Cres.* 586, S. C.)

II. The Summons or Warrant of Apprehension.

Summons.]—When the information is laid, if the justice or justices think it sufficient, and that they have jurisdiction over the subject-matter of the complaint, and see cause for calling upon the party complained of for an answer to it, it is their duty to issue a summons. Summons.

It is absolutely requisite in all cases, unless where the legislature has in express terms dispensed therewith, that the defendant should be *summoned*, in order that he may have an opportunity of being heard and making his defence. (*R.* v. *Allington*, 2 *Stra.* 678; *R.* v. *Benn*, 6 *T. R.* 198; *R.* v. *Columins*, 8 *D. & R.* 344; *per Bayley*, J. in *Child* v. *Capel*, 2 *C. & J.* 579; *R.* v. *Hall*, 6 *D. & R.* 84; *R.* v. *Justices of Stafford*, 5 *Nev. & M.* 94; 1 *H. & W.* 328, S. C.; *Painter* v. *Liverpool Gas Company*, 3 *Ad. & Ell.* 433; 11 *Coke's Rep.* 99.) This is but natural justice, and if a magistrate should proceed againt a person without summoning or hearing him, he would be guilty of a misdemeanor, punishable either by information or indictment. (*R.* v. *Allington*, 2 *Stra.* 678; *R.* v. *Venables*, 2 *Ld. Raym.* 1406; 2 *Stra.* 630; *R.* v. *Constable*, 7 *D. & R.* 663.) And an action might be supported against him. (See *Mason* v. *Barker*, 1 *Car. & Kir.* 100.) Where necessary.

If, indeed, the defendant appear and be present during the hearing of the information against him, and have a full opportunity of being heard, and do not ask for further time for the hearing of it, he may be convicted without a summons. (See *R.* v. *Stone*, 1 *East*, 649; *R.* v. *Johnson*, 1 *Stra.* 261; *Reg.* v. *Barrett*, 1 *Salk.* 383; *R.* v. *Aiken*, 3 *Burr.* 1785.)

In the case of *orders*, also, a summons is in general requisite, though it need not in general be stated on the face of the order to have been issued. (*Paley*, 125; *R.* v. *Wilson*, 5 *N. & M.* 164; see "*Order*," Vol. V.) But in some cases the order may be made *ex parte*, as in the case of binding out a poor child as a parish apprentice. (See *ante*, 214.)

By the 3 Geo. IV. c. 23, s. 2 (*ante*, 962), one justice may receive the information and issue a summons in cases where the hearing and conviction must be by two or more justices. One justice may issue it.

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They might be compelled by mandamus to issue it, and to hear the case, if there be no reasonable doubt of the sufficiency of the information and of their having jurisdiction. (See *R.* v. *Benn*, 6 *T. R.* 195; *R.* v. *Buckinghamshire* (*Justices*), 5 *B. & Cres.* 485; 2 *D. & Ry.* 689; S. C. *ante*, 963; and title "*Justices*," Vol. III. p. 1025.)

Mandamus to issue.

Form of.

Where a particular form of summons is required by the statute, the same must be adopted. (*R.* v. *Croke*, *Cowp.* 30.) In general it may be directed either to the offender, requiring him to appear, or to a constable or some third person, requiring him to summon the offender.

It is usually directed to the constable of the district in which the party accused is to be found, and he might be punished for not executing it.

It should state the substance of the charge laid against the defendant.

Time allowed and day for appearance.

It should name a day and time for the defendant's appearance. Natural justice requires that the defendant should have a *reasonable* time allowed him for making his defence. A conviction upon default of appearance, where the summons was to appear immediately upon the receipt of it, was held bad. (*R.* v. *Mallinson*, 2 *Burr.* 679.) In *R.* v. *Johnson*, the defendant was convicted for keeping a gun to kill game, not being qualified. It was objected that there was not a reasonable summons; for it was made to appear the same day, which might be impossible upon account of the distance, or the summons being served late; and his witnesses might not be got together on so short a warning; then it was to appear at the parish aforesaid, whereas there were two parishes mentioned before; so that the man might have gone to one, whilst they were convicting him at the other. It was answered that the defendant appeared at the time, and made defence; so that cures all defects in the summons; and by the Court, the answer is right. (1 *Strange*, 261.)

In some cases the statute expressly requires a particular time to be allowed in the summons for the defendant's appearance; and care must be taken in such case that the summons comply with the act, and that it does not name too early a day. (*Mitchell* v. *Foster*, 12 *Ad. & Ell.* 472; 4 *P. & D.* 150; 9 *Dowl.* 527, S. C.)

It must not require the defendant to appear on an impossible day. In *Reg.* v. *Dyer* (1 *Salk* 181), it was stated that the defendant was summoned to appear, and did appear on Tuesday, the 17th of April, 1802, &c. The 17th of April fell on a Friday, not Tuesday; and it being objected that the time of the summons being impossible, it was the same as if there had been no summons; the Court quashed the conviction, saying, "there could be no such day, and, therefore, he could not appear thereupon; and when the day is not set forth, his appearance on another cannot be intended." (See *R.* v. *Picton*, 2 *East*, 196; *post*, 990.)

Before whom to appear.

Where a statute authorises a justice to summon a party to appear before *him*, not adding the words "any other justice," the matter must be heard by the justice to whom the information or complaint was made. (*Jones* v. *Gurdon*, 11 *Law J., N S., M. C.* 45; 2 *Gale & D.* 133, S. C.)

Place of appearance.

The summons should name a certain place for the defendant's appearance. (*R.* v. *Simpson*, 1 *Stra.* 46.)

Date.

It must not bear date on a day earlier than that on which the information was laid. (*R.* v. *Kent*, 2 *Ld. Raym.* 1546.)

Signature of justice, &c.

It should be signed by the justice by whom it is issued. (*R.* v. *Stevenson*, 2 *East*, 365.)

Service of.

In general it is necessary that the service of the summons should be on the *person* of the defendant, unless where personal service is dispensed with, as is sometimes the case by statute; or by defendant's appearance. (*R.* v. *Hall*, 6 *D. & R.* 84; 3 *D. & R. M. C.* 19; *R.* v. *Colmins*, 8 *D. & R.* 344; *Paley*, 36.) Lord C. J. *Parker* was of opinion (*Reg.* v. *Simpson*, 10 *Mod.* 245), (and the provisions specially introduced into many acts of parliament, to make a service at the dwelling-house sufficient, seem to justify the inference,) that the law in other cases is understood to require a service upon the person. (And see *per Bayley*, J. in *R.* v. *Hall*, 6 *D. & Ry.* 84.)

Where the summons is directed to the constable or a third person, a copy of it plainly and legibly written on paper should be served personally upon the party accused. If directed to the party himself, the original should be

personally served upon him, and a copy of it kept by the party serving it. (1 *Burn's J.* 27th ed. 689, n.)

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Several statutes expressly direct that a service of the summons at the defendant's dwelling-house shall suffice. In these and the like cases, leaving a *copy* at the house is sufficient (*R.* v. *Chandler*, 14 *East*, 268); and the delivery may be to a person on the premises apparently residing there as a servant. (*Id.*; and see *R.* v. *Clement*, 4 *B. & Ald.* 218.)

The Larceny Act, 7 & 8 Geo. IV. c. 29, s. 65 (see "*Larceny*," Vol. III.); the Malicious Injuries to the Person Act, 9 Geo. IV. c. 31, s. 33 (see "*Malicious Injuries to the Person*," Vol. V.); the Malicious Trespass Act, 7 & 8 Geo. IV. c. 30, s. 30 (see "*Malicious Injuries to Property*," Vol. V.); point out a mode of compelling the appearance of persons charged with offences thereunder.

As to the service of the summons in boroughs, as pointed out by the 5 & 6 Will. IV. c. 76, s. 127, see "*Corporations*," Vol. II. p. 117.

Consequences of defect.

If no summons be issued, or if it be defective in any of these particulars, or be not duly served, the party commits no default by not appearing, and the magistrate cannot proceed in the defendant's absence; and if he did so proceed, knowing of the defect, he would make himself liable to an information or indictment. (*R.* v. *Simpson*, 1 *Stra.* 44; *R.* v. *Venables*, 2 *Ld. Raym.* 1407; *R.* v. *Allington*, 1 *Stra.* 678; *Paley*, 21.) And if the defect appeared on the face of the conviction, the magistrate would be liable to an action for any act done under that conviction. (See *Mitchell* v. *Forster*, 12 *Ad. & Ell.* 72; 4 *P. & D.* 150; 9 *Dowl.* 527, S. C.)

If the defendant appears and pleads, and makes a defence, he cannot afterwards take any advantage of the want of a summons, or of a defective one, or defective service. (*Ante*, 975.)

Statement of in conviction.

As to the mode of stating the summons in the conviction, see *post*, 989.

Warrant.

Warrant of Apprehension.]—Wherever a statute gives to a justice a jurisdiction over an offence amounting to a breach of the peace, or a power to require any person to do a certain thing ordained by such statute, it impliedly gives a power to such justice to make out a warrant to bring before him any person accused of such offence or compellable to do any thing ordained by such statute; for it cannot but be intended that a statute giving a person jurisdiction over an offence, doth mean also to give him the powers incident to all courts of compelling the party to come before him. (2 *Hawk.* c. 13, s. 15; 12 *Rep.* 131 b; *R.* v. *Simpson*, 10 *Mod.* 248; *Bane* v. *Methuen*, 2 *Bing.* 63; 9 *Moore*, 161, S. C.

Power to issue when implied.

Not so in penal informations.

But for offences merely arising by penal statutes and not connected with any breach of the peace, a justice has no authority, as necessarily incident to the cognizance of the offence, to apprehend the accused in the first instance, or even after a summons and default, but can only summon him to attend, and in default of his appearance proceed *ex parte*. (*R.* v. *Simpson*, 10 *Mod.* 341; 1 *Stra.* 44; *Paley*, 38.)

Sometime statute authorises a warrant in first instance.

In a variety of cases, where there may be reason to apprehend, from the nature of the offence, or the probable description of the offender, that the object of the prosecution would be defeated by giving him notice, the legislature has thought proper, in express terms, to arm the magistrate with authority to issue a warrant immediately upon the information which, in these cases, is generally directed to be taken upon oath. (*Paley*, 37.) And it seems to have been considered as a common law doctrine, that as a warrant deprives a man of his liberty, a summons ought only to issue and not a warrant without information on oath. (2 *Barnard.* 34, 77, 101.)

The warrant should be on information on oath.

Some statutes, indeed, in general terms direct the magistrate to cause the defendant to be brought before him; and this implies, it would seem, an authority in him to issue the compulsory process of a warrant.

Proper in general to issue a summons in first instance.

Even where a statute authorises the issuing a warrant upon complaint, yet if it be for a penalty, or the non-payment of money, the magistrate had better in general issue a summons in the first instance, before he grants a warrant, unless it is probable the party will abscond as soon as he hears of the complaint

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against him, or the object of the prosecution would otherwise be defeated by a mere summons. It is more reasonable that a summons should in such a case be issued in the first instance. (*R.* v. *Martyr*, 13 *East*, 61; *R.* v. *Justices of Stafford*, 3 *Adol. & E.* 426.)

Form of warrant. How long in force.

As to the form of the warrant, see "*Warrant*," Vol. VI. It is not in general made returnable at any particular time, but remains in force until executed. (*Dickenson* v. *Brown*, *Peake*, 234)

III. Of the Hearing of the Charge, and Proceedings at.

Before whom to take place.

Before whom to take place.]—The jurisdiction of justices of the peace in general, as it regards the place where the offence was committed, the time of the offence, and its nature, will be noticed hereafter under title "*Justices*," Vol. III. p. 1000 to 1007; and see the various titles of offence throughout the work.

Where a statute authorises a justice to summon a party to appear before *him*, not adding the words "or any other justice," the complaint must be heard by the justice to whom the information or complaint was made. (*Jones* v. *Gurdon*, 11 *Law J. N. S. Mag. Ca.* 45; 2 *Gale & D.* 133, S. C.)

Whether the conviction should take place before one or more justices, depends entirely on the statute giving cognizance of the offence. If the statute allow one justice to convict, the conviction may be by two or more; but where the statute requires the conviction to be by two justices, a conviction by one would be *coram non judice*, and void, and the justice making the conviction, and the constable executing it, would be liable to an action of trespass, if the party's goods were distrained upon, or himself committed. (See "*Justices*," Vol. III. p. 1008.)

Appearance or default.

Appearance or Default.]—The defendant either appears or makes default. Upon the accused party's appearing before the justice, either in obedience to the summons, or upon being apprehended and brought there under a warrant, or where, after personal service of the summons, the party does not attend at the time and place appointed by it, and oath is duly made of the service, the justice then proceeds to the hearing of the case.

In the summons it is usual, and upon many accounts convenient, to fix not only a day, but a particular time of the day, for the appearance of the party; but if he appear at the time, and the justices shall not attend, he is not to go away, but must wait during the remaining part of the day, for many things may happen to hinder the justice's immediate attendance.

Where the defendant neglects to appear upon the summons, the statute creating the offence frequently directs the magistrate to issue a warrant for his apprehension. (12 *Rep.* 130; 2 *Hawk.* c. 13, s. 15; *Bane* v. *Methuen*, 2 *Bing.* 63.) The justice may, if he thinks proper, proceed *ex parte* against the defendant, without issuing any warrant for his apprehension. (*Reg.* v. *Simpson*, 10 *Mod.* 379; 1 *Stra.* 44, S. C.)

If the defendant appears, the information (if one have been drawn up in form) is first read to the defendant; or if no information have been drawn up, then the charge is read to him from the summons or warrant: and he is asked what he has to say to the charge thus made against him. Such information must be read or stated to defendant, who should be apprized of the charge against him, and put to plead thereto. (*Per Grose*, J., *R.* v. *Thompson*, 2 *T. R.* 23.) After this the defendant either confesses the charge or denies it, and makes defence immediately, or prays time.

By his appearance, and entering on his defence, he cures any defect or irregularity in the summons, or even the want of a summons altogether; except perhaps in a case where a special form of summons is required by the act which is not complied with. (*Ante*, 977.)

The non-attendance of the party does not, it seems, authorise a judgment against him without a due examination of the facts, with the same formality as if he were present and made defence. (*R.* v. *Simpson*, 10 *Mod.* 381.)

3. *Of the Hearing and Proceedings.*

Confession of charge.

Confession of Charge.]—If the defendant confess charge, it is needless to go into the proof of it, the justice then, after taking a formal minute of such confession, passes judgment, and imposes the penalty or punishment. It has been determined, that though the act only empowers the justices to convict upon the oath of one or more witnesses, this implies a power to convict upon the confession of the party alone. (*R.* v. *Gage*, 1 *Stra.* 546; 1 *Saund.* 262, n. 1.) As the confession supplies the want of evidence, so it cures any objection to the manner of taking the depositions; such, for instance, as that they were not made in the presence of the defendant. (*R.* v. *Hall*, 1 *T. R.* 320; *Mann* v. *Davers*, 3 *B. & Ald.* 103.) But the general rule, that if the defendant confess the offence, it is needless to go into the proof of it, is to be understood of a confession to the full extent of a good and sufficient information; for where either the confession does not come up to the charge in the information, or is made upon an insufficient information, it will not supply the want of evidence in the one case, or of a sufficient charge in the other. Thus, in *R.* v. *Little* (1 *Burr.* 613), confession by the defendant of a single fact of offering to sell silk handkerchiefs without a license, was holden not sufficient to convict him of a *trading* as a hawker, pedlar or petty chapman, without license; because a *single act* of selling a parcel of silk handkerchiefs to a *particular person* is not a proof that he was such hawker, pedlar or petty chapman, as ought to have taken out a license. Conviction quashed. (And see *R.* v. *Smith*, 3 *Burr.* 1475; *R.* v. *Corden*, 4 *Burr.* 2279.)

Denial of the charge.

Denial of Charge, or saying nothing.]—If the defendant denies the charge, the next step is to substantiate the charge by testimony. For this purpose the prosecutor or informer must produce his witnesses to prove the facts alleged, and after that, if the defendant appear, he may produce witnesses for the defence.

Saying nothing.

If the defendant says nothing, or refuses to enter upon any defence, still the charge must be substantiated the same as if he denied it. (See *R.* v. *Crowther*, 1 *T. R.* 127; *R.* v. *Bennell*, 6 *T. R.* 75.)

Adjournment.

Adjournment.]—If the defendant denies the charge, and requires time for his defence, and to produce his evidence, it is reasonable, and the law seems to require that the party should be allowed a proper interval for that purpose; (see *R.* v. *Stone*, 1 *East*, 469; *Paley*, 40;) and the hearing may, either upon the application of the defendant, or for any other cause, if the justice thinks fit, be adjourned to a subsequent day; taking care not to exceed the time (if any) limited by the act for making the conviction. (*R.* v. *Folley*, 3 *East*, 467; *R.* v. *Bellamy*, 1 *B. & C.* 500; 2 *D. & R.* 727, S. C.; and see *ante*, 961.)

Time of making conviction.

Right to have counsel, presence of third persons, &c.

Defence by Counsel, &c.—Presence of Third Persons.]—A magistrate, when hearing a case of summary conviction, is exercising a judicial authority, and therefore must be regarded as holding a court of justice for that purpose. And it is one of the essential qualities of a court of justice that its proceedings should be public, and all parties who may be desirous of hearing what is going on have a right to be present, if there be room in the place for the purpose, provided they do not interrupt the proceedings, and provided there is no specific reason why they should be removed. This appears fully settled by the case of *Daubney* v. *Cooper*, (10 *B. & Cres.* 237,) where it was held, that the proceedings against a party in a summary manner, under the 5 Ann. c. 14, for keeping and using a gun to destroy game, is of a judicial nature, at which all persons have a *primâ facie* right to be present; and, therefore, in that case, where a magistrate had, without any specific reason, caused a party, who claimed a right to be present, to be removed from a justice-room, where such a proceeding was going on, it was held that he was liable to an action of trespass.

6 & 7 Will 4, c. 114.

But until the recent statute of 6 & 7 Will. IV. c. 114, s. 2, no person, whether counsel or attorney, or not, was entitled as of right to attend to take part in the proceedings on a summary conviction as an advocate, by examining the witnesses or expounding the law; and the allowance of such persons

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to interfere was purely in the discretion of the magistrate, who, like any other judge, must have the power to regulate the proceedings of his own Court. (See "*Justices*," Vol. III. p. 1012.) By that enactment, however, it is declared and enacted, "That in all cases of summary conviction persons accused shall be admitted to make their full answer and defence, and to have all witnesses examined and cross-examined by counsel or attorney." It will be seen that this enactment only extends the privilege to counsel and attornies.

Even before the enactment any one might attend as a friend of either party and take notes, and quietly make suggestions and give advice; but not take part in the proceedings without leave of the magistrate. (*Collier* v. *Hicks*, 2 *B. & Adol.* 663.)

As to the right of parties to have legal advisers present to assist them on other occasions than on the hearing of cases to be decided by summary conviction, see "*Justices*," Vol. III. p. 1012.

Evidence to support the charge.

Evidence to support the Charge.]—The evidence must fully establish the offence with which the defendant is charged; as it regards the time when it was committed, the place where it was committed, (*R.* v. *Highmore*, 2 *Ld. Raym.* 1220; *R.* v. *Jefferies*, 1 *T. R.* 241; *R.* v. *Hazell*, 13 *East*, 139; *R.* v. *Chandler*, *id.* 267,) and every fact and circumstance necessarily constituting the offence: for if any one of these be not proved, or cannot fairly be presumed from other facts or circumstances which have been proved, the defendant should not be convicted. Where the facts constituting an offence are all of a positive nature, there can be no doubt that they must be established in proof by the prosecutor, before any judgment of conviction can be pronounced; but with regard to such offences as are made penal only by the want of certain qualifications in the offender, or by the absence of several exculpatory circumstances, a difficulty will sometimes occur in determining the degree of *negative* proof which ought to be required by the magistrate. (*Paley*, 50, 53; *R.* v. *Turner*, 5 *M. & Sel.* 206.) It may be taken as a general rule, that the affirmative is to be proved, and not the negative, of any fact which is stated, unless under particular circumstances, where the general rule does not apply; for where the fact lies peculiarly within the knowledge of one party, it is easy for him to prove it, but often impossible for the other. Therefore, notwithstanding a negative averment must be made by the prosecutor, the affirmative, if it affords a justification to the party charged, must be proved by him as a defence. And in a case where the defendant was charged with selling ale without a license, it was held that the onus of proving defendant was licensed lay upon him. (*R.* v. *Hanson*, *Paley*, 53; *R.* v. *Neville*, 1 *B. & Ad.* 489.) It would, however, be a prudent, and not unreasonable course, for the magistrate in all cases of this description to require some general *primâ facie* evidence on the part of the informer in support of the negative allegation. (*Id.* 51.) The defendant's own representations or admissions afford a legitimate and strong ground for supporting such allegation; and it has been decided that justices, before whom an information was exhibited on the game laws, were justified in founding the want of the defendant's qualification upon the fact of his having sworn before them, acting in another capacity, as commissioners of the income tax, to an estate under 100*l.* a year. (*R.* v. *Clark*, 8 *T. R.* 120.) It is clear that in all cases where the exceptions come by way of proviso in a separate clause or act from that which describes the offence, and without reference in the enacting clause incorporating them therewith, the defendant must bring himself by proof within the proviso by which he seeks to protect himself. (*R.* v. *Jervis*, 1 *East*, 647, 650; *R.* v. *Bryan*, 2 *Stra.* 1101; *R.* v. *Neville*, 1 *B. & Adol.* 489.)

The justice cannot be required to hear evidence which ought not to affect his decision in the matter before him. (*R.* v. *Minshull*, 1 *N. & M.* 277.)

The defence.

The Defence.]—After hearing all the evidence in support of the charge, the defendant should be called upon for his defence; and the magistrate is bound to hear the evidence tendered by him.

That he acted under a claim of right.

Besides protesting against and commenting on the validity or effect of the evidence tendered against him, the accused may defend himself by proving

that he is within some provisio or exception which excuses or qualifies the fact charged, or that the act complained of was done under an asserted authority, or pursuant to a *boná fide* claim of right of property; for where the title to property comes in question, the exercise of a summary jurisdiction by justices of the peace is generally ousted. (*R.* v. *Burnaby*, 1 *Salk.* 181; 3 *Salk.* 217; 2 *Ld. Raym.* 900, S. C.) This principle is not in general founded upon any legislative provision, but is a qualification which the law itself raises in the execution of penal statutes, and is always implied in their construction. (See *Paley*, 48, 49.) Some statutes, for instance the statute 7 & 8 Geo. IV. c. 30, s. 24, (relative to malicious injuries to property,) expressly excepts offences done under a *boná fide* claim of right. (See title "*Malicious Injuries to Property*," Vol. V. p. 44; and see the Game Act, 1 & 2 Will. IV. c. 32, s. 35; title "*Game*," Vol. III. p. 252.)

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In these cases it is sufficient to stop the summary interference of the justice, that even a *colour of title* appears to be in question, and that the act was really done under an assertion of that supposed title, however weak the claim may appear to be. (*Paley*, 55.) Thus it has been held, that the act of killing fish in a private fishery after notice given to the owner that it was done to try the right to the place in question, did not subject the party to penalties under 5 Geo. III. c. 14, s. 4, (repealed by 7 & 8 Geo. IV. c. 27,) although the same title had before been tried and determined by a verdict against the party now claiming it, the act of parliament having expressly excepted persons who have a just right *or claim*. (*Kinnersley* v. *Orpe*, *Dougl.* 500; see *Hunt* v. *Andrews*, 3 *B. & Ald.* 341; *R.* v. *Hampshire*, 3 *Dowl.* 47.) The rule, however, ought not to be so extended as to enable an offender to arrest the summary jurisdiction of the justice by a mere fictitious pretence of title. An assertion of right, therefore, is not to be regarded, where it evidently appears that no colour or pretext for it exists; as where the party's own showing, or other manifest circumstances, prove the claim to be wholly groundless. (*Calcraft* v. *Gibbs*, 5 *T. R.* 19; *R.* v. *Wrottesley*, 1 *B. & Adol.* 648; *Grant* v. *Hulton*, 1 *B. & Ald.* 134.)

It is said, *per Holt*, C. J. (*R.* v. *Burnaby*, 2 *Ld. Raym.* 901), that upon a suggestion of title, the Court of Queen's Bench, at any time while the conviction remains below, and has not been removed by *certiorari*, will grant a prohibition after conviction to stay the justice from proceeding upon it. (See *R.* v. *Harper*, 1 *D. & R.* 222, and *Paley*, 59.)

In some cases the statute expressly empowers a magistrate to decide on a claim of right. On a complaint against a party, on the 11 Geo. II. c. 19, s. 4, for fraudulently removing goods to avoid a distress, it was holden that the justices had jurisdiction, though it appeared that the title to the premises was disputed, and that the tenant had actually paid his rent to one of the claimants. (*Coster* v. *Wilson*, 3 *M. & Wels.* 411.)

Witnesses.

Compelling attendance of.

The Witnesses, and Examination of.]—It is open to great doubt whether the magistrate has any authority to compel the attendance of witnesses for the purpose of a summary trial, unless where it is specially given by act of parliament. In many acts this authority is given, and the provision is accompanied with a penalty on refusal to attend for the purpose of being examined. (See *Paley*, by *Dowling*, 33; *Evans* v. *Rees*, 12 *Ad. & Ell.* 55; title "*Examination*," Vol. II. p. 465.)

The examination of.

Must be on oath.

The examination of witnesses must be upon oath, and no legal conviction can be founded upon evidence not so taken. (*Paley*, 24; 1 *Hale*, 580; *Morgan* v. *Hughes*, 2 *T. R.* 225.) There is a difference in the manner in which the acts are worded in regard to the mode of examination to be pursued. For while some acts expressly mention the testimony of witnesses *on oath*, others in general terms authorise the magistrate *to hear and determine* or to convict or give judgment *on the examination of witnesses*, without noticing the oath. But such general expressions seem, in legal construction, necessarily to refer to the only kind of testimony known to the law, *viz.* that upon oath: "For," says *Dalton*, "in all cases wheresoever any man is authorised to examine witnesses, such examination shall be taken and construed

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to be as the law wills, *i. e.* upon oath." (*Dalt.* c. 6, s. 6.) This was the opinion of Lord C. J. *Broke* and Mr. *Lambert*, and the rather (adds the latter,) because in these cases of conviction by justices of the peace the trial dependeth wholly upon these examinations. (*Id.* c. 115, 164; *Plow.* 12 a; *Lamb.* 517; and see *Exp. Aldridge*, 4 *D. & R.* 83; 2 *D. & R. M. C.* 120; 2 *B. & Cres.* 600, S. C.; *Wilkins* v. *Wright*, 2 *C. & M.* 191, S. C.)

Which must be taken before hand.

The oath must be administered before the witnesses are examined, and administering it afterwards is irregular; for at the time the witness is giving evidence he ought to be under the sanction and control of an oath. (*R.* v. *Kiddy*, 4 *D. & R.* 734; *Dalt. Just.* c. 164, s. 3.)

Power to administer.

The power of justices to administer an oath by virtue of that jurisdiction, which is conveyed in the authority to hear, examine and convict, without any express mention of a power to administer an oath, does not seem, from any thing now extant, to have been ever questioned so as to be brought to a judicial decision. (See *Paley*, 34, 35; "*Justices*," Vol. III. p. 1013; "*Oaths*," Vol. V.)

Form of.

The form of the oath will be found under title "*Examination*," Vol. II. p. 464.

Quakers, &c. affirmation.

As to the taking the affirmation instead of an oath where the witness is a Quaker, Moravian, or Separatist, see "*Oath*," Vol. V. pp. 252, 255.

Competency of witnesses.

The competency of witnesses will be treated of hereafter under title "*Evidence*," Vol. II. p. 421 to 440; and especially as to when informers or inhabitants of a parish are competent, see the recent statute of 6 & 7 Vict. c. 85, in the *Addenda* to that title.

Credible witness.

Where, in acts of parliament directing justices to convict, &c. parties, the term *credible witness* is used, it bears no precise or legal signification, but the magistrate is to judge, like the jury on a trial, how far the witness is sufficiently to be believed, to warrant the conviction, &c.; (*Windham* v. *Chetwynd*, 1 *Burr.* 418; *Peake, Evid.* 124.) But the term must be construed to mean a *competent* witness, and such witnesses, therefore, only as are competent in a court of justice are competent on hearing the information before a magistrate. See further, as to the credibility of witnesses, title "*Evidence*," Vol. II. p. 442.

Examination must be in defendant's presence.

With respect to the *mode of examination*, although no mode be pointed out by the statutes giving jurisdiction over the offence, yet as justice requires that the accused should be confronted with the witnesses against him, and have an opportunity of cross-examination, it is required by law, in the summary mode of trial now under consideration, that the evidence and depositions should be taken in the presence of the defendant, where he appears; for though the legislature by a summary mode of inquiry intended to substitute a more expeditious process for the common law method of trial, it could not design to dispense with the rules of justice as far as they are compatible with the method adopted. Indeed it may be useful upon this occasion to notice the general maxim which has been laid down as a guide to the conduct of magistrates in regulating all their summary proceedings, *viz.* that "acts of parliament, in what they are silent, are best expounded according to the use and reason of the common law." (*Per Parker*, C. J., *R.* v. *Simpson*, 1 *Stra.* 45.)

Unless, therefore, the defendant forfeits the advantage by his wilful absence, he ought to be called upon to plead before any evidence is given; (*R.* v. *Hall*, 1 *T. R.* 320;) and the witnesses must be sworn and examined in his presence; (*R.* v. *Vipont*, 2 *Burr.* 1163; *R.* v. *Baker*, 1 *Stra.* 316; *Re Tordoff*, 13 *Law J. N. S. Mag. Cas.* 145;) or if the evidence has been taken down in his absence and is read over to him afterwards, the witness must, at the same time, (unless the defendant upon hearing the evidence should confess the fact,) (*R.* v. *Hall*, 1 *T. R.* 320,) be re-sworn in his presence, and not merely called upon to assert the truth of his former testimony; (*R.* v. *Crowther*, 1 *T. R.* 125;) for the intent of the rule is, that the witness should be subjected to the cross-examination of the defendant upon his oath. (*R.* v. *Vipont*, 2 *Burr.* 1163; *R.* v. *Kiddy*, 4 *D. & R.* 734; *R.* v.

Solway, 2 *Chit. Rep.* 522: *R.* v. *Cummins*, 4 *D. & R. M. C.* 94; *Cox* v. *Coleridge*, 1 *B. & Cres.* 97.)

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Examining witnesses apart from the others.

In many cases it may be proper to examine a witness apart from the others, and. for that purpose to require the latter to withdraw during his examination. (See *Dalt. Just.* 165; *Taylor* v. *Lawson*, 3 *C. & P.* 543.)

Informer's oath.

Where a statute appoints a conviction to be on the *oath of one witness*, this ought not to be by the single oath of the informer; for if the same person shall be allowed to be both prosecutor and witness, it would induce profligate persons to commit perjury for the sake of the reward. (*R.* v. *Stone*, 2 *Ld. Raym.* 1545. See further, *ante*, 963; title "*Evidence*," Vol. II. p. 435.)

Number of witnesses.

A statute allowing a conviction on the oath of *one witness* shall be understood to denote *one witness or more*. And *two witnesses* shall denote *two or more witnesses*.

Taking down examination in writing.

It is the duty of the justice, as well as for his own protection, that he should take down with great care the examination, or the material part of the examination of the witnesses, and also the cross-examination, formally in writing, in the exact natural language and peculiar expressions used by the witnesses. Mere memorandums, or such minutes as may satisfy the justice at the moment, are not sufficient; for unless in cases where the form of the conviction is given by the statute, and does not so require it, the magistrate is bound, since the 3 Geo. IV. c. 23, *post*, 988, which gives a general form of conviction, to set out the evidence on the record of the conviction, as nearly as possible in the words used by the witnesses; and if he neglects so to do, a *mandamus* lies to compel him. (See *Re Rix*, 4 *D. & R.* 352; 2 *D. & R. M. C.* 249; *R.* v. *Marsh*, *id.* 260; and see *R.* v. *Warnford*, 5 *D. & R.* 489; *post*, 993.) Should the justice have omitted to take regular and formal minutes of the evidence, he will have considerable, if not insurmountable difficulty in obeying such a *mandamus*. See further as to the mode of taking down examinations, title "*Examination*," Vol. II. p. 468.

The adjudication.

The Adjudication.]—When the case and evidence have been heard and concluded on both sides, it remains for the magistrate to convict or acquit the party, according to his judgment upon the circumstances. The judgment should be confined to the subject-matter of the complaint laid before him. (See *R.* v. *Soper*, 3 *B. & Cres.* 857; 5 *D. & R.* 669, S.C.)

The degree of credit due to the evidence on either side is entirely for his consideration. In summary proceedings before a justice of peace, he is substituted for a jury, so far as relates to the conviction, that is, to the finding of the party guilty or not guilty. He should judge, therefore, of the guilt or innocence of the defendant from the evidence, in the same manner as if he were upon a jury; if the evidence be such as to leave no reasonable doubt upon his mind of the guilt of the defendant, he should convict him; if otherwise he should acquit him. (*R.* v. *Reason*, 6 *T. R.* 375; *R.* v. *Smith*, 8 *T. R.* 590.)

If any reasonable doubt exist in the mind of the magistrate, the party charged is entitled to the benefit of that doubt. Such cases, it is to be recollected, differ very materially indeed from those where mere civil rights are concerned, and where the mere preponderance of evidence may be sufficient to decide the question. (2 *Stark. Ev.* 414.)

It is sufficient to authorise a conviction, that there is such evidence before the magistrate as might in an action, or on an indictment, be left to a jury; and the Court of Queen's Bench, when the conviction is brought before it, will not examine further, to see whether the conclusion drawn by the magistrate be or be not the inevitable conclusion from the evidence. (*R.* v. *Davis*, 6 *T. R.* 178.)

And if the magistrates think fit to dismiss the charge, although there appears *primâ facie* ground for a conviction, their acquittal cannot be questioned; since no other court can judge of the credit due to witnesses which it did not hear examined. (*R.* v. *Reason*, 6 *T. R.* 376; see *R.* v. *Ridgway*, 1 *D. & R.* 132; 5 *B. & Ald.* 527, S. C.; *post*, 994.)

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Fixed punishments.

Fixed Punishments.]—In some cases the statute is peremptory as to the penalty or punishment, giving no discretion to the justice to lessen or vary it; and in such case the justice of course can only pursue the directions of the statute. In other cases the penalty or punishment is left in some measure in the discretion of the justice, as to the amount and nature of the penalty or punishment: in such cases he should guide his discretion according to the circumstances of the case and the condition in life of the defendant, and the circumstances of aggravation or extenuation, under which the offence is proved to have been committed. (See *post*, 995, 996.)

Fixing the penalty.

Fixing Penalty.]—The magistrate is not obliged to fix the penalty or punishment at the instant of conviction, but may take time, either for the purpose of informing himself of the legal penalty, or of considering the amount proper to be imposed. Therefore, though the forfeiture must necessarily appear as a part of the judgment in the conviction when formally drawn up (*post*, 996,) (which will otherwise be irregular,) yet if it be ascertained and imposed at any time before the conviction is so drawn up, and appears in the record returned to the Court of Queen's Bench on a writ of *certiorari*, that Court will not hear any objection on the ground that it was not in fact imposed by the magistrate at the time when he convicted the offender; (*R.* v. *Elwell*, *Ld. Raym.* 1514; 2 *Stra.* 794, S.C.; *Reg.* v. *Layton*, 1 *Salk.* 352;) for the Court will not take notice of any defect which does not appear on the face of the conviction itself. (*R.* v. *Liston*, 5 *T. R.* 338; *R.* v. *Cashiobury*, 3 *D. & R.* 35; 1 *D. & R. M. C.* 485; *Paley*, 60.)

In affixing the punishment of an offence which may be proceeded against upon one or other of two different statutes, care must be taken not to blend the penalties under both. (*Paley*, 206; *R.* v. *Clarke*, *Cowp.* 35.)

Where several penalties.

Where several Penalties.] The defendant may be convicted in the same conviction in several penalties for several offences. (*R.* v. *Swallow*, 8 *T. R.* 284; *Paley*, 195, 196.)

Where several acts.

It must depend upon the wording of the statute creating the offence whether a party is liable to several penalties for several acts committed by him, or only one penalty. In some cases it will appear that the several acts constitute but one aggregate offence, and then but one penalty can be inflicted. Under particular acts of parliament only one offence can be committed on the same day. As under stat. 29 Car. II. c. 7, for exercising a trade on the Lord's Day. (*Crepps* v. *Durden*, 2 *Cowp.* 640.) So under stat. 5 Anne, c. 14, s. 4, (repealed by 1 & 2 Will. IV. c. 32,) for keeping or using a dog or gun. (*R.* v. *Matthews*, 10 *Mod.* 26; see "*Game*," Vol. III. pp. 229, 263; and *Marriott* v. *Shaw*, *Com.* 274; *R.* v. *Lovett*, 7 *T. R.* 152.) But under stat. 12 Geo. II. c. 36, (expired,) for selling books originally printed here, and afterwards reprinted abroad and imported into this country, the party may incur several penalties on the same day for several distinct acts of sale of such books here. (*Brooke* q. t. v. *Milliken*, 3 *T. R.* 509.)

Where several offenders.

Where a statute imposes a penalty "if any person or persons" shall do *an act* prohibited, if two persons do such act together, and are jointly convicted, it is deemed but one offence, and the magistrate can inflict only one penalty. Thus in *R.* v. *Bleasdale* (4 *T. R.* 809,) where the defendants were convicted in 5*l. each*, under 5 Anne, c. 14, s. 4, (repealed by 1 & 2 Will. IV. c. 32,) for using a greyhound to destroy game without being qualified, the Court, without hearing any argument, said the conviction could not be supported, for that it was only one offence, and that the magistrate should only have convicted them in one penalty. But this might be otherwise under the 1 & 2 Will. IV. c. 32. (See "*Game*," Vol. III. p. 229.) But if either the penalty imposed by the statute be upon *each person* convicted, or if the particular nature or quality of the offence be such that the guilt of each of the parties be essentially distinct from that of the others, in either of these cases the parties ought to be convicted in several and distinct penalties. (*R.* v. *Clarke*, *Cowp.* 610; *Crepps* v. *Durden*, *Cowp.* 640; *Paley*, 199.) Thus the 44th section of the 3 & 4 Will. IV. c. 53, enacts, that "every person" who shall be concerned in the unshipping of goods, the duties for which have not been paid, &c.,

shall forfeit either the treble value thereof, or be liable to the penalty of 100*l.* The defendant and his partner having been separately convicted of the same offences, it was held that each was liable to the penalties imposed by the act. (*Reg.* v. *Dean*, 12 *M. & Wels.* 39.) In the construction of the Toleration Act, 1 W. & M. c. 18, s. 18, which inflicts a penalty of 20*l.* on any person or persons who may disquiet or disturb any congregation permitted by that act, it has been decided that several persons for a joint disturbance are liable to separate penalties of 20*l.* each. (*R.* v. *Hube and others*, 5 *T. R.* 542. *Vide post*, "*Dissenters*," Vol. II. See the cases of *R.* v. *Smith and others*, *R. & R.* 368; *R.* v. *Southern*, *id.* 444; decided on the act against night poaching; "*Game*," Vol. III. p. 266.)

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As to the form of the conviction where several penalties are adjudged, see *post*, 996.

Mitigating the Penalty.]—The *mitigation* of penalties is not of course, but depends upon the power given to justices by particular acts of parliament to exercise their discretion in this case, within certain bounds, in the instances mentioned in those acts. It is a general rule that where a statute gives a discretionary power of mitigating a penalty, there the legislature must have intended to place the matter under the jurisdiction of justices of the peace. (See *per Abbott*, C. J. *Reeve* v. *Poole*, 4 *B. & Cres.* 156; 1 *C. & P.* 622, S. C.; and see *R.* v. *Rawlinson*, 6 *D. & R.* 26; *Thompson* v. *Poole*, *id.* 29.) As to the statement of the mitigation, see *post*, 997.

Mitigating the penalty.

Damages.]—Statutes frequently empower justices of the peace to give damages to the injured party, as in the case of common assaults, (see "*Assault*," *ante*, p. 286;) or malicious and trifling injuries to property, (see "*Malicious Injuries to Property*," Vol. V. p. 44.) In each particular case the extent of the injury is to be ascertained by the justices, and compensation awarded only in proportion to the injury proved. (*R.* v. *Harpur*, 1 *D. & R.* 222.)

Damages.

Costs.]—In many cases the statute creating the offence gives the justices power to award costs.

Costs.

If it does not do so, then the justices have jurisdiction over them by the 18 Geo. III. c. 19, which enacts that "where any complaint shall be made before a justice, and a warrant or summons shall issue in consequence thereon, the justice, upon hearing and determining the matter, may award *costs* to either party; but if the conviction be upon a penal statute, and the penalty amounts to 5*l.* or upwards, the costs shall be deducted out of the penalty." Sect. 1 of that act, after reciting that "by the laws now in being, his majesty's justices of the peace are not sufficiently authorised, on complaints that come before them out of sessions, to award costs against either the person or persons complaining, or the person or persons against whom any complaint is made, as to justice may appertain," it is enacted, that "where any complaint shall be made before any of his majesty's justices of the peace for any county, riding, division, city, town corporate, franchise, or liberty, and any warrant or summons shall issue in consequence of such complaint, that then it shall and may be lawful to and for any justice or justices of the peace, who shall have heard and determined the matter of the said complaint, to award such costs to be paid by either of the parties, and in manner and form as to him or them shall seem fit, to the party injured: and in case any person, so ordered by the said justice or justices of the peace to pay such sums of money as aforesaid, shall not forthwith pay down or give security for the same to the satisfaction of the justice or justices, it shall and may be lawful for the said justice or justices, by warrant under his hand and seal or their hands and seals, to levy the said sum or sums by distress and sale of the goods and chattels of such person so refusing or neglecting; and where goods and chattels of such person cannot be found, to commit such person to the house of correction for the county, riding, division, city, town corporate, franchise, or liberty, wherein such person shall reside, there to be kept to hard labour for any time not exceeding one month, nor less than ten days, or until such sum or sums of

18 Geo. 3, c. 19.

Justices, out of session, empowered to award costs on determination of complaints brought before them.

On refusal of party to pay, &c. the same may be levied by distress.

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money, together with the expenses attending the commitment of such person to such house of correction, be first paid."

If the penalty on any conviction shall amount to 5*l.*, the costs shall be deducted thereout, &c.

Sect. 2. "Provided, nevertheless, that upon the conviction of any person or persons upon any penal statute or statutes, where the penalty or penalties shall amount to or exceed the sum of 5*l.*, the said costs shall be deducted by the said justice or justices, according to his or their discretion, out of the said penalty or penalties, so that the said deduction shall not exceed one-fifth part of the said penalty or penalties; and the remainder of the said penalty or penalties shall be paid to, or divided among, the person or persons who would have been entitled to the whole of the penalty or penalties in case this act had not been made."

Before this act, a justice had no power to award costs unless expressly authorised by statute.

There must be a complaint and adjudication on it.

To enable justices to award costs under this enactment, there must be a *complaint* against some party, and an adjudication upon it. In a recent case, where one of the defendants who were magistrates having received information on oath that a turnpike road was out of repair, summoned the surveyor, under the 5 & 6 Will. IV. c. 50, s. 94, to appear at a special sessions; at that sessions the two defendants ordered A. B. to view the road, and report thereon to them at another special sessions. A. B. having reported at the latter sessions, when the plaintiff was present, that the road was out of repair, the defendants ordered the surveyor to repair it within six weeks, and at the same time ordered him, under stat. 18 Geo. III. c. 19, s. 1, to pay 2*l.* 3*s.* as costs. It was held, amongst other points, that the justices could not award costs in such a case under that act. (*George* v. *Chambers*, 11 *M. & Wels.* 149; 2 *Dowl. N. S.* 783, S. C.)

Amount should be fixed by justices.

The justices should of course themselves ascertain and fix the amount of these costs, and they cannot delegate that act to another, or the conviction would be vitiated. (*R.* v. *St. Mary, Nottingham*, 13 *East's Rep.* 57; see *Sellwood* v. *Mount*, 1 *Gale & D.* 358; *Lock* v. *Sellwood*, *id.* 366.) It was held in *R.* v. *Long*, (1 *Ad. & Ell. N. S.* 740,) that where, on the hearing of an appeal against an order of removal, a Court of quarter sessions ordered a parish to pay costs under the 4 & 5 Will. IV. c. 76, s. 82, the Court must fix the amount of such costs by their order before the close of the sessions.

As to the statement of the costs in the conviction, see *post*, 997.

Drawing up conviction.

Drawing up the Conviction.]—As to this, see *post*, 1002. It need not be drawn up at the time of the trial. The conviction may be complete in operation of law before the formal instrument setting it out is drawn up.

Giving copy of, and returning it.

Giving a Copy and returning the Conviction.]—As to this see *post*, 1001, 1002.

As regards the form of conviction, we will treat of it as it affects—1st, Convictions in General; and 2dly, Convictions where the Form is pointed out by a particular Statute.

IV. Form of Convictions and Construction of, in General.

Form of convictions in general.

And herein—

1st, Of the *General* Requisites and Construction of a Conviction.

2dly, The statement of the Information, or Charge against the Defendant.

3dly, The Summons or Notice of such Information, in order that he may make his Defence.

4thly, His Appearance or Non-Appearance.

5thly, His Confession or Defence.

6thly, The Witnesses and Evidence against him.

7thly, The Adjournment.

8thly, The Judgment or Adjudication.

And 9thly, The Subscription and Date.

1st *The General Requisites and Construction of, and herein of the General Form given by the 3 Geo. IV. c. 23.*]—The conviction being a record should in all cases be upon parchment.

4. *Form of, in general.*

(1.) General requisites and construction of.

Authenticating it.

It must be under the hand and seal of the justice, that being the only regular mode of authenticating it as his record (*Dalt.* c. 115; *R.* v. *Elwell*, 2 *Stra.* 794; and see *Basten* v. *Carew*, 5 *D. & R.* 558; 2 *D. & R. M. C.* 563; 3 *B. & C.* 649, S. C.); showing the time when it was made.

It ought to be in words and figures at length. (2 *H. H.* 170; *Paley, Conv.* 59.)

It need not state all the proceedings in the present tense; it may state them in the past tense. (*R.* v. *Hall*, 1 *T. R.* 320; *Paley*, 59; *Wilkins* v. *Wright*, 2 *C. & M.* 205; *sed vide R.* v. *Roberts*, 2 *Ld. Raym.* 1376; 1 *Stra.* 608, S. C.) The judgment itself, however, should be in the present tense, for that is an act of the Court itself, and not of the parties. (*Hull* v. *Clarke*, 1 *Mod.* 31; *sed vide R.* v. *Inhabitants of St. Nicholas, Leicester*, 4 *Nev. & M.* 624; 3 *Ad. & Ell.* 79; *post*, 995, which, however, was the case of an order and not a conviction.)

The general requisites of a conviction are, that it should be precise and certain, and show that the convicting magistrate has power to convict, that the requisite proceedings preliminary to the conviction have been duly taken, and that the defendant has been guilty of the offence charged upon him. It is not necessary that the conviction should be drawn up in any *precise form*, but the matters must appear with reasonable certainty. (See *per Vaughan*, B. 2 *C. & M.* 203.)

The requisite degree of *certainty*, a term not easily explained or understood, has been already noticed, *ante*, 967, &c., and will be found further treated of under title "*Indictment*," Vol. III. p. 864. As to which certainty it is said, that the charge should be positive and certain, in order that the defendant may both be apprised how to direct his defence and protected from a second accusation of the same fact (*R.* v. *Stoughton*, 2 *Stra.* 900); and in order also that the evidence may be seen to support the charge, and the judgment may appear appropriate to the offence. (2 *Hawk. c.* 25, *s.* 57, 8th ed.)

The conviction must at all events have as much certainty in it as an indictment. (See *R.* v. *Pain*, 7 *D. & R.* 678; 5 *B. & Cres.* 251, S. C., *per Abbott*, C. J.)

General rules of construction of convictions.

With respect to the construction of convictions, it was formerly more strict, for the Courts were more inclined against this summary mode of proceeding that at present. The slightest innovation upon the boasted right of trial by jury was most narrowly watched. Experience, however, has taught us that the due exercise of the summary powers vested in justices of the peace are of very considerable advantage to the country. Convictions now receive every support from the courts of law which can be given consistently with the immovable principles of *certainty*, and provided there be a reasonable degree of certainty, the Courts will not be astute in discovering defects. It is certainly reasonable that these convictions should be construed with strictness, because they are against the common law, and must be taken to be true against the defendant; but provided it appears with sufficient certainty on the face of the conviction that the authority given to the justice has been strictly pursued according to the letter of the act by which it was created, that the justice has jurisdiction in the case, and that rules similar to those adopted by the common law in criminal prosecutions have been adopted, it will suffice. (See *Paley*, 75; 2 *T. R.* 18; *R.* v. *Corden*, 4 *Burr.* 2218.) If the sense be clear, nice exceptions ought not to be regarded.

But though, in construing a conviction, nothing will be intended against it, on the other hand, nothing will be intended in its favour; all facts necessary to support the charge must be stated expressly, and not left to be gathered from inference or intendment. (See *Paley*, 69; 1 *Ld. Raym.* 508; *R.* v. *Davis*, 5 *B. & Adol.* 551; 2 *Nev. & M.* 349, S. C.; *Day* v. *King*, 5 *Ad. & Ell.* 359.) In *R.* v. *Hazell* (13 *East*, 141), Lord *Ellenborough* said, "the Court can intend nothing in favour of convictions, and will intend nothing against them;" and in a more recent case, *R.* v. *Daman* (1 *Chit. Rep.* 155),

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it was said, that "no intendment can be made in favour of a conviction so as to get rid of an objection in point of form."

In *Wilkins* v. *Wright* (2 *C. & M.* 201), *Vaughan*, B. said, "I am alive to the necessity of watching with jealousy the execution of the powers confided to the justices of the peace in those summary convictions, which, it must be conceded, are derogatory to the liberty of the subject, and all powers given in restraint of liberty must be strictly pursued." (And see *per Curiam*, *Bracy's case*, 1 *Salk.* 349.)

The Courts will never presume injustice or impartiality in magistrates (*Skin.* 123), but give them credit to the truth of the facts stated, subject to the peril attending the wilful abuse of that credit by a false statement. (*Reg.* v. *Simpson*, 10 *Mod.* 382; *Basten* v. *Carew*, 5 *D. & R.* 558; 3 *B. & C.* 649.)

Surplusage.

Any defect in the manner of stating that which is in itself *surplusage*, and might be omitted altogether, does not vitiate the rest which is sound. The principal difficulties arise from the impracticability of fixing absolutely and incontrovertibly any definite rule or criterion by which to determine at once what shall be considered words of surplusage. This is a difficulty not to be entirely removed, because every case must stand on its own peculiar circumstances; but besides the determinations on convictions noticed hereafter and throughout this work, some tolerably precise notion on the subject may be deduced from the law of indictments. Thus, if an indictment conclude "contrary to the form of the statute," when in fact there is no statute applicable to the case, and, therefore, no uncertainty can ensue, but it is an offence at common law; this conclusion may be rejected as surplusage, and the proceedings supported. (*R.* v. *Horne*, *Cowp.* 683; *R.* v. *Matthews*, 5 *T. R.* 162; 2 *Leach*, 585.) So if the word "there" be inserted when locality makes no part of the charge and need not be averred, it may be rejected as immaterial and surplusage, because there probably can be no preceding matter to which it can be referable. (2 *Sess. Ca.* 7.) And generally all words that are entirely useless or without particular sense or meaning, especially if they contravene the intent or purpose of the indictment, ought to be struck out as surplusage. (2 *Leach*, 525, 536.) But though perhaps not absolutely necessary to be inserted at all, if any averments be introduced so connected with the main charge that they cannot be separated and still leave the necessary part *a charge sufficiently made* by itself, all must be proved, and no part can be struck out as surplusage; but if they can be separated, and after such separation the material part remain sensibly true and grammatically correct, and containing a sufficient charge in law, that which has been unnecessarily introduced may be struck out as surplusage. (2 *Leach*, 594; *R.* v. *Leefe*, 2 *Campb.* 135; *R.* v. *Hunt*, *id.* 584; see *Dick. Sess.* 3d. edit. 594.)

Conviction bad in part is bad in toto.

A judgment by conviction being an *entire act* cannot be severed, and be bad in part, and good as to the rest, even though their several parts may be in their nature distinct. (*R.* v. *Patchet*, 5 *East's Rep.* 344; 1 *Smith's Rep.* 547, S. C.) Thus a conviction for not accounting for tolls, and also for not paying over the receipts, being defective as to the latter offence for not specifying the sums, though correct as to the former, was discharged altogether. (*R.* v. *Catherall*, 2 *Stra.* 900.) This position does not militate against that immediately preceding, because in the case of superfluous insertions they are taken as if they had not been part of the conviction, and, therefore, errors in *them* do not affect the other *parts* which are correct, nor the *whole* taken together. By consent, however, it seems a conviction may be set aside as to part of the judgment. (*R.* v. *Hale*, *Cowp.* 728.)

See as to commitments in execution being bad *in toto* if bad in part, *ante*, 794. See also *Skingley* v. *Surridge*, 11 *M. & Wels.* 513.

As to when defects are aided, see *post*, 1000.

General form given by 3 Geo. 4, c. 23.

Before proceeding to inquire minutely as to how the statements in a conviction should be made, we must notice the important act of 3 Geo. IV. c. 23, intituled "*An Act to facilitate Summary Proceedings before Justices of the Peace and Others*," which in a great degree, to avoid the perplexity so often felt in drawing up a conviction, has provided an outline of a form to be used

and filled up in all cases where the statute creating the offence, or regulating the mode of prosecuting it, has not given a specific form. 4. *Form of, in general.*

The first section of the act reciting that "great inconveniences often arise in summary proceedings before justices of the peace, deputy lieutenants and others, from the want of a general form of conviction," enacts, "that from and after the passing of this act, in all cases wherein a conviction shall have taken place, and no particular form for the record thereof has been directed, the justice or justices, deputy lieutenant or deputy lieutenants, or other person or persons duly authorised to proceed summarily therein, and before whom the offender or offenders shall have been convicted, shall and may cause the record of such conviction to be drawn up in the manner and form following, or in any words to the same effect, (see *post*, 999,) *mutatis mutandis;* (that is to say,)

"*County* [or as the case may be] *of* } *BE it remembered, that on the day of, in the year of our Lord, at in the county of, A. B. of, in the county of, labourer,* [or as the case may be,] *personally came before me* [or *before us, &c.*], *C. D. one* [or more, as the case may be], *of his majesty's justices of the peace for the said, and informed me* [or, *us &c.*] *that E. F. of, in the county of, on the day of, at in the said, did* [here set forth the fact for which the information is laid,] *contrary to the form of the statute in such case made and provided, whereupon the said E. F. after being duly summoned to answer the said charge appeared before me,* [or *us, &c.*] *on the day of, at in the said, and having heard the charge contained in the said information, declared he was not guilty of the said offence,* [or as the case may happen to be,] *did not appear before me,* [or *us, &c.*] *pursuant to the said summons,* [or *did neglect or refuse to make any defence against the said charge*]: *whereupon I* [or *we, &c.* or *nevertheless, I,* or *we, &c.*] *the said justice* [or *justices,*] *did proceed to examine into the truth of the charge contained in the said information, and on the day of aforesaid, at the parish of aforesaid, one credible witness, to wit, A. W. of, in the county of, upon his oath deposeth and saith,* [if E. F. be present, say, *in the presence of the said E. F.*] *that, within months* [or as the case may be] *next before the said information was made before me* [or *us, &c.*] *the said justice by the said A. B., to wit, on the day of, in the year, the said E. F. at, in the said county of*, [here state the evidence, and as nearly as possible in the words used by the witness, and if more than one witness be examined, state the evidence given by each] [or, if the defendant confess, instead of stating the evidence say, *and the said E. F. acknowledged and voluntarily confessed the same to be true,*] *therefore it manifestly appearing* to me* [or *us, &c.*] *that he the said E. F. is guilty of the offence charged upon him in the said information, I* [or *we, &c.*] *do hereby convict him of the offence aforesaid, and do declare and adjudge, that he the said E. F. hath forfeited the sum of of lawful money of Great Britain, for the offence aforesaid, to be distributed* [or *paid,* as the case may be,] *according to the form of the statute in that case made and provided. Given under my hand* [or *our hands, &c.*] *and seal, the day of, in the year of our Lord.*"

This act is *compulsory* on the magistrates as to the mode of drawing up the conviction, and not merely directory; and they may be compelled by *mandamus* to adopt the form prescribed, or one like it in effect. (*Re Rix*, 4 *D. & R.* 352; *post*, 993.) The act is compulsory.

It is to be observed, however, that it is not sufficient to adhere literally to the form given, where, from the nature of the case, the general terms adopted in the form do not show in reality the facts, and this observation, as will be hereafter seen, will in many cases peculiarly apply to that part of the form stating the adjudication of the penalty and its distribution. (See *post*, 995.) And see as to the construction and mode of drawing up forms of convictions, when the form is expressly pointed out by a statute, *post*, 999. Form not to be adhered to literally.

2dly. *Statement of the Information or Charge.*]—The conviction must recite the information. This it usually does in the past tense, until the prayer of process against the defendant. The conviction must set out the information, exactly as it was laid before the justice, or the substance of it. Statement of the information, offence, &c.

We have already seen how the information, when in writing, should be framed, and especially as to the statement therein of the time of making it,

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the place where made, the authority or name and style of the justice before whom made, the informer making it, and the offence and charge made. Such observations will be found here applicable; for all objections that can be taken to an information, and which are not merely for a defect in form, may be taken also to this part of the conviction. (See fully, *ante*, 963 to 975.)

In describing the offence, therefore, all that the framer of the conviction has in general to do, is to follow the statement of it in the information.

Where there has been no information in writing, drawn up in form, and which is not unfrequently the case where it is not otherwise expressly required, and where the proceedings are not at the suit of a common informer for a penalty, the mode of stating the offence may be collected from the observations, *ante*, 965 to 975.

Where there has been no information, but the magistrate has convicted on his own view (as in a few instances he is authorised by statute so to do), after stating such view, the offence may also be described in the mode pointed out, *ante*, 965 to 975.

Statement of the summons.

3dly. *Statement of the Summons.*]—The necessity for, the form, and the service of the summons upon the offender, have been already considered, *ante*, 975.

It must be stated in the conviction that the defendant was summoned to answer the information; unless in those cases (which are not many) in which particular statutes have expressly allowed justices to convict persons without a summons, or on view of the offence, in which latter case the view must be stated.

If the date of the summons be stated, it must not appear to have been before the information was laid, if it does the conviction will be bad. (*R.* v. *Kent*, 2 *Ld. Raym.* 1546.)

Where penalties are to be recovered by information before justices of the peace, under a statute which directs that the justices shall summon the person against whom the information is exhibited, to appear and plead to, and to attend the hearing of the information, at a time and place named in the summons, such summons to be served "ten days at the least" before the time appointed: it was held, that there must be ten clear days between the service and the day of hearing; and that where the conviction shows on its face that the party was convicted *exparte*, on default of appearance to a summons appointing too early a day, such conviction is no defence to an action of trespass for enforcing it. (*Mitchell* v. *Forster*, 12 *Ad. & El.* 72; 9 *Dowl. P. C.* 527; 4 *P. & D.* 150, S. C.)

If the conviction state that the defendant was summoned to appear and did appear on an impossible day, as Tuesday, the 17th day of April, A.D. 1802, when in fact the 17th fell on a Friday, it was held bad. (See *R.* v. *Dyer*, 1 *Salk.* 181; *R.* v. *Picton*, 2 *East.* 196; *ante*, 976.)

If the offender be stated to be present at the time of the proceeding, and to have heard all the witnesses, and not to have asked for any further time to bring forward his defence, if he had any, this at all times has been deemed sufficient. (*R.* v. *Stone*, 1 *East*, 649. See also *R.* v. *Johnson*, 1 *Stra.* 261, *ante*, 977.)

A statement that the defendant was *duly summoned*, will now, since the form prescribed by the 3 Geo. IV. c. 23, s. 1, *ante*, 989, in all cases suffice, unless where there is another form of conviction pointed out by the statute. (See *R.* v. *Johnson*, 1 *Stra.* 261; *R.* v. *Stone*, 1 *East*, 639; *Reg.* v. *Barret*, 1 *Salk.* 383; *R.* v. *Aiken*, 3 *Burr.* 1785; *R.* v. *Hall*, 6 *D. & Ry.* 84; *Mason* v. *Barker*, 1 *Car. & K.* 107, n.)

Statement of appearance or non-appearance of defendant.

4thly. *Statement of Defendant's Appearance.*]—The defendant's appearance or non-appearance should be stated according to the fact. (*Bos.* 62; *Paley*, 138; *Wilkins* v. *Wright*, 2 *C. & M.* 206.) The form of the statement is prescribed by the 3 Geo. IV. c. 23, s. 1, *ante*, 989.

Statement of defendant's confession.

5thly. *Statement of Defendant's Confession.*] If the defendant appear, and confess that he is guilty of the offence imputed to him, the appearance

and confession are recorded in the conviction; and then, if it be a confession of the entire offence, instead of stating any evidence, which is quite unnecessary in such a case, the justice may at once proceed to the conviction and adjudication; but if it be a confession merely of a fact, which forms but a part of the offence charged, the conviction then, after stating the confession in the words of the defendant, proceeds to state the evidence as to the other facts and circumstances constituting the offence charged, and, lastly, states the conviction and adjudication. (See *R.* v. *Gage*, 1 *Stra.* 546; *R.* v. *Hall*, 1 *T. R.* 320; *R.* v. *Little*, 1 *Burr.* 613; *R.* v. *Smith*, 3 *Burr.* 1475; *Wilkins* v. *Wright*, 2 *C. & M.* 206.)

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The confession cures any objection to the *manner* of taking the evidence; as that it was not taken in the defendant's presence, or that improper evidence was taken, or the like. (*R.* v. *Clarke*, *Cowp.* 35; *R.* v. *Hall*, 1 *T. R.* 320, *ante*, 979.)

The mode of stating the confession is pointed out by the form given by the 3 Geo. IV. c. 23 (*ante*, 989.)

6thly. *Statement of the Witnesses and Evidence.*]—It is requisite to name the witness, that he may appear to be a different person from the informer, as the statutes generally give the latter a share of the penalty, and therefore he cannot be a witness, excepting where the act shall specially so direct (*R.* v. *Stone*, 2 *Ld. Raym.* 1545; 1 *Sess. Cas.* 378, S.C.; *R.* v. *Tilly*, 1 *Stra.* 316; *Andr.* 18, 240; *Bosc.* 69.) The form given by the 3 Geo. IV. c. 23 (*ante*, 989), requires the name of the witness to be stated.

Statement of the witnesses and evidence.

The conviction should state that the witness was examined on oath. (*R.* v. *Aldridge*, 4 *D. & Ry.* 83; *R.* v. *Lears*, 13 *Law J. N. S.* 47, *Mag. Cas.*) It is not necessary to add that the magistrate had authority to administer the oath. (*R.* v. *Picton*, 2 *East*, 195.) In *R.* v. *Glossop* (4 *B. & Ald.* 616), it was held, that from a statement that certain witnesses came before the justices upon their oaths to them severally and respectively administered, it substantially appeared that the oath was administered to the witnesses in the presence of the magistrates. In *R.* v. *Selway* (2 *Chit. Rep.* 522) it was held unnecessary to state how the witnesses were sworn. The 3 Geo. IV. c. 23 (*ante*, 989), now gives a proper precise form as to these statements.

In the case of *R.* v. *Vipont and others* (2 *Burr.* 1163), the conviction was that the defendants *having heard the charge*, (of conspiring to advance their wages in the woollen manufacture,) and being called upon by the justices to show cause why they should not be convicted, and having nothing to say whereby to defend themselves, are therefore convicted: this was quashed by the Court; because the evidence ought to be particularly set forth, that the Court may judge thereof; and it must be given in the presence of the defendant, that he may have an opportunity of cross-examination. (*R.* v. *Crowther*, 1 *T. R.* 127, and see *Re Tordoff*, 13 *Law J. N. S. M. C.* 145; *R.* v. *Benwell*, 6 *T. R.* 75; *Bosc.* 71.) The form given by the 3 Geo. IV. c. 23, s. 1 (*ante*, 989), requires the justice to state that witness gave his evidence in the defendant's presence, if such was the fact. It was considered before the passing of this act, that though the evidence ought to be given in the presence of the defendant, if the appearance of the defendant and the examination of the witness are both stated on the same day, the Court would presume that the witness was examined in the presence of the defendant, though it be not expressly so stated; (*R.* v. *Aiken*, 3 *Burr.* 1786; *R.* v. *Kempson*, *Cowp.* 241; *R.* v. *Thompson*, 2 *T. R.* 23; and *R.* v. *Lovet*, 7 *T. R.* 152); even though it were stated that the appearance was at A. and the evidence was given at B. (*R.* v. *Swallow*, 8 *T. R.* 284.)

Where, in a conviction, the information was stated to have been laid on the 29th May, 1805, and that the defendant appeared on the 4th June (without mentioning the year), and it concluded by stating the conviction as signed and sealed on this 4th of June, 1805; the Court held that the proceedings appeared to have been all one continuing transaction, from the appearance of the defendant after the summons to the close of the conviction, and that this appeared, both from the antecedent date of May, 1805, and the date of the conviction to have been June, 1805, because the defendant was

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stated to have appeared on the 4th June, and the conviction was signed and sealed on the 4th June, 1805; and they held that it therefore appeared that the evidence was given in the defendant's presence, as his departure pending the continuance of the transaction could not be presumed. (*R.* v. *Crisp*, 7 *East*, 389; 3 *Smith*, 377, S. C.)

The evidence itself must be fully set forth.

The 3 Geo. IV. c. 23, s. 1 (*ante*, 989), in the form therein prescribed, directs that the evidence should be stated, *as nearly as possible, in the words used by the witness, and that if more than one witness be examined, then that the evidence given by each shall be stated.* Independently of this, it was previously fully settled, that in all convictions, the evidence must be set out *particularly*, not merely the *result* of it; and that sufficient proof must appear upon the face of the record to sustain every material part of the charge, and to warrant the adjudication. (*R.* v. *Lovet*, 7 *T. R.* 152.) It was laid down by Lord *Mansfield*, in 1 *Burr.* 1163, as an undoubted maxim, that on a conviction the evidence must be set out, in order that the superior court may judge of it. It has been likewise solemnly recognized as a known distinction between orders and convictions, that in the former it is allowed to state the result only of the evidence, whereas the same mode of stating it would be undoubtedly bad in a conviction. (*R.* v. *Lloyd*, 2 *Stra.* 999; *R.* v. *Justices of Cheshire*, 2 *Nev. & M.* 827; 5 *B. & Ad.* 439; *R.* v. *Kellett*, 4 *Burr.* 2063; "*Orders*," Vol. V. p. 288.) In a very early case (*Reg.* v. *Green*, 10 *Mod.* 212,) the conviction was quashed because the evidence was not set forth. It was only laid down that the witness was sworn *de veritate præmissorum*, and that it did not appear from what was sworn to the justice that the defendant was guilty; but it was said it ought so to have appeared to the court. Again, a conviction for taking pilchards *contra formam statuti* was quashed; and the reason assigned was, because the witness swore generally that the defendant was *guilty of the premises*; for that is taking the law upon himself. (*R.* v. *Baker*, 1 *Stra.* 316.) A conviction on the candle act was set aside because the evidence was not set out, it being only alleged that the offence was *fully and duly* proved. (*R.* v. *Baker*, 1 *Stra.* 316; *R.* v. *Theed*, 2 *Stra.* 919; 2 *Barnard.* 16, 73.)

In *R.* v. *Marsh* (4 *D. & R.* 260; 2 *B. & C.* 717, S. C.), it was suggested that the magistrate might have great difficulty in setting out the evidence in the words used by the witnesses, it not being usual to take the depositions in writing; but the Court said it was the duty of the magistrate to take down the evidence, and give the detail of it in the conviction.

It has been held that if a conviction state *in the words of the statute* the depositions of the witness to the fact, it is sufficient; but if the magistrate endeavour to shelter himself from detection by merely stating the fact of the offence in the terms of the act of parliament, as if it were the legal effect of the evidence, when the evidence itself would not warrant the conclusion, he subjects himself to a criminal information, upon a proper case laid before the court. (*R.* v. *Pearse*, 9 *East*, 358.) And in *R.* v. *Allen*, cited *Paley on Conv.* by *Dowling*, 165, n., *Abbott*, C. J., said, "that no witness would swear in the words of the statute, and that the Court could not, on a conviction, stating a witness so swore, assume that the magistrate had done his duty;" and the magistrate was there ordered to draw up a fresh conviction.

Exceptions in evidence.

In those cases where the offence is created in a section in a statute, which section contains particular *exceptions*, though it is necessary to negative every one of those exceptions in the information (*Dougl.* 331), it has been doubted whether or not it be necessary also to negative them in the evidence given in support of the charge. In *R.* v. *Jarvis* (1 *Burr.* 154), Mr. J. *Denison* said it was necessary to negative, by *the evidence* and adjudication, that the defendant had any of the particular qualifications to kill game, that being a conviction on the game laws before the 1 & 2 Will. IV. c. 32. But it was determined and fully settled by the Court of Queen's Bench in *R.* v. *Turner* (5 *M. & Sel.* 206; 2 *Phill. Ev.* 25, 189,) that a conviction which specifically negatives the several qualifications mentioned in the statute was sufficient, without stating evidence to negative those qualifications. (And see the opinions of *Lawrence*, J., and *Le Blanc*, J., in *R.* v. *Stone*, 1 *East*, 653; *R.* v. *Marsh*, 4 *D. & R.* 260; 2 *B. & C.* 717, S. C.; *Paley*, 180, 184.)

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The evidence, both in support of the information and for the defence, must be stated where it is relevant to the matter at issue. (*Per Abbott*, C. J., *Re Rix*, 4 *D. & R.* 354.)

Evidence for defence.

Matter of evidence, irrelevant to the charge contained in the information, need not be stated. (*Id.*)

Irrelevant evidence.

Nor need every word used by the witness. (*Per Abbott*, C. J., *R.* v. *Warnford*, 5 *D. & R.* 490.)

Justices must use their discretion.

The justices must use their discretion in the statement, but they must attend to the general directions contained in the act 3 Geo. IV. c. 23, s. 1. (*Id.*)

Mandamus to set forth the evidence.

If the justices omit to state the evidence in the conviction, as we have just seen they are bound to do, the Court of Queen's Bench will compel them to do so by *mandamus*, on an affidavit that there was some evidence not set out, or not exactly set out in the conviction. In *Re Rix* (4 *D. & R.* 352), where justices omitted to set out, on the record of a conviction on the Building Act, the evidence adduced on the hearing of the information as nearly as possible in the words used by each of the witnesses, in pursuance of the 3 Geo. IV. c. 23, a *mandamus* was issued to compel them. And so in the case of a game conviction before the 1 & 2 Will. IV. c. 32. (4 *D. & R.* 354, n.; *R.* v. *Marsh*, *id.* 260; *R.* v. *Warnford*, 5 *D. & R.* 489; 2 *D. & R. Mag. Ca.* 511; *R.* v. *Allen*, 5 *D. & R.* 490.)

In order to obtain a *mandamus* to the justices to set out the evidence in a conviction under the stat. 8 Hen. VI. c. 9, for a forcible entry, it is necessary that the affidavits should suggest that evidence was received by the magistrates on the view. (*R.* v. *Wilson*, 5 *Nev. & M.* 164; 1 *Ad. & Ell.* 627, S. C.; "*Justices*," Vol. III. pp. 1024, 1025.)

Information for not setting it forth.

Under circumstances, if the evidence be not set forth as it was given, a criminal information or indictment might be supported against a magistrate. (See *R.* v. *Peace*, 9 *East*, 358; "*Justices*," Vol III. p. 1017.)

The evidence set forth must be sufficient to warrant conviction.

The evidence, when set forth, must contain reasonably sufficient matter to warrant the conviction. Therefore it must be of a fact existing at the time of the information; and so it must appear. In *R.* v. *Fuller* (1 *Ld Raym.* 509), a conviction on stat. 8 & 9 Will. III. c. 19 (now repealed), for keeping two concealed washbacks was quashed, because, though the information, which was given on the 30th March, charged the defendant with then having the washbacks, the evidence, which was not given until the 3d of April, was merely that the defendant *habet et custodit eadem duo et concelata vasa*; confining it to the time when the evidence was given, and of course subsequent to the day of the information.

In a conviction under the 2 Geo. II. c. 26, s. 4, for working a boat or skiff on the river Thames for hire, without being qualified so to do, it must expressly appear from the evidence in such conviction that the defendant worked such boat for hire. (*R.* v. *Taylor*, 2 *Chit.* 578.)

The evidence must go to establish the identical offence which forms the subject of the information. It is not sufficient that there appears to be evidence of another offence of the same kind and subject to the same penalty. (See *R.* v. *Smith*, 8 *T. R.* 588; *R* v. *Harper*, 1 *D. & R.* 214; 2 *D. & R. Mag. Ca.* 67, S. C.; *Paley*, 178.)

If the offence be confined to persons of a particular description, there must be competent evidence of their answering that description. (*R.* v. *Little*, 1 *Burr.* 609; *R.* v. *Smith*, 3 *Burr.* 1475; *Paley*, 184, *by Deacon*) By 1 Jac. I. c. 9, s. 2, (now repealed by the 9 Geo IV. c. 61,) an innkeeper permitting an inhabitant of the parish to tipple, was liable to be convicted on the oath of two witnesses; that act having expired, it was provided by 21 Jac. I. c. 7, that the conviction might be made on the oath of one witness; the stat. of 1 Car. I, c. 4, extended the same penalty to the case of strangers, but required proof by two witnesses, as in 1 Jac. I. c. 9: held, that a conviction appearing to have been made on the oath of one witness, against an alehouse-keeper, for suffering tippling in his alehouse, was bad, for not stating whether the persons found tippling were inhabitants of the parish or strangers. (*R.* v. *Dove*, 3 *B. & Ald.* 596.)

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It should appear that the fact was proved to have been committed in some place within the jurisdiction of the magistrate. (*R.* v. *Jeffries*, 1 *T. R.* 241; *R.* v. *Smith*, 8 *T. R.* 588; *R.* v. *Highmore*, 2 *Ld. Raym.* 1220; *R.* v. *Hazell*, 13 *East*, 142; *Paley*, 164; *ante*, 966.)

When a certain time is limited by statute for a summary prosecution before justices of peace, it is necessary on that account also to fix the offence to a certain date, and state the time of committing the offence in that part of the conviction in which the evidence is set forth. (*Paley*, 132.) For if that be not shown either by positive proof of the day, or by express reference in the evidence to a date previously mentioned, the conviction cannot be supported, as is exemplified in this case. A conviction on the Malt Act, 42 Geo. III. c. 38, s. 38 (now repealed), stated an information to have been exhibited on the 29th of May, 1805, charging "that the defendant within three months now last past did wet certain corn," &c. The evidence stated was, that the witness on the 22d of May (without mentioning the year), found a floor of malt then in the operation, &c. (so proceeding to state the fact of the offence.) The conviction was quashed on account of the defective manner in which the date was alleged in the evidence. Lord *Ellenborough*, C. J. "The evidence ought to appear to support the information, and the justices should either have stated the evidence of the witness to be that the offence was committed on the 22d May, 1805, if they really so understood the witness to mean; or, if they had any doubt of that, they should have inquired of him more particularly as to the date of the fact. But here the date of the year neither appears expressly by the evidence, nor by any words of reference to any other date which is certain. And if they have done their business slovenly, we cannot supply their omission. As it stands on the conviction, the offence does not appear to have been committed within three months before the prosecution commenced, which is necessary to give them cognizance. (*R.* v. *Woodcock*, 7 *East*, 146.) It is sufficient, however, to refer to a date already mentioned and ascertained. Thus where a conviction was dated the 4th of June, and the information exhibited the 29th of May, charged the offence within three months now last past, *viz.* on the 12th of May now last past; it was held sufficient that in the evidence the fact was sworn to have happened on the said 12th of May. (*R.* v. *Crisp*, 7 *East*, 389; 3 *Smith*, 377, S. C.; see further, *Paley*, 167, 168.)

Suffices if reasonably sufficient to support conviction.

If the evidence set forth be such as might reasonably warrant the conclusion drawn by the justices, the conviction will be good. Thus in a conviction against defendant for causing to be acted at a place called the Coburg Theatre, for gain and reward, a certain entertainment of the stage called *Richard the Third*, the evidence set forth was, that the defendant was seen once or twice at the rehearsal of the piece, and that the defendant engaged an actor to perform, and gave him a check for the amount of his benefit; it was held that the justices were warranted in drawing the conclusion that the defendant caused the play to be acted. (*R.* v. *Glossop*, 4 *B. & Ald.* 616; and see *Anon.* 1 *B. & Adol.* 382.) *Et per* Lord *Kenyon*, C. J., *R.* v. *Davis* (6 *T. R.* 178), it is sufficient in convictions, if there were such evidence before the magistrate as in an action would be sufficient to be left to a jury.

And the Court of Queen's Bench will not interfere unless the evidence stated on the face of the conviction be such that no reasonable person could draw the conclusion which the magistrate has drawn. (*R.* v. *Glossop*, 4 *B. & Ald.* 618; *Anon.* 1 *B. & Adol.* 382.)

Where the justices acquitted the defendant upon evidence which *primâ facie* was sufficient to convict, and there being no contradictory or explanatory evidence; the Court said that the evidence given was entirely and exclusively for the consideration of the justices below, who were placed in the situation of a jury; and as they had acquitted the defendant, the Court could not substitute themselves in the place of the justices acting as jurymen, and convict him. That they could not judge of the credit due the witnesses whom they did not hear examined. That they could only look to the form of the conviction, and see that the party, if convicted, had been convicted by

legal evidence. (*R.* v. *Reason*, 6 *T. R.* 375, *ante*, 983; and see *Anon.* 1 *B. & Adol.* 382.)

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But if no evidence appear on the conviction to support a material part of the information, the Court will quash the conviction. (*R.* v. *J. Smith*, 8 *T. R.* 588.)

And where the evidence set forth to support a conviction under 11 Geo. I. c. 30, s. 16, (repealed by 6 Geo. IV. c. 105,) for knowingly harbouring and concealing smuggled spirits, consisted merely of proof of finding the smuggled spirits in the house of the party convicted, the Court of King's Bench thought the evidence insufficient, and quashed the conviction. (*Ex parte Ransley*, 3 *D. & R.* 572; see *R.* v. *Dean*, 12 *M. & Wels.* 39.)

Statement of the adjournment.

7thly. *Statement of the Adjournment.*]—If the magistrate adjourns the hearing of the information (and which he may do if either the defendant or the prosecutor requires time for adducing further proofs), the fact of the adjournment should perhaps be stated in the conviction. (*Paley*, 189.) If a certain time be limited within which the *conviction* must take place, a conviction after that period cannot be supported, though it appears on the face of it to be upon an information commenced in time, and adjourned with the consent of the defendant to a future day. (See *ante*, 979.)

Statement of the adjudication.

8thly. *Statement of the Adjudication.*]—The conviction must contain an adjudication of the fact which forms the offence, and of the defendant's having been convicted of it, and also an adjudication of the forfeiture incurred thereby; and if either of these be wanting, the conviction is bad. (See *Paley*, 206, 208.) Even in cases where the punishment is fixed by statute there must be an adjudication; for the want of which the conviction in *R.* v. *Harris* (7 *T. R.* 238), was quashed. In that case Lord *Kenyon*, C. J. said, "a conviction is in the nature of a verdict and judgment, and therefore must be precise and certain." And it may be observed as a general rule, that the adjudication on every point to which it refers must be *precise* and *certain*, and that a judgment for too little is as bad as one for too much; and this is so whether it respect the fine, the costs, or any other portion of the penalty which lies attached to the commission of the offence. (*R.* v. *Salomans*, 1 *T. R.* 251.)

Must be certain.

Judgment for too little or too much, bad.

Must be warranted by statute.

The adjudication must be warranted by the statute creating the offence, or the conviction will be bad. (See *R.* v. *Hall*, *Cowp.* 60; *R.* v. *Elwall*, 2 *Ld. Raym.* 1514.)

Formal words of.

The form given by the 3 Geo. IV. c. 23 (*ante*, 989), points out the form of the judgment. It was held, before the passing of that act, that no formal style of adjudication was necessary as in other judgments. A judgment in these terms, *viz.* "*that R. T.* (the defendant), *according to the form of the statute, is convicted*," was held a sufficient adjudication that he was convicted of the offence. (*R.* v. *Thompson*, 2 *T. R.* 18; see *R.* v. *Chandler*, 14 *East*, 267; *R.* v. *Jeffries*, 4 *T. R.* 768.) So in *R.* v. *Inhabitants of St. Nicholas* (4 *Nev. & M.* 624; 3 *Ad. & E.* 79, S. C.), an order of justices upon parish officers, for removing a person of unsound mind (not chargeable) to a house of reception for such persons, under the 9 Geo. IV. c. 40, s. 38 and 44 (see "*Lunatics*," Vol. III.), was held good, although it stated that the justices "*have adjudged*" and not "*do adjudge*" the settlement of such person to be in the parish of, &c. (and see *R.* v. *Maulden*, 8 *B. & C.* 78; 2 *M. & R.* 146, S. C.) An order of bastardy under the 4 & 5 Will. IV. c. 76, s. 72, following the words of the enactment, and stating that the justices were *satisfied* that A. B. is the father, has been held sufficient. (*R.* v. *Lewis*, 1 *P. & D.* 118; 8 *Ad. & Ell.* 881, S. C.; *ante*, 384.)

Of punishment.

In cases where a corporeal punishment is assigned, the adjudication should expressly and particularly state it. (*R.* v. *Vipont*, 2 *Burr.* 1163; and see *ante*, "*Commitment in Execution*," p. 792, as to what is a sufficient form of adjudication in this respect.) If imprisonment be awarded, and it be not for any certain period, but generally till the payment of a fine, or the performance of some other act, the condition must be distinctly expressed, and such as is authorised by statute. If it be till payment, the sum must be fixed. Thus

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a conviction and commitment for a forcible entry, "there to remain till they shall have paid a fine to the king," the justices not having assessed any fine, was held to be irregular. (*R.* v. *Elwell*, 2 *Ld. Raym.* 1514; see *ante*, "*Commitment*," p. 792, 793.) So under stat. 6 Geo. III. c. 48, s. 1, which empowers the magistrates to commit till the penalty and charges are paid, a commitment for nine months, or until the sum of 15*l.* "together with charges previous to and attending the conviction, shall be paid," was held to be bad, for want of ascertaining the exact sum by the payment of which the defendant might be released. (*R.* v. *Hall*, 1 *Cowp.* 60.)

Of penalty of, and forfeiture.

The form given by the 3 Geo. IV. c. 23 (*ante*, 989), shows that a judgment of forfeiture should be stated. In *R.* v. *Hawkes* (2 *Stra.* 858), a conviction before this act for killing a deer was quashed, because it was only "*he is convicted*," without any judgment of *forfeiture*. And in the case of *R.* v. *Vipont and others* (2 *Burr.* 1163, *ante*, 991), the conviction *not adjudging the forfeiture*, was for that reason, as well as the other before mentioned, determined to be ill; especially as the statute upon which the conviction was made leaves the judgment discretionary concerning the duration of the punishment, the offender being subjected to be imprisoned by the justices for any time not exceeding three months, (*et vide R.* v. *Ashton*, 8 *Mod.* 175.)

Amount or nature of penalty or punishment.

The penalty, whether pecuniary or corporeal, must be stated with sufficient certainty as to its amount and nature, and be such as is warranted by the statute; and more strictness is required in this respect where it is discretionary. (*Paley*, 221, 224. See some cases, *post*, 998, as to the mode of stating the costs and charges.)

Where several offences or penalties.

The conviction, as we have already seen, *ante*, 984, may be of several offences and penalties. If the information be for two or more offences, and the justice find him guilty of all, the conviction must state him to be guilty of the "offences" charged upon him in the information; if, on the other hand, the justice find him guilty of one of the offences only, the conviction should state that offence specially, thus: "*that he the said E. F. is guilty of the offence firstly above charged upon him in the said information, for that he the said E. F. on at did*," &c., stating the offence as in the information; if the conviction in such a case were to state that the defendant was guilty of the "*offence*" charged, &c. it would be quashed, because it would be uncertain of which of the offences he was guilty. (*R.* v. *Salomans*, 1 *T. R.* 249.) Where, in a conviction on one of the statutes relating to beer shops (3 & 4 Vict. c. 61, s. 15), it was stated that the party had kept his house open for the sale of beer, and had sold beer, and had suffered and permitted beer to be consumed upon his premises, after the hour limited for that purpose, and the party was convicted "for the offence aforesaid;" the Court held the conviction bad, as it stated three offences, and it could not be known of which of them the party was convicted. (*Newman* v. *Bendyshe et al. MS. Q. B.*; 8 *Law J.* 58, *M. C.*; 10 *Ad. & Ell.* 11, S. C.)

If several defendants are convicted, whether the offence is in its nature single or joint, a joint award of one penalty against them is bad; for it ought to be several against each defendant, otherwise one who had paid his proportionable part might be continued in prison till all the others had paid theirs, which would be in effect to punish him for the offence of another. (2 *Hawk.* c. 10, s. 16.) Therefore a conviction of A and B. for an offence by A. and B. several in its nature, (as an assault under stat. 9 Geo. IV. c. 31,) adjudging that they the said A. and B. for their said offence do forfeit the sum of, &c., and in default of payment be imprisoned for the space of, &c. is bad, inasmuch as the penalty ought to be imposed on the parties severally and not jointly. (*Morgan* v. *Brown*, 6 *N. & M.* 57; 4 *Ad. & El.* 515; 1 *H. & W.* 717, S. C.) And it was held in that case that the magistrates who committed a party under such a conviction might be sued in an action of trespass.

Distribution of penalty.

In general the application of the penalty constitutes a necessary part of the judgment. The 3 Geo. IV. c. 23, s. 1, directs that the form shall state the penalty "*to be distributed* (or '*paid*,' as the case may be), *according to the form of the statute in such case made and provided*;" and such an adjudication would, it seems, at all events suffice, where the statute giving the penalty points out the mode of its distribution without leaving it discretionary in the

justice. (See *Reg.* v. *Barrett*, *Salk.* 383; *Paley*, 209.) Where, however, the statute does not positively and directly fix the mode of distribution of the penalty, but leaves it in any degree uncertain or discretionary, then the precise mode of distribution should, it would seem, be stated. (See *R.* v. *Dempsey*, 2 *T. R.* 96.)

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In a case where the distribution directed by the statute was part to the party aggrieved, and the remainder to the *overseers of the poor* of the parish, a distribution to the *poor of the township* was held bad, because there may be many townships in the same parish, and therefore there was uncertainty; but it was admitted if it had been general, *viz.* to be distributed as the *law directs*, it would have been sufficient, for there would not necessarily have been any uncertainty in such a case. (*R.* v. *Priest*, 6 *T. R.* 538; see *R.* v. *Wyatt*, 2 *Ld. Raym.* 1478.)

The stat. 42 Geo. III. c. 119, against illegal lotteries, directing the penalty to be distributed, one-third to the king, one-third to the informer, and one-third to "the person apprehending or securing the offender,"—a conviction directing the penalty to be distributed "as the law directs," without ascertaining to whom the last third is to be paid, (the person being uncertain,) is bad. (*R.* v. *Seale*, 8 *East*, 568.)

In *R.* v. *Smith* (5 *M. & Sel.* 133), the defendant was convicted on the 12 Geo. III. c. 61, s. 18, for conveying at one time a larger quantity of gunpowder than is allowed by that statute, which authorises the seizure of such gunpowder, and directs that upon conviction of the offender the same shall be forfeited for the use of the person making the seizure. The justices having adjudged the gunpowder to be forfeited "to the use of the aforesaid J. G., *the person who seized the same*," without showing previously by the evidence that there had been in fact a seizure, and that he was the person seizing, the Court quashed the conviction.

In a conviction of defendant for causing to be acted, at a certain place called the Coburg Theatre, in the parish of St. Mary, Lambeth, for gain and reward, a certain entertainment of the stage called "*Richard the Third*," the evidence stated that the theatre was in the parish of Lambeth, and the adjudication of the penalty was to the poor of the parish of St. Mary, Lambeth; it was held that this was no variance, it not appearing that there were two distinct parishes so named. (*R.* v. *Glossop*, 4 *B. & Ald.* 616.)

Must award penalty to proper party.

If the conviction state to whom the penalty is to be paid, care must be taken to adjudicate the payment to the proper party; and where there is a material variation in the appropriation of the penalty from the directions of the act of parliament, the conviction will be bad. Thus where a conviction was framed on the new Game Act (1 Will. IV. c 32), which directs the penalty to be paid to the parish officer, and by him to be paid over for the use of the county rate, (but which, by the subsequent act of 5 & 6 Will. IV. c. 20, s. 2, is directed, as to one moiety, to be paid to the informer, and the other as before,) and adjudicated the whole penalty to be paid to the overseer, to be applied according to the directions of the statute in such case, &c.; it was held, that the conviction was bad, and that an imprisonment under it was illegal, and the parties liable in trespass. (*Griffith* v. *Harries*, 2 *M. & Wels.* 325.)

Mitigation of penalty.

As to the justices' power to mitigate the penalty, see *ante*, 985. When the penalty has been mitigated, this ought to be stated in the conviction, for otherwise it cannot appear to the Court upon appeal, how or in what degree the magistrate has exercised the authority with which he was invested. Thus the conviction must first adjudicate the whole penalty inflicted by the statute, and then in a separate sentence state to what inferior sum he has mitigated it; for otherwise it could not appear that he had exercised his authority in both points, according to the terms of the statute. (See *Dick. Sess.* 3d ed. 595; see form, *post*, 1005, No. 6.) A judgment for too small a penalty is as bad as a judgment for too much. (*R.* v. *Salomans*, 1 *T. R.* 252)

Costs.

Costs.]—The power of adjudicating costs will be found noticed *ante*, 985. In adjudicating them in the conviction the amount must be mentioned. (*R.* v.

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v. *Payne*, 4 *D. & Ry.* 72.) And so when an act gives power to a magistrate, on a summary conviction, to award the reasonable charges of taking a distress, he must ascertain the amount in the conviction; and an adjudication that the defendant shall pay the *reasonable* charges of the levy is bad. (*R.* v. *Symons*, 1 *East*, 189.)

By sect. 90 of the Highway Act (5 & 6 Will. IV. c. 50, the Court of Quarter Sessions is authorised and required to award to the party giving or receiving notice of appeal such costs and expenses as shall be incurred in prosecuting or resisting such appeal: it was held, that the order of the Court for the payment of such costs and expenses must state the amount; and that an order for the payment of the costs incurred, leaving the amount to be subsequently ascertained by the clerk of the peace, is bad. (*Sellwood* v. *Mount*, 1 *Ad. & El. N. S.* 726.)

Where a distress warrant was issued to levy the costs incurred by a party in prosecuting an appeal under sect. 88 of the Highway Act (5 & 6 Will. IV. c. 50), which did not recite any order of quarter sessions for payment of such costs, but was founded on a subsequent conviction by two justices out of sessions for non-payment of such costs: it was held, that the warrant was illegal, and that no property passed to the vendee of goods seized and sold under it. (*Lock* v. *Selwood*, 1 *Ad. & El. N. S.* 736.) The 18 Geo. III. c. 19, prescribes a form of adjudication of costs where they are not awarded in a conviction, and which see, title "*Costs*," Vol. II.

Levying penalties.

Statement as to levying Penalty on.]—The conviction need not adjudge that if the penalty, &c. be not paid, the offender shall be conmmitted. (See *R.* v. *Helps*, 3 *M. & Sel.* 331; *R.* v. *Chandler*, *Cath.* 501.)

Subscription and date.

9thly. *The Subscription and Date.*]—The conviction is complete by the convicting justice or justices subscribing and sealing it, by which act it becomes a record, and without which it cannot be produced before any court for any ulterior purpose, as for appeal, &c. (*Dalt.* c. 115; *R.* v. *Elwell*, 2 *Stra.* 794; see *Basten* v. *Carew*, 5 *D. & R.* 558; 2 *D. & R. M. C.* 563; 3 *B. & C.* 649, S.C.) It seems immaterial as to the time when the magistrate puts his subscription and seal. (*R.* v. *Picton*, 2 *East*, 198; and see *R.* v. *Barker*, 1 *East*, 185; *post*, 1002.)

The conviction must be dated, or else it must otherwise appear when it was made. In *R.* v. *Picton*, (2 *East*, 196,) it was held that an impossible or an incongruous date, if the conviction be *complete without it*, (*id est*, if it otherwise appear truly and properly when it was made,) may be rejected as surplusage, and will not vitiate. But the date of the conviction is material when the statute on which it is founded requires that the conviction shall take place within a prescribed period after the offence committed. In such a case the date must be within that period when compared with the date alleged for the offence. (*Paley*, 174; *R.* v. *Bellamy*, 1 *B. & Cres.* 500; 2 *D. & R.* 727.)

A warrant of commitment, directing a gaoler to imprison a party for three months, omitting the day of the month on which it was granted, was held bad. (*Re Fletcher*, 13 *Law J. N. S. Mag. Cas.* 16.) Such a warrant, if not issued too soon, is not bad because dated too soon. (*Newnham* v. *Hardwicke*, 3 *N. & P.* 368.)

V. Form of Conviction when pointed out by Statute (*a*).

Form pointed out by statute.

Many of the preceding observations and rules as to the requisites of convictions in general will here apply.

(*a*) These rules and observations will generally be found in *Dickenson's Sessions*, 2d and 3d editions. In *Wilkins* v. *Wright*, 2 *C. & M.* 208, Baron *Bolland* expresses his regret at the legislature having in so many instances frittered away all the requisites of a legal conviction by giving a summary form.

If a statute prescribe any particular form of conviction, it is best to adhere to it strictly, adopting the very words; at all events the conviction must be according to the *intent and purport* of the act. (See *R.* v. *Priest*, 6 *T. R.* 538; *ante*, 997.) Indeed some statutes are so worded in this respect, that the form must be literally pursued. Thus if a statute say, "*the conviction shall be in the form following*," the direction is peremptory and must be obeyed. (*R.* v. *Jefferies*, 4 *T.R.* 769; and see *Davison* v. *Gill*, 1 *East*, 72; *Goss* v. *Jackson*, 3 *Esp.* 198.)

5. *Form of, when pointed out by Statute.*

When the form should be strictly pursued.

In a conviction under the Vagrant Act, 5 Geo. IV. c. 33, which purports to pursue the form given by that act, it is not necessary to set out the evidence. (*Nixon* v. *Nanny*, 1 *Gale & D.* 370.)

Certain expressions used in the summary forms explained.

In convictions directed by statutes, wherein summary forms are given, (omitting, as is usually the case, the information, summons and evidence,) the material part begins at the word "*convicted.*" It is equally necessary in these, as it is in other convictions, that certain essential ingredients should appear on the face of the instruments, *viz.* the jurisdiction of the convicting magistrate, the time, the place and the charge, in such terms as to bring the whole within the description given of the offence in the act of parliament; also that the defendant had not any such defence as the act may have afforded him; for, without these being evident upon the inspection of the record, the Court cannot say that he has incurred the penalty, or subjected himself to the forfeiture annexed. By way of example: under the Bread Acts, if the offence be laid where an assize has been set, it will be necessary to set forth what the assize is in that place, in order to show what is the deficiency of weight; to state the time of purchasing and of weighing, in order to show that the article was found deficient within the then limited terms for trial; the species of bread, to show that the object of the complaint does not fall within the exception. (*Dick. Sess.* 3d edit. 394, 395.)

In many of the summary forms prescribed in statutes, the words "(*here state the offence*)" are used; when this is the case, the offence must be described as fully as is there insisted on; *ex. gr.* the statute against combinations among journeymen manufacturers, (39 & 40 Geo. III. c. 106,) gave a summary form, and in which, by way of a parenthesis, these words were inserted. On these it was decided, that agreements among these workmen *for certain* specified *purposes*, being the offence to be punished, it is necessary the agreement itself should be set out in the conviction, in order to show on the face of it that it was an agreement *for the special purposes* denounced by the statute *in the very terms used therein*, so that it might appear that the magistrate had authority to convict, and that the defendants had incurred the penalty. (*R.* v. *Neild*, 6 *East's Rep.* 417; *R.* v. *Hazell*, 13 *East's Rep.* 139; *Dick Sess.* 3d edit. 595; and see *R.* v. *Ridgway*, 5 *B. & Ald.* 530; 1 *D. & R.* 132, S.C.)

Alternative punishments.

Sometimes it is said in the statute that the magistrate before whom the party is convicted, (and in consequence of which conviction the alternative punishments of pecuniary penalty *or* imprisonment, according to the circumstances in each particular case, are annexed,) "shall cause the said conviction to be made out *in manner and form following*, or in any *other form* of words, *mutatis mutandis;* which conviction shall be good and effectual to all intents and purposes, without stating the *case*, the *fact*, or the *evidence in any more particular* manner." In such instances it must be even more decidedly necessary to set out the *adjudication* with *particular* precision, for otherwise, without the statement of the *case*, the *facts*, or the *evidence*, it cannot appear to the Court upon the face of the conviction appealed from, which of the alternative sentences has been pronounced; what is the subject or the object of the appeal; and what is the judgment they have to confirm or to reverse.

Blanks.

Where a blank is left for inserting the offence, the same accuracy is requisite in the description of it as in other cases. (*R.* v. *Hazell*, 13 *East*, 139.)

Titles of acts.

In some of these statutable forms the titles of acts are ordered to be set forth thus, "(*here set forth the title of the act*)." Wherever these directions occur, they must be strictly complied with; that is to say, no word must be omitted or changed, lest such omission or alteration should make the whole

5. *Form of, when pointed out by Statute.*

taken together convey a different meaning from what was the design of the act. (*Mills* v. *Walkins*, 2 *Salk.* 609; *Dick. Sess.* 595; see *Nixon* v. *Nanney*, 1 *Gale & D.* 370; *ante*, 973.)

Distribution of penalty.

In some cases it is necessary that the conviction should be *more particular* than even the words inserted in the statute itself. Thus where a statute leaves it discretionary in the justices to distribute the penalty in such proportions as they shall think fit, the distribution forms part of the judgment, and must therefore appear expressly on the conviction itself, although the statute gives a form of conviction stating generally the penalty "to be distributed according to the form of the statute in that case made and provided." (*R.* v. *Dempsey*, 2 *T. R.* 96; and see *Dick. Sess.* 591; *R.* v. *Barrett*, 1 *Salk.* 383; *R.* v. *Helps*, 3 *M. & Sel.* 331; *ante*, 996, 997.)

Surplusage.

If a statute direct the conviction of any offence under it to be drawn up according to an annexed form, or *to the effect thereof*, and the convicting justice, *beside all* the requisites indicated by the statute itself, unnecessarily insert other particulars beyond what are absolutely necessary, they do not vitiate the instrument or invalidate its effect. (*R.* v. *Jefferies*, 4 *T. R.* 768; *Massey* v. *Johnson*, 12 *East's Rep.* 67; and see further as to surplusage, *ante*, 988.)

VI. Defects in Form of Conviction, when aided.

Defects in form.

By the statute 3 Geo. IV. c. 23, s. 3, "in all cases where it appears by the conviction that the defendant has appeared and pleaded, and the merits have been tried, and that the defendant has not appealed against the conviction, where an appeal is allowed, or, if appealed against, the conviction has been affirmed, such conviction shall not afterwards be set aside or vacated, in consequence of any defect of form whatever; but the construction shall be a *fair and liberal construction*, as will be agreeable to the justice of the case."

Enactment as to defects in form being cured.

And independently of the above general enactment, applicable to all cases, it is often the case that the act creating the offence directs "*that no conviction under the act shall be set aside for defect in form or through the mistake of any fact, circumstance or other matter, provided the material facts alleged be proved.*" Notwithstanding these words, however, every material fact must be alleged, and the omission, if any, is not aided by reference to such clause. (*R.* v. *Walsh*, 3 *Nev. & M.* 632; 1 *Ad. & El.* 481, S. C.)

Lord *Kenyon*, in allusion to a provision in the terms just mentioned, says, with regard to the section in the act that no conviction shall be quashed for want of form, "I confess I am not able to understand it as applied to proceedings removed into this Court. It enacts that no conviction on this act (36 Geo. III. c. 60, s. 11,) shall be set aside by any Court for want of form or through the mistake of any fact, circumstance or other matter whatsoever, provided the material facts alleged in such conviction, and upon which the same shall be grounded, be proved to the satisfaction of the Court. I can understand it as far as respects the proceedings before the sessions by way of appeal. On an appeal the whole case is gone into, evidence is to be given to support the conviction, and then it may be known whether the material facts alleged in such conviction, and upon which the same shall be grounded, be proved to the *satisfaction of the Court*. But when the conviction is removed here by *certiorari*, I do not understand how we can inquire into those facts." (*R.* v. *Jukes*, 8 *T. R.* 536, 540. See *ante*, title "*Certiorari.*")

A conviction under the 48 Geo. III. c. 143, (now repealed,) upon an information for selling beer *or* ale without a licence, was held bad for uncertainty, notwithstanding the evidence applied to selling the ale alone, and the 3d section of that act declared, that in all cases where it appeared by the conviction that the defendant had appeared and pleaded, and the merits had been tried, no advantage should be taken of any defect in form, for the Court considered that this was not a mere formal objection, but a substantial one, going to the merits. (*R.* v. *North*, 6 *D. & R.* 143.)

VII. Proceedings after Conviction and enforcing of, &c.

7. *Proceedings after, &c.*

Copy of Conviction.]—A justice ought to give the defendant a copy of the conviction if he demands it, for it is a record, and he is entitled to it. (*R.* v. *Midlam*, 3 *Burr.* 1720. (*a*)) And where a justice refused to grant a copy, which was required by the defendant for the purposes of his defence against an action for the same offence as that of which he had been convicted, the justice was compelled to pay his own costs of returning the conviction into the Queen's Bench on a *certiorari*, which the defendant was under the necessity of suing out, as the only means of procuring a copy. (*Id.*)

Defendant's right to have a copy of conviction.

It seems, however, that the defendant is not entitled, as of right, to have a copy of a conviction to enable him to appeal against it at the sessions for any matter of mere form, or to pick holes in it without regard to the merits. (*R.* v. *Justices of Huntingdon*, 5 *D. & R.* 588; 2 *D. & R. M. C.* 594, S. C.)

If the defendant is acquitted, he is still entitled to have his acquittal recorded and transmitted to the sessions, in order that he may be enabled to give it in evidence as a bar to any other subsequent complaint against him for the same offence.

The copy, however, given is not to be conclusively taken as the true copy, at least so far as regards mere formal defects, for the Court will notice only the record of the conviction returned by the magistrates. (*R.* v. *Allen*, 15 *East*, 332.) The defendant should therefore be cautious not to rely on mere *formal defects* in the copy given him, since the justices may return to the sessions a conviction in a more formal shape than that in which it has been drawn up, and of which a copy has been delivered to the party. (*R.* v. *Barker*, 1 *East*, 186.) But this may be different with respect to an *order* of justices, which cannot, like a conviction, be returned to the sessions in an amended form. (*R.* v. *Justices of Cheshire*, 2 *Nev. & M.* 827; 5 *B. & Ad.* 439, S. C.) A *warrant of commitment* must be drawn up in writing as soon as possible after the commitment is ordered. (*Ante*, title "*Commitment in Execution*," p. 788.)

Copy given not conclusive.

In cases where the sessions, upon proof that the appellant had received from the clerk of the convicting magistrates a copy of his conviction, signed and sealed by such justices, purporting on the face of it to have been made *upon the information of B. and C.*, (though such copy was drawn upon the back of the paper which contained the information of A., (the true informer B. and C. being only the witnesses who had been examined in support of the charge,) and though the same justices had returned to the sessions to be filed of record a regular conviction of the same date, signed and sealed by them, on parchment, stating it to have been made on the information of A., and supported by the evidence of B. and C., according to the truth of the case,) had quashed the latter conviction so returned by the justices, as being at variance with the minutes of the conviction delivered to the appellant, without entering into the merits of the case, upon a preliminary objection taken by the appellant, the Court of King's Bench quashed the order of sessions generally, thereby setting up again the registered conviction, considering that the variance arose from the mere mistake and irregularity of the justice's clerk, and that the appellant was not really surprised by it, but had waived his appeal on the merits. (*R.* v. *Allen*, 15 *East*, 332.)

It may be as well here to notice the decision of *Wilkins* v. *Wright*, (2 *C. & M.* 191.) At the time of making an order of bastardy the magistrate's clerk delivered an order in a correct form to the parish officers, but delivered to the reputed father an order, in which the *mother* was ordered to pay 1*s.* 6*d.* weekly instead of the father; but at the same time, the magistrate told the reputed father that he must pay 1*s.* 6*d.* per week; and the parish officers afterwards served him with a copy of the order in their possession: it was held, that as the parish officers were the proper parties to have the custody

(*a*) As to the defendant's right to a copy of the record of an indictment against him, see title "*Indictment*," Vol. III. p. 905.

7. *Proceedings after, &c.*

of the order of bastardy, the one delivered to them must be deemed the original, and the defective order to the father only a "notice thereof," under 13 Eliz. c. 3, s. 2, the defect in which might be cured by the statement of the magistrate at the time of making the order, or by a subsequent service of a correct copy of the valid order; and that the father was not justified in refusing to pay the arrears of maintenance. (*Wilkins* v. *Wright*, 2 *Crom. & Mee.* 191.)

Drawing up conviction.

Drawing up Conviction.]—The conviction need not be drawn up at the time of the hearing and adjudging on the case. It may be complete in operation of law before the formal instrument setting it out is drawn up. It may be drawn up at any time before a return to a *certiorari* or the sessions, though after a commitment, (*Massey* v. *Johnson*, 12 *East*, 32; see *Re Richards and others*, 13 *Law J. N. S.* 147,) or after the penalty has been levied by distress. (*R.* v. *Barker*, 1 *East*, 182; *Still* v. *Walls*, 7 *East*, 533; *ante*, 998.) *Et per* Lord *Kenyon*, C. J., in *R.* v. *Barker*, "If the magistrate has done no more than return the conviction in a more formal shape, instead of sending it up in the formal manner in which it was first drawn, and supposing that the facts as they really happened will warrant him in the return he has now made, I am of opinion, that it was not only legal but laudable in him to do as he has done; and he would have done wrong if he had acted otherwise. It is a matter of constant experience for a magistrate to take minutes of their proceedings without attending to the precise form of them at the time when they pronounce their judgment, to serve as memorandums for them to draw up a more formal statement of them afterwards, to be returned to the sessions, and it is by no means unusual to draw up the conviction in point of form after the penalty has been levied under the judgment, nor is there any legal objection to this method, provided the facts will warrant them in stating what they do. It is no answer to say that a party convicted may be thereby induced to incur an unnecessary expense in suing out a *certiorari*, to get rid of an informal conviction; for a mere informality in the manner of drawing up a conviction ought not to be the inducement for removing it into this Court, but some substantial defect in the justice and legality of the proceeding itself before the magistrate." (And see *R.* v. *Js. of Huntingdon*, 5 *D. & R.* 588; 2 *D. & R. M. C.* 594, S. C.; *Massey* v. *Johnson*, 12 *East*, 32.)

But after a conviction has been quashed on appeal or *certiorari* for defects on the face of it, it is not competent for the convicting justice to protect himself from an action by drawing up another more formal one for the same offence, nor can he do so after the defendant, taken under a warrant founded on and reciting a defective conviction, has been discharged by *habeas corpus*, though the conviction itself has not been removed or quashed. (*Chaney* v. *Payne*, 1 *Adol. & El. N. S.* 712; 1 *Gale & D.* 348, S. C.)

It was indeed questioned in that case, but not decided, whether a justice, who has returned and filed among the records of the quarter sessions an informal conviction, can afterwards return an amended one, before any proceeding has been taken to quash the first, or to discharge the defendant by *habeas corpus*.

Orders.

An order of justices cannot, like a conviction, be returned to sessions in an amended form, though not varying as to the facts or nature of the offence; and where an order under 11 Geo. II. c. 19, s. 4, was defective in form, and the justices returned a new and different order to be filed with the clerk of the peace; the Court held, that the party affected had a right to appeal against the order as originally made. (*R.* v. *Justices of Cheshire*, 5 *B. & Adol.* 439; 2 *N. & M.* 827, S. C.)

If two orders be made by mistake at the sitting of magistrates, it is competent to them at the time to declare which is the right one. (*Wilkins* v. *Hemsworth*, 3 *Nev. & Per.* 552.)

Return of conviction to sessions.

Return of Conviction to Sessions.]—In all cases a justice of the peace ought to return a conviction by him to the sessions, whether the party appeal or not, or whether an appeal is or is not given, that the crown may not

be deprived of its share of forfeitures, as also for other reasons. (*R.* v. *Eaton*, 2 *T. R.* 285.)

7. *Proceedings after, &c.*

In some cases, by the express words of the act creating the offence, such as for instance the 7 & 8 Geo. IV. c. 29, s. 74; 7 & 8 Geo. IV. c. 30, s. 40; and 1 & 2 Will. IV. c. 32, s. 43, the convicting justices must transmit the conviction to the next general or quarter sessions.

In other statutes also the return of the conviction is particularly pointed out and directed, and especially in cases where a *second* conviction is to be visited by a severer judgment, because in such cases the first conviction, or a true copy thereof as returned and filed by the clerk of the peace, is usually declared to be sufficient evidence of the former conviction.

Action against magistrate for neglect.

It seems that in all cases where a conviction is necessary, if the convicting justice, after receiving due notice of appeal, neglect to return the conviction, whereby the party is prevented from prosecuting his appeal, independently of any other punishment for such misdemeanor in his office, he is liable to an action for damages. (See *Prosser* v. *Hyde*, 1 *T. R.* 414; *R.* v. *Medlam*, 3 *Burr.* 1720.)

Amendment.

Amendment.]—As to the power of justices to amend a conviction, see *ante*, 146. See *supra* as to when they may draw up a more formal one before or after it is returned to the sessions.

Erroneous acquittal.

Erroneous Acquittal.]—An acquittal by the justices is conclusive, and cannot be reversed by the Court of Queen's Bench, or otherwise, and that is so even though the justices state in return to a *certiorari* evidence which *primâ facie* is sufficient to convict. (*R.* v. *Reason*, 6 *T. R*, 575, *ante*, 983; and see "*Evidence*," Vol. II. p. 404.)

After an acquittal on the merits, the defendant cannot be again subject to a proceeding against him for the same charge. But this is otherwise where the acquittal is for a mere defect in form. Quashing a conviction on a penal statute for mere matter of form at sessions, is not an acquittal of the defendant so as to conclude the case against further inquiry in the Court of Queen's Bench. (*R.* v. *Ridgeway*, 1 *D. & Ry.* 132; 5 *B. & Ald.* 527, S. C.)

Erroneous conviction.

Erroneous Conviction.]—An erroneous conviction may be reversed on appeal or *certiorari*. (See *ante*, "*Appeal*," "*Certiorari*.") If it be bad on the face of it, and shows that the magistrates have exceeded their jurisdiction in convicting the party, and any proceedings are taken under it, the justices who have ordered such proceedings may be subjected to an action for any act done under them. See "*Justices*," Vol. III. p. 1026.

Justice cannot be compelled to enforce it.

A justice of the peace cannot be compelled to enforce an erroneous conviction where the error is in matter of *substance*. Therefore he cannot be compelled to issue a warrant to levy the penalty adjudged; for where a mandamus was directed to a justice of the peace, commanding him to levy, or cause to be levied, a certain penalty, in a certain conviction, against T. L., the justice returned, "that the defendant was convicted of the penalty before him, (setting forth the manner and occasion,) but that the conviction was invalid in law, and was not a conviction of any offence for which the penalty was payable, or could be legally levied." *Per Curiam:* "The return to the mandamus is good and sufficient; for although when a justice has once fairly convicted a man he ought to proceed to enforce that conviction, yet if it be altogether a nullity, the justice is not bound to proceed further in order to subject himself to damages." It is, however, otherwise, if the error be merely *formal*. (*R.* v. *Robinson*, 2 *Smith's Rep.* 274; *Dick. Sess.* 590, 3d ed.) See "*Justices*," Vol. III. p. 1023.

Resisting conviction by appeal, certiorari, or habeas corpus.

As to resisting a conviction by appeal or writ of *habeas corpus* or *certiorari*, see "*Appeal*," "*Certiorari*," *ante*; and "*Habeas Corpus*," Vol. III.

Enforcing conviction.

Enforcing Conviction.]—As to the mode of enforcing the conviction by commitment, see *ante*, "*Commitment in Execution;* by distress, see "*Dis-*

7. Proceedings after, &c.

tress under Justices' Warrant;" see also titles "*Fines*," Vol. II.; "*Recognizance*," Vol. V.

If on the removal of a conviction by *certiorari* into the Court of Queen's Bench, that Court find they have not power to award an execution sufficient to enforce the payment of the penalty, the Court will award a *procedendo*. (*R.* v. *Neville*, 2 *B. & Adol.* 299.)

Liability of magistrates, &c.

Liability of Justices, &c.]—As to the liability of magistrates and officers, see *ante*, "*Constables;*" "*Justices*," Vol. III. p. 1026. And as to how far the conviction will protect them, see "*Evidence*," Vol. II. p. 404.

VIII. Forms.

(1.) General form of information on a penal statute. (a)

Kent, to wit. } *BE it remembered, that on the day of , in the year of our Lord , at , in the said county of , A. B. of , in the county aforesaid, labourer,* [*who, as well for our sovereign Lady the Queen,* or *who as well for the poor of the parish of , in the said county, as for himself, doth prosecute in this behalf,*] (b) *personally cometh before me J. P. one of her Majesty's justices of the peace for the said county, and* [*as well for our said Lady the Queen,* or *the poor of the said parish, as for himself,*] *informeth me that C. D., late of the parish of , in the county aforesaid, labourer, within the space of six months* [or whatever time is limited by the statute] *now last past, to wit, on the day of , in the year aforesaid, at the parish of , in the county aforesaid* [here state the facts and circumstances constituting the offence, as directed *ante*, , &c.; see the various titles of offences]; *contrary to the form of the statute in such case made and provided; whereby, and by force of the statute in such case made and provided, the said C. D. hath forfeited for his said offence the sum of .** *Wherefore the said A. B.* [*who sueth as aforesaid*] *prayeth the consideration of me the said justice in the premises, and that the said C. D. may be convicted of the offence aforesaid,* [*and that one moiety of the said forfeiture may be adjudged to our said Lady the Queen, and the other moiety thereof to the said A. B. according to the form of the statute in that case made and provided*]; *and that the said C. D. may be summoned to appear before me or some other justice, and answer the premises, and make his defence thereto.* J. P.

(2.) The like, stating several offences. (c)

[Proceed as in the above form to the asterisk, and then state the second or subsequent offence, thus:] *And also that the said C. D. on , at, &c.* [stating the offence as directed, *ante*, , &c.]; *contrary to the form of the statute in such case made and provided; whereby and by force of the statute in such case made and provided the said C. D. hath forfeited for his said last mentioned offence the sum of . Wherefore the said A. B. &c.* [conclude as in preceding form.]

(3.) General form of a summons directed to the constable. (d)

County of } *To the Constable of , in the county of .*

WHEREAS information and complaint have been made before me J. P. Esquire, one of her Majesty's justices of the peace for the said county, that C. D. of , in the county aforesaid, labourer, on the day of now last past, at , in the county aforesaid, did [here set forth the nature and circumstances of the case as far as it is necessary to show the offence, and bring it within the authority of the justice; and in doing so follow the words of the statute as near as may be.] *These are therefore to require you forthwith to summon the said C. D. to appear before me* [or *such other of her Majesty's justices of the peace as shall be then present*] *at , in the said county, on the day of , at the hour of , in the noon of the same day, to answer to the said information and complaint, and to*

(a) See the observations as to the form of the information, *ante*, 963 to 975.

(b) If the penalty is given wholly to the informer, omit these words between brackets, and the other parts of the information not applicable to such a case.

(c) That several offences may be joined, and the mode of stating the adjudication as to them, see *ante*, 984, 996.

(d) The summons may be directed to a third person, requiring him to summon the offender, as in the above form; or else be directed to the offender himself, as in the next form. See *ante*, 975.

be further dealt with according to law. And be you then there to certify what you shall have done in the premises. Herein fail you not. Given under my hand and seal the day of , in the year of our Lord J. P.

8. *Forms.*

___ } *To A. B. of .*

WHEREAS complaint and information have been made before me J. P. one of her Majesty's justices of the peace for the said [county, &c.] that, &c. [here state the nature and circumstances of the case as far as it is necessary to show the offence, and to bring it within the authority of the justice; and in doing that follow the words of the act as near as may be.] *These are therefore to require you to appear personally before me* [or *such other of her Majesty's justices of the peace for the said county as shall be then present*] *on the day of next, at the hour of in the noon, to answer the said complaint and information, and further to do and receive what to the law shall appertain. Herein fail you not. Given under my hand and seal this day of , 18 . J. P.*

(4.) General form of a summons directed to the defendant himself.

County of } *To the Constable of .*

WHEREAS information hath been made before me J. P. Esquire, one of her Majesty's justices of the peace for the said county, that [here set forth the substance of the complaint]; *and that A. W. of , in the said county,* [*yeoman,*] *is a material witness to be examined concerning the same; these are therefore to require you to summon the said A. W. to appear before me* [*or such other of her Majesty's justices of the peace as shall be then present*] *at , in the said county, on , the day of , at the hour of , in the noon of the same day, to testify his knowledge concerning the premises. Herein fail you not. Given under my hand and seal the day of , in the year of the reign of . J. P.*

(5.) Summons of a witness.

This form will be found *ante*, 989.

General form of conviction where the defendant appears and pleads, or refuses to make a defence.

[If costs be awarded, add the following at the end of the form given by the 3 Geo. IV., if the form prescribed, however, does not contain this award of costs]: *And also that the said C. D. shall forthwith pay unto the said A. B. the further sum of for his costs and charges by the said A. B. about the prosecution in this behalf expended. Given under my hand and seal* [or *our hands and seals*] *the day of , in the year of our Lord . J. P.*

(6.) Award of costs in conviction. (a)

[Proceed as directed in the form, *ante*, 989, and state the adjudication thus]: *do declare and adjudge that the said C. D. for his said offence be imprisoned in the* [*there to be kept to hard labour*] *for the space of calendar months. Given under my hand, &c.* [conclude as in the form *ante*, 989.]

(7.) Conviction where imprisonment or hard labour is added.

[Proceed as directed in the form, *ante*, 989, and state the adjudication thus]: *do declare and adjudge that the said C. D. hath forfeited for his said offence the sum of , the one moiety thereof to the use of , and the other moiety to* [the informer, or as the statute directs,] *according to the form of the statute in such case made and provided. And I the said justice* [or *we the said justices,*] *seeing cause to mitigate* [or *lessen*] *the said penalty, do at the request of the said C. D., according to the statute, mitigate and lessen the same to the sum of over and above the reasonable costs and charges of the said A. B. by him laid out and expended in and about the prosecution in this behalf, to be distributed* [or *paid*, as the case may be] *one moiety thereof to, &c.* [as before] *and the other moiety to, &c. and which costs and charges of the said A. B. the said informer, I* [or *we*] *do allow, assess, and adjudge to him, at the sum of of like lawful money, according to the statute in that case made and provided, &c.* [conclude as in the form, *ante*, 989.]

(8.) The like, where the penalty is mitigated.

County [as the case may be] *of .* } *BE it remembered, that on the day of , in the year of our Lord , at , in the county of ,*

(9.) Conviction where the defendant appears and confesses.

(a) See the form of adjudication of costs prescribed by the 18 Geo. 2, c. 19, title "*Costs*," Vol. II. p. 181.

8. *Forms.*

A. B. of , in the county aforesaid, labourer, personally came before me J. P. one [or *before us J. P. and L. L. two*] *of her Majesty's justices of the peace for the said county, and informed me* [or *us*] *that C. D. of , in the county of , on the day of , in the year aforesaid, at , in the said county, did* [here set forth the fact for which the information is laid]; *contrary to the form of the statute in such case made and provided. Whereupon the said C. D., after being duly summoned to answer the said charge, appeared before me* [or *us*] *on the day of instant, at , in the said county; and having heard the charge contained in the said information, acknowledged and voluntarily confessed the same to be true. Therefore, it manifestly appearing, &c.* [as in the form, *ante*, 989, from the * to the end.]

(10.) Conviction where the defendant does not appear.

County [as the case may be] *of . } BE it remembered, that on the day of , in the year of our Lord , at , in the county of , A. B. of , in the county of , labourer, personally came before me, J. P. one* [or *us J. P. and L. L. two*] *of her Majesty's justices of the peace for the said county, and informed me* [or *us*] *that C. D. of , in the county aforesaid, on the day of , in the year aforesaid, at , in the said county, did* [here set forth the fact for which the information is laid]; *contrary to the form of the statute in such case made and provided. Whereupon the said C. D., after being duly summoned to answer the said charge, did not appear before me* [or *us*] *the said justice pursuant to the said summons; nevertheless I, the said justice,* [or *we the said justices*] *did proceed to examine into the truth of the charge contained in the said information, and on the day of aforesaid, at aforesaid, one credible witness, to wit, E. F. of , in the county of , upon his oath deposeth and saith, that* [here state the evidence, and as nearly as possible in the words used by the witness; and if more than one witness be examined, state the evidence given by each, thus: *and one other credible witness, to wit, G. H. of , in the county of , upon his oath deposeth and saith, that* [stating his evidence.] *Therefore, it manifestly appearing, &c.* [as in the form, *ante*, 989, from the * to the end.]

(11.) Record of acquittal on information on a penal statute.

See form, *ante*, title "*Acquittal.*"

Copy of Conviction. See *ante*, 1001.

Copy of Depositions. See "*Sessions,*" Vol. V. p. 959; "*Examination,*" Vol. II. p. 474.

Copy of Indictment. See "*Indictment,*" Vol. III. p. 905.

Copy of Writings, &c. *When Evidence*, see "*Evidence,*" Vol. II. p. 370.

Copyhold. See "*Manor,*" Vol. V. p. 61. *Forfeiture of, on conviction*, see "*Forfeiture,*" Vol. III. *Forcible entry into*, see "*Forcible Entry,*" Vol. III. *In general statutes do not extend to*, see "*Statute,*" Vol. V. p. 1174.

Copyright.

[5 & 6 Vict. c. 45; c. 100; 6 & 7 Vict. c. 45; 7 Vict. c. 12.]

Literary works, &c.

THE act now in force relating to the copyright in literary works is the 5 & 6 Vict. c. 45. That relating to international copyright is the 7 Vict.

c. 12. . Neither of them contain any matter falling within the cognizance of magistrates.

Designs. 5 & 6 Vict. c. 100.

By the 5 & 6 Vict. c. 100, intituled "*An Act to consolidate and amend the Laws relating to the Copyright of Designs for ornamenting Articles of Manufacture,*" (10th August, 1842,) reciting that "by the several acts mentioned in the schedule (A.) to this act annexed, there was granted, in respect of the woven fabrics therein mentioned, the sole right to use any new and original pattern for printing the same during the period of three calendar months: and that by the act mentioned in the schedule (B.) to this act annexed, there was granted, in respect of all articles, except lace, and except the articles within the meaning of the acts hereinbefore referred to, the sole right of using any new and original design, for certain purposes, during the respective periods therein mentioned; but forasmuch as the protection afforded by the said acts in respect of the application of designs to certain articles of manufacture is insufficient, it is expedient to extend the same, but upon the conditions hereinafter expressed; now, for that purpose, and for the purpose of consolidating the provisions of the said acts," it is enacted, "that this act shall come into operation on the first day of September one thousand eight hundred and forty-two, and that thereupon all the said acts mentioned in the said Schedules (A.) and (B.) to this act annexed shall be and they are hereby repealed."

Commencement of act, and repeal of former acts.

Proviso as to existing copyrights.

Sect. 2, provides and enacts, "That notwithstanding such repeal of the said acts, every copyright in force under the same shall continue in force till the expiration of such copyright; and with regard to all offences or injuries committed against any such copyright before this act shall come into operation, every penalty imposed and every remedy given by the said acts, in relation to any such offence or injury, shall be applicable as if such acts had not been repealed; but with regard to such offences or injuries committed against any such copyright after this act shall come into operation, every penalty imposed and every remedy given by this act in relation to any such offence or injury shall be applicable as if such copyright had been conferred by this act."

Grant of copyright.

Sect. 3. "And with regard to any new and original design (except for sculpture and other things within the provisions of the several acts mentioned in the schedule (C.) to this act annexed), whether such design be applicable to the ornamenting of any article of manufacture, or of any substance, artificial or natural, or partly artificial and partly natural, and that whether such design be so applicable for the pattern, or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes, and by whatever means such design may be so applicable, whether by printing, or by painting, or by embroidery, or by weaving, or by sewing, or by modelling, or by casting, or by embossing, or by engraving, or by staining, or by any other means whatsoever, manual, mechanical, or chemical, separate or combined; be it enacted, that the proprietor of every such design, not previously published either within the united kingdom of Great Britain and Ireland, or elsewhere, shall have the sole right to apply the same to any articles of manufacture, or to any such substances as aforesaid, provided the same be done within the united kingdom of Great Britain and Ireland, for the respective terms hereinafter mentioned, such respective terms to be computed from the time of such design being registered according to this act; (that is to say,)

In respect of the application of any such design to ornamenting any article of manufacture contained in the first, second, third, fourth, fifth, sixth, eighth, or eleventh of the classes following, for the term of three years:

In respect of the application of any such design to ornamenting any article of manufacture contained in the seventh, ninth, or tenth of the classes following, for the term of nine calendar months:

In respect of the application of any such design to ornamenting any article of manufacture or substance contained in the twelfth or thirteenth of the classes following, for the term of twelve calendar months:

5 & 6 Vict. c. 100.

Class 1.—Articles of manufacture composed wholly or chiefly of any metal or mixed metals:

Class 2.—Articles of manufacture composed wholly or chiefly of wood:

Class 3.—Articles of manufacture composed wholly or chiefly of glass:

Class 4.—Articles of manufacture composed wholly or chiefly of earthenware:

Class 5.—Paper hangings:

Class 6.—Carpets:

Class 7.—Shawls, if the design be applied solely by printing, or by any other process by which colours are or may hereafter be produced upon tissue or texile fabrics:

Class 8.—Shawls not comprised in class 7:

Class 9.—Yarn, thread, or warp, if the design be applied by printing, or by any other process by which colours are or may hereafter be produced:

Class 10.—Woven fabrics, composed of linen, cotton, wool, silk, or hair, or of any two or more of such materials, if the design be applied by printing, or by any other process by which colours are or may hereafter be produced upon tissue or textile fabrics; excepting the articles included in class 11:

Class 11.—Woven fabrics, composed of linen, cotton, wool, silk or hair, or of any two or more of such materials, if the design be applied by printing, or by any other process by which colours are or may hereafter be produced upon tissue or textile fabrics, such woven fabrics being or coming within the description technically called furnitures, and the repeat of the design whereof shall be more than twelve inches by eight inches:

Class 12.—Woven fabrics, not comprised in any preceding class:

Class 13.—Lace, and any article of manufacture or substance not comprised in any preceding class."

Conditions of copyrights.

Registration.

Marks denoting a registered design.

Sect. 4. Provides and enacts, "That no person shall be entitled to the benefit of this act, with regard to any design in respect of the application thereof to ornamenting any article of manufacture, or any such substance, unless such design have before publication thereof been registered according to this act, and unless at the time of such registration such design have been registered in respect of the application thereof to some or one of the articles of manufacture or substance comprised in the above-mentioned classes, by specifying the number of the class in respect of which such registration is made, and unless the name of such person shall be registered according to this act as a proprietor of such design, and unless after publication of such design every such article of manufacture, or such substance to which the same shall be so applied, published by him, hath thereon, if the article of manufacture be a woven fabric for printing, at one end thereof, or, if of any other kind or substance as aforesaid, at the end or edge thereof, or other convenient place thereon, the letters 'Rd,' together with such number or letter, or number and letter, and in such form as shall correspond with the date of the registration of such design according to the registry of designs in that behalf; and such marks may be put on such article of manufacture or such substance, either by making the same in or on the material itself of which such article or such substance shall consist, or by attaching thereto a label containing such marks."

The term "Proprietor" explained.

Sect. 5. "That the author of any such new and original design shall be considered the proprietor thereof, unless he have executed the work on behalf of another person for a good or a valuable consideration, in which case such person shall be considered the proprietor, and shall be entitled to be registered in the place of the author; and every person acquiring for a good or a valuable consideration a new and original design, or the right to apply the same to ornamenting any one or more articles of manufacture, or any one or more such substances as aforesaid, either exclusively of any other

person or otherwise, and also every other person upon whom the property in such design or such right to the application thereof shall devolve, shall be considered the proprietor of the design in the respect in which the same may have been so acquired, and to that extent, but not otherwise."

3 & 6 Vict. c. 100.

Sect. 6. "That every person purchasing or otherwise acquiring the right to the entire or partial use of any such design may enter his title in the register hereby provided, and any writing purporting to be a transfer of such design and signed by the proprietor thereof shall operate as an effectual transfer; and the registrar shall, on request, and the production of such writing, or in the case of acquiring such right by any other mode than that of purchase on the production of any evidence to the satisfaction of the registrar, insert the name of the new proprietor in the register; and the following may be the form of such transfer, and of such request to the registrar:

Transfer of copyright, and register thereof.

'*Form of Transfer, and Authority to register.*

'*I. A. B. author* [or *proprietor*] *of design, No.* , *having transferred my right thereto,* [or, if such transfer be partial,] *so far as regards the ornamenting of* [describe the articles of manufacture or substances, or the locality with respect to which the right is transferred,] *to B. C., of* , *do hereby authorise you to insert his name on the register of designs accordingly.*'

Form of Request to register.

'*I. B. C., the person mentioned in the above transfer, do request you to register my name and property in the said design as entitled* [if to the entire use] *to the entire use of such design,* [or, if to the partial use,] *to the partial use of such design, so far as regards to application thereof* [describe the articles of manufacture, or the locality in relation to which the right is transferred].'

But if such request to register be made by any person to whom any such design shall devolve otherwise than by transfer, such request may be in the following form:

'*I. C. D., in whom is vested by* [state bankruptcy or otherwise] *the design, No.* , [or if such devolution be of a partial right, *so far as regards the application thereof*] *to* [describe the articles of manufacture or substance, or the locality in relation to which the right has devolved.]'

Sect. 7. And for preventing the piracy of registered designs, be it enacted, "That during the existence of any such right to the entire or partial use of any such design no person shall either do or cause to be done any of the following acts with regard to any articles of manufacture, or substances, in respect of which the copyright of such design shall be in force, without the licence or consent in writing of the registered proprietor thereof; (that is to say,)

Piracy of designs.

No person shall apply any such design, or any fraudulent imitation thereof, for the purpose of sale, to the ornamenting of any article of manufacture, or any substance, artificial or natural, or partly artificial and partly natural:

No person shall publish, sell or expose for sale any article of manufacture, or any substance, to which such design, or any fraudulent imitation thereof, shall have been so applied, after having received, either verbally or in writing, or otherwise from any source other than the proprietor of such design, knowledge that his consent has not been given to such application, or after having been served with or had left at his premises a written notice signed by such proprietor or his agent to the same effect."

Sect. 8. "That if any person commit any such act he shall for every offence forfeit a sum not less than five pounds and not exceeding thirty pounds to the proprietor of the design in respect of whose right such offence has been committed; and such proprietor may recover such penalty as follows:

Recovery of penalties for piracy.

In England, either by an action of debt or on the case against the party offending, or by summary proceeding before two justices having jurisdiction where the party offending resides; and if such proprietor proceed by such summary proceeding, any justice of the peace acting for the

5 & 6 Vict. c. 100.

county, riding, division, city or borough, where the party offending resides, and not being concerned either in the sale or manufacture of the article of manufacture, or in the design to which such summary proceeding relates, may issue a summons requiring such party to appear on a day and at a time and place to be named in such summons, such time not being less than eight days from the date thereof; and every such summons shall be served on the party offending, either in person or at his usual place of abode; and either upon the appearance or upon the default to appear of the party offending, any two or more of such justices may proceed to the hearing of the complaint, and upon proof of the offence, either by the confession of the party offending, or upon the oath or affirmation of one or more credible witnesses, which such justices are hereby authorised to administer, may convict the offender in a penalty of not less than five pounds or more than thirty pounds, as aforesaid, for each offence, as to such justices doth seem fit; but the aggregate amount of penalties for offences in respect of any one design committed by any one person, up to the time at which any of the proceedings herein mentioned shall be instituted, shall not exceed the sum of one hundred pounds; and if the amount of such penalty or of such penalties, and the costs attending the conviction, so assessed by such justices, be not forthwith paid, the amount of the penalty or of the penalties, and of the costs, together with the costs of the distress and sale, shall be levied by distress and sale of the goods and chattels of the offender, wherever the same happen to be in England; and the justices before whom the party has been convicted, or, on proof of the conviction, any two justices acting for any county, riding, division, city or borough in England, where goods and chattels of the person offending happen to be, may grant a warrant for such distress and sale; and the overplus, if any, shall be returned to the owner of the goods and chattels, on demand; and every information and conviction which shall be respectively laid or made in such summary proceeding before two justices under this act, may be drawn or made out in the following forms respectively, or to the effect thereof, *mutatis mutandis*, as the case may require:

"Form of Information.

Form of information.

"BE it remembered, that on the , at , in the county of , A. B. of , in the county of , [or C. D. of , in the county of , at the instance and on the behalf of A. B. of , in the county of ,] cometh before us, and , two of her Majesty's justices of the peace in and for the county of , and giveth us to understand that the said A B., before and at the time when the offence hereinafter mentioned was committed, was the proprietor of a new and original design for [here describe the design], *and that within twelve calendar months last past, to wit, on the , at , in the county of , E. F. of , in the county of , did* [here describe the offence], *contrary to the form of the act passed in the year of the reign of her present Majesty, intituled* 'An Act to consolidate and amend the Laws relating to the Copyright of Designs for ornamenting Articles of Manufacture.'"

"Form of Conviction.

Form of conviction.

"BE it remembered, that on the day of , in the year of our Lord , at , in the county of , E. F. of , in the county aforesaid, is convicted before us, and , two of her Majesty's justices of the peace for the said county, for that he the said E. F. on the day of , in the year , at , in the county of , did [here describe the offence], *contrary to the form of the statute in that case made and provided; and we the said justices do adjudge that the said E. F. for his offence aforesaid hath forfeited the sum of to the said A. B."*

In Scotland, by action before the Court of Session in ordinary form, or by summary action before the sheriff of the county where the offence may be committed or the offender resides, who, upon proof of the offence or offences, either by confession of the party offending or by the oath or affirmation of one or more credible witnesses, shall convict the offender and find him liable in the penalty or penalties aforesaid, as also in ex-

expenses; and it shall be lawful for the sheriff, in pronouncing such judgment for the penalty or penalties and costs, to insert in such judgment a warrant, in the event of such penalty or penalties and costs not being paid, to levy and recover the amount of the same by poinding: provided always, that it shall be lawful to the sheriff, in the event of his dismissing the action and assoilzieing the defender, to find the complainer liable in expenses; and any judgment so to be pronounced by the sheriff in such summary application shall be final and conclusive, and not subject to review by advocation, suspension, reduction, or otherwise:

In Ireland, either by action in a superior court of law at Dublin or by civil bill in the civil bill court of the county or place where the offence was committed."

Proviso as to action for damages.

Sect. 9 provides, "That notwithstanding the remedies hereby given for the recovery of any such penalty as aforesaid, it shall be lawful for the proprietor in respect of whose right such penalty shall have been incurred (if he shall elect to do so) to bring such action as he may be entitled to for the recovery of any damages which he shall have sustained, either by the application of any such design or of a fraudulent imitation thereof, for the purpose of sale, to any articles of manufacture or substances, or by the publication, sale or exposure to sale, as aforesaid, by any person, of any article or substance to which such design or any fraudulent imitation thereof shall have been so applied, such person knowing that the proprietor of such design had not given his consent to such application."

Registration may in some cases be cancelled or amended.

Sect. 10. "That in any suit in equity which may be instituted by the proprietor of any design or the person lawfully entitled thereto, relative to such design, if it shall appear to the satisfaction of the judge having cognizance of such suit that the design has been registered in the name of a person not being the proprietor or lawfully entitled thereto, it shall be competent for such judge, in his discretion, by a decree or order in such suit to direct either that such registration be cancelled (in which case the same shall thenceforth be wholly void), or that the name of the proprietor of such design, or other person lawfully entitled thereto, be substituted in the register for the name of such wrongful proprietor or claimant, in like manner as is hereinbefore directed in case of the transfer of a design, and to make such order respecting the costs of such cancellation or substitution, and of all proceedings to procure and effect the same, as he shall think fit; and the registrar is hereby authorised and required, upon being served with an official copy of such decree or order, and upon payment of the proper fee, to comply with the tenor of such decree or order, and either cancel such registration or substitute such new name, as the case may be."

Penalty for wrongfully using marks denoting a registered design.

Sect. 11. "That unless a design applied to ornamenting any article of manufacture or any such substance as aforesaid be so registered as aforesaid, and unless such design so registered shall have been applied to the ornamenting such article or substance within the United Kingdom of Great Britain and Ireland, and also after the copyright of such design in relation to such article or substance shall have expired, it shall be unlawful to put on any such article or such substance, in the manner hereinbefore required with respect to articles or substances whereto shall be applied a registered design, the marks hereinbefore required to be so applied, or any marks corresponding therewith or similar thereto; and if any person shall so unlawfully apply any such marks, or shall publish, sell, or expose for sale any article of manufacture, or any substance with any such marks so unlawfully applied, knowing that any such marks have been unlawfully applied, he shall forfeit for every such offence a sum not exceeding 5*l.*, which may be recovered by any person proceeding for the same by any of the ways hereinbefore directed with respect to penalties for pirating any such design."

Limitation of actions.

Sect. 12. "That no action or other proceeding for any offence or injury under this act shall be brought after the expiration of twelve calendar months from the commission of the offence; and in every such action or other proceeding the party who shall prevail shall recover his full costs of suit or of such other proceeding."

5 & 6 Vict. c. 100.

Justices may order payment of costs in cases of summary proceeding.

Sect. 13. "That in the case of any summary proceeding before any two justices in England, such justices are hereby authorised to award payment of costs to the party prevailing, and to grant a warrant for enforcing payment thereof against the summoning party, if unsuccessful, in the like manner as is hereinbefore provided for recovering any penalty with costs against any offender under this act."

Registrar, &c. of designs to be appointed.

Sect. 14. "And for the purpose of registering designs for articles of manufacture, in order to obtain the protection of this act, be it enacted, that the lords of the committee of privy council for the consideration of all matters of trade and plantations may appoint a person to be a registrar of designs for ornamenting articles of manufacture, and, if the lords of the said committee see fit, a deputy registrar, clerks, and other necessary officers and servants; and such registrar, deputy registrar, clerks, officers, and servants, shall hold their offices during the pleasure of the lords of the said committee; and the commissioners of the treasury may from time to time fix the salary or remuneration of such registrar, deputy registrar, clerks, officers, and servants; and, subject to the provisions of this act, the lords of the said committee may make rules for regulating the execution of the duties of the office of the said registrar; and such registrar shall have a seal of office."

Registrar's duties.

Sect. 15. "That the said registrar shall not register any design in respect of any application thereof to ornamenting any articles of manufacture or substances, unless he be furnished, in respect of each such application, with two copies, drawings, or prints of such design, accompanied with the name of every person who shall claim to be proprietor, or of the style or title of the firm under which such proprietor may be trading, with his place of abode or place of carrying on his business, or other place of address, and the number of the class in respect of which such registration is made; and the registrar shall register all such copies, drawings, or prints, from time to time successively, as they are received by him for that purpose; and on every such copy, drawing, or print, he shall affix a number corresponding to such succession; and he shall retain one copy, drawing, or print, which he shall file in his office, and the other he shall return to the person by whom the same has been forwarded to him; and in order to give ready access to the copies of designs so registered, he shall class such copies of designs, and keep a proper index of each class."

Certificate of registration of design.

Sect. 16. "That upon every copy, drawing, or print of an original design so returned to the person registering as aforesaid, or attached thereto, and upon every copy, drawing, or print thereof received for the purpose of such registration, or of the transfer of such design being certified thereon or attached thereto, the registrar shall certify under his hand that the design has been so registered, the date of such registration, and the name of the registered proprietor or the style or title of the firm under which such proprietor may be trading, with his place of abode or place of carrying on his business, or other place of address, and also the number of such design, together with such number or letter, or number and letter, and in such form as shall be employed by him to denote or correspond with the date of such registration; and such certificate made on every such original design, or on such copy thereof, and purporting to be signed by the registrar or deputy registrar, and purporting to have the seal of office of such registrar affixed thereto, shall, in the absence of evidence to the contrary, be sufficient proof, as follows,

Of the design, and of the name of the proprietor therein mentioned, having been duly registered; and

Of the commencement of the period of registry; and

Of the person named therein as proprietor being the proprietor;

Of the originality of the design; and

Of the provisions of this act, and of any rule under which the certificate appears to be made, having been complied with:

"And any such writing purporting to be such certificate shall, in the absence of evidence to the contrary, be received as evidence, without proof of the handwriting of the signature thereto, or of the seal of office affixed thereto, or of the person signing the same being the registrar or deputy registrar."

5 & 6 Vict. c. 100.

Inspection of registered designs.

Sect. 17. "That every person shall be at liberty to inspect any design whereof the copyright shall have expired, paying only such fee as shall be appointed by virtue of this act in that behalf; but with regard to designs whereof the copyright shall not have expired, no such design shall be open to inspection, except by a proprietor of such design or by any person authorised by him in writing, or by any person specially authorised by the registrar, and then only in the presence of such registrar or in the presence of some person holding an appointment under this act, and not so as to take a copy of any such design or of any part thereof, nor without paying for every such inspection such fee as aforesaid: provided always, that it shall be lawful for the said registrar to give to any person applying to him, and producing a particular design, together with the registration mark thereof, or producing such registration mark only, a certificate stating whether of such design there be any copyright existing, and if there be, in respect to what particular article of manufacture or substance such copyright exists, and the term of such copyright, and the date of registration, and also the name and address of the registered proprietor thereof."

Application of fees of registration.

Sect. 18. "That the commissioners of the treasury shall from time to time fix fees to be paid for the services to be performed by the registrar, as they shall deem requisite, to defray the expenses of the said office, and the salaries or other remuneration of the said registrar, and of any other persons employed under him, with the sanction of the commissioners of the treasury, in the execution of this act; and the balance, if any, shall be carried to the consolidated fund of the united kingdom, and be paid accordingly into the receipt of her majesty's exchequer at Westminster; and the commissioners of the treasury may regulate the manner in which such fees are to be received, and in which they are to be kept, and in which they are to be accounted for, and they may also remit or dispense with the payment of such fees in any cases where they may think it expedient so to do: provided always, that the fee for registering a design to be applied to any woven fabric, mentioned or comprised in classes 7, 9, or 10, shall not exceed the sum of one shilling; that the fee for registering a design to be applied to a paper hanging shall not exceed the sum of ten shillings; and that the fee to be received by the registrar for giving a certificate relative to the existence or expiration of any copyright in any design printed on any woven fabric, yarn, thread, or warp, or printed, embossed, or worked on any paper hanging, to any person exhibiting a piece or of a registered pattern, with the registration mark thereon, shall not exceed the sum of two shillings and sixpence."

Penalty for extortion.

Sect. 19. "That if either the registrar or any person employed under him shall demand or receive any gratuity or reward, whether in money or otherwise, except the salary or remuneration authorised by the commissioners of the treasury, he shall forfeit for every such offence fifty pounds to any person suing for the same by action of debt in the Court of Exchequer at Westminster; and he shall also be liable to be either suspended or dismissed from the office, and rendered incapable of holding any situation in the said office, as the commissioners of the treasury see fit."

Interpretation act.

Sect. 20. And for the interpretation of this act, be it enacted, "That the following terms and expressions, so far as they are not repugnant to the context of this act, shall be construed as follows; (that is to say,) the expression 'commissioners of the treasury' shall mean the lord high treasurer for the time being, or the commissioners of her Majesty's treasury for the time being, or any three or more of them; and the singular number shall include the plural as well as the singular number; and the masculine gender shall include the feminine gender as well as the masculine gender."

6 & 7 Vict. c. 65.

By 6 & 7 Vict. c. 65, intituled "*An Act to amend the Laws relating to the Copyright of Designs*," [22d August, 1843,] reciting that by the 5 & 6 Vict. c. 100, "there was granted to the proprietor of any new and original design, with the exceptions therein mentioned, the sole right to apply the same to the ornamenting of any article of manufacture or any such substance as therein described during the respective periods therein mentioned: and that it is expedient to extend the protection afforded by the said act to such de-

6 & 7 Vict. c. 65.

Commencement of act.

signs hereinafter mentioned, not being of an ornamental character, as are not included therein:" it is therefore enacted, "that this act shall come into operation on the first day of September, 1843."

Grant of copyright.

Sect. 2. "And with regard to any new or original design for any article of manufacture having reference to some purpose of utility, so far as such design shall be for the shape or configuration of such article, and that whether it be for the whole of such shape or configuration or only for a part thereof, be it enacted, that the proprietor of such design not previously published within the united kingdom of Great Britain and Ireland or elsewhere, shall have the sole right to apply such design to any article, or make or sell any article according to such design, for the term of three years, to be computed from the time of such design being registered according to this act: provided always that this enactment shall not extend to such designs as are within the provisions of the said act, or of two other acts passed respectively in the thirty-eighth and fifty-fourth years of the reign of his late majesty king George the Third, and intituled respectively '*An Act for encouraging the Art of making new Models and Casts of Busts and other Things therein mentioned*,' and '*An Act to amend and render more effectual an Act for encouraging the Art of making new Models and Casts of Busts, and other Things therein mentioned*.'"

Proviso.

38 Geo. 3, c. 71.

54 Geo. 3, c. 56.

Conditions of copyright.

Sect. 3 provides and enacts, "That no person shall be entitled to the benefit of this act unless such design have before publication thereof been registered according to this act, and unless the name of such person shall be registered according to this act as a proprietor of such design, and unless after publication of such design every article of manufacture made by him according to such design, or on which such design is used, hath thereon the word 'registered,' with the date of registration."

Penalty for wrongfully using marks denoting a registered design.

Sect. 4. "That unless a design applied to any article of manufacture be registered either as aforesaid or according to the provisions of the said first-mentioned act, and also after the copyright of such design shall have expired, it shall be unlawful to put on any such article the word 'Registered,' or to advertise the same for sale as a registered article; and if any person shall so unlawfully publish, sell or expose or advertise for sale any such article of manufacture, he shall forfeit for every such offence a sum not exceeding five pounds nor less than one pound, which may be recovered by any person proceeding for the same by any of the remedies hereby given for the recovery of penalties for pirating any such design."

Floor or oil cloths included in class six.

Sect. 5. "That all such articles of manufacture as are commonly known by the name of floor cloths or oil cloths shall henceforth be considered as included in class six in the said first-mentioned act in that behalf mentioned, and be registered accordingly."

Certain provisions of 5 & 6 Vict. c. 100, to apply to this act.

Sect. 6. "That all and every the clauses and provisions contained in the said first-mentioned act, so far as they are not repugnant to the provisions contained in this act, relating respectively to the explanation of the term proprietor, to the transfer of designs, to the piracy of designs, to the mode of recovering penalties, to actions for damages, to cancelling and amending registrations, to the limitation of actions, to the awarding of costs, to the certificate of registration, to the fixing and application of fees of registration, and to the penalty for extortion, shall be applied and extended to this present act as fully and effectually, and to all intents and purposes, as if the said several clauses and provisoes had been particularly repeated and re-enacted in the body of this act."

Appointment of registrar, &c.

Sect. 7. "That so much of the said first-mentioned act as relates to the appointment of a register of designs for ornamenting articles of manufacture, and other officers, as well as to the fixing of the salaries for the payment of the same, shall be and the same is hereby repealed; and for the purpose of carrying into effect the provisions as well of this act as of the said first-mentioned act, the lords of the committee of the privy council for the consideration of all matters of trade and plantations may appoint a person to be registrar of designs for articles of manufacture, and, if the lords of the said committee see fit, an assistant registrar and other necessary officers and servants; and such registrar, assistant registrar, officers and servants shall hold

their offices during the pleasure of the lords of the said committee; and such registrar shall have a seal of office; and the commissioners of her Majesty's treasury may from time to time fix the salary or other remuneration of such registrar, assistant registrar, and other officers and servants; and all the provisions contained in the said first-mentioned act, and not hereby repealed, relating to the registrar, deputy registrar, clerks, and other officers and servants thereby appointed and therein named, shall be construed and held to apply respectively to the registrar, assistant registrar, and other officers and servants to be appointed under this act." 6 & 7 Vict. c. 65.

Sect. 8. "That the said registrar shall not register any design for the shape or configuration of any article of manufacture as aforesaid unless he be furnished with two exactly similar drawings or prints of such design, with such description in writing as may be necessary to render the same intelligible according to the judgment of the said registrar, together with the title of the said design, and the name of every person who shall claim to be proprietor, or of the style or title of the firm under which such proprietor may be trading, with his place of abode, or place of carrying on business, or other place of address; and every such drawing or print, together with the title and description of such design, and the name and address of the proprietor aforesaid, shall be on one sheet of paper or parchment, and on the same side thereof; and the size of the said sheet shall not exceed twenty-four inches by fifteen inches; and there shall be left on one of the said sheets a blank space on the same side on which are the said drawings, title, description, name, and address of the size of six inches by four inches, for the certificate herein mentioned; and the said drawings or prints shall be made on a proper geometric scale; and the said description shall set forth such part or parts of the said design (if any) as shall not be new or original; and the said registrar shall register all such drawings or prints from time to time as they are received by him for that purpose; and on every such drawing or print he shall affix a number corresponding to the order of succession in the register, and he shall retain one drawing or print which he shall file at his office, and the other he shall return to the person by whom the same has been forwarded to him; and in order to give ready access to the designs so registered he shall keep a proper index of the titles thereof." Registrar's duties. Drawings.

Sect. 9. "That if any design be brought to the said registrar to be registered under the said first-mentioned act, and it shall appear to him that the same ought to be registered under this present act, it shall be lawful for the said registrar to refuse to register such design otherwise than under the present act and in the manner hereby provided; and if it shall appear to the said registrar that the design brought to be registered under the said first-mentioned act or this act is not intended to be applied to any article of manufacture, but only to some label, wrapper or other covering in which such article might be exposed for sale, or that such design is contrary to public morality or order, it shall be lawful for the said registrar, in his discretion, wholly to refuse to register such design: provided always, that the lords of the said committee of privy council may, on representation made to them by the proprietor of any design so wholly refused to be registered as aforesaid, if they shall see fit, direct the said registrar to register such design, whereupon and in such case the said registrar shall be and is hereby required to register the same accordingly." Discretionary power as to registry vested in the registrar. Proviso.

Sect. 10. "That every person shall be at liberty to inspect the index of the titles of the designs, not being ornamental designs, registered under this act, and to take copies from the same, paying only such fees as shall be appointed by virtue of this act in that behalf; and every person shall be at liberty to inspect any such design, and to take copies thereof, paying such fee as aforesaid; but no design whereof the copyright shall not have expired shall be open to inspection, except in the presence of such registrar, or in the presence of some person holding an appointment under this act, and not so as to take a copy of such design, nor without paying such fee as aforesaid." Inspection of index of titles of designs, &c.

Sect. 11. "And, for the interpretation of this act, be it enacted, that the following terms and expressions, so far as they are not repugnant to the context of this act, shall be construed as follows; (that is to say,) the expression Interpretation of act.

6 & 7 Vict. c. 65. 'commissioners of the treasury' shall mean the lord high treasurer for the time being, or the commissioners of her Majesty's treasury of the United Kingdom of Great Britain and Ireland for the time being, or any three or more of them; and the singular number shall include the plural as well as the singular number, and the masculine gender shall include the feminine gender as well as the masculine gender."

SCHEDULES referred to by the 5 & & 6 Vict. c. 100.

SCHEDULE (A.)

DATE OF ACTS.	TITLE.
27 Geo. III. c. 38. (1787.)	An Act for the Encouragement of the Arts of designing and printing Linens, Cottons, Calicoes, and Muslins, by vesting the Properties thereof in the Designers, Printers, and Proprietors for a limited Time.
29 Geo. III. c. 19. (1789.)	An Act for continuing an Act for the Encouragement of the Arts of designing and printing Linens, Cottons, Calicoes, and Muslins, by vesting the Properties thereof in the Designers, Printers, and Proprietors for a limited Time.
34 Geo. III. c. 23. (1794.)	An Act for amending and making perpetual an Act for the Encouragement of the Arts of designing and printing Linens, Cottons, Calicoes, and Muslins, by vesting the Properties thereof in the Designers, Printers, and Proprietors for a limited Time.
2 Vict. c. 13. (1839.)	An Act for extending the Copyright of Designs for Calico Printing to Designs for printing other woven Fabrics.

SCHEDULE (B.)

DATE OF ACT.	TITLE.
2 Vict. c. 17. (1839.)	An Act to secure to Proprietors of Designs for Articles of Manufacture the Copyright of such Designs for a limited Time.

SCHEDULE (C.)

DATE OF ACTS.	TITLE.
38 Geo. III. c. 71. (1798.)	An Act for encouraging the Art of making new Models and Casts of Busts and other Things therein mentioned.
54 Geo. III. c. 56. (1814.)	An Act to amend and render more effectual an Act for encouraging the Art of making new Models and Casts of Busts and other Things therein mentioned, and for giving further Encouragement to such Arts.

Copper, *Stealing of*, see title "*Larceny*," Vol. III.

Cordage for Shipping, see titles "*Ships*," "*Stores*," Vol. V.

END OF VOL. I.

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